

THE FACULTY DIGEST

VOLUME V

SLANDER—WRIT

AN ANALYTICAL
DIGEST OF CASES

DECIDED IN THE
SUPREME COURTS OF SCOTLAND

AND, ON APPEAL, IN THE
HOUSE OF LORDS

1868 to 1922

PREPARED FOR
THE FACULTY OF ADVOCATES
BY MEMBERS OF THE BAR



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ABBREVIATIONS USED IN THE CITATION OF CASES.

M.	Macpherson—Court of Session Reports, Third Series.
R.	Rettie—Court of Session Reports, Fourth Series.
F.	Fraser—Court of Session Reports, Fifth Series.
S.C.	Session Cases — Court of Session Reports, Sixth (current) Series.

Note—The addition of (H.L.) to any of the above means that the case was decided in the House of Lords.

The addition of (J) means that the case was decided in the Court of Justiciary.

(O.H.) prefixed to the date means that the case was decided by a single judge in the Outer House or the Bill Chamber.

Irv.	Irvine's Justiciary Reports, 1867.
Coup.	Couper's Justiciary Reports, 1868-1885.
White	White's Justiciary Reports, 1885-1893.
Adam	Adam's Justiciary Reports, 1893-1916.
J.C.	Justiciary Cases—Cases decided in the Court of Justiciary since September, 1916, issued either separately or along with the Session Cases.
J.	The Scottish Jurist.
S.L.R.	The Scottish Law Reporter.
S.L.T.	The Scots Law Times.
L.R., H.L. Sc., or Sc.App.	House of Lords Appeals in Scottish cases in the First Series of the English Law Reports.
App.Cas.	
	Appeal Cases in the Second Series of the English Law Reports.
A.C.	Appeal Cases in the Third Series of the English Law Reports.
R.P.C.	Reports of Patent Cases.

ABBREVIATIONS USED IN THE HEAD-WORDS AND RUBRICS.

A.S.	Act of Sederunt.
C.A.S.	The Codifying Act of Sederunt, 1913.

THE FACULTY DIGEST

VOLUME V.

SLANDER.

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I. GENERALLY—PUBLICATION.

(1)
Actionable wrong—Relevancy—Averment of damage.

In an action of damages for slander the sheriff-substitute dismissed the action, inter alia, upon the ground that the pursuer on his own showing had suffered no damage. **Held** that the slander being relevantly averred, the question whether the pursuer had or had not sustained damage could not be disposed of without inquiry.

Cassidy v Connochie, 1907 S.C. 1112; 44 S.L.R. 331; 15 S.L.T. 195.

(2)
Trifling nature of damage—Wrongous information to police.

In an action at the instance of a dismissed employee against the manager of the employer's firm for damages on account of wrongful information given by the defender to the police, which led to the pursuer being accosted by the police in the street and ordered to move on, **held** that in spite of the trifling nature of the damage involved in being ordered to move on the pursuer had relevantly averred an actionable wrong—the information given to the police.

Shaw v Burns, 1911 S.C. 537; 48 S.L.R. 432; 1911, 1 S.L.T. 184.

(3)
Agent and client—Letters written by law agent on instructions of client—Liability of agent—Liability of agent.

Crawford v Adams; Crawford v Dunlop, 1900, 2 F. 987; 37 S.L.R. 767; 8 S.L.T. 62, No. 413, infra.

(4)
Compensatio injuriarum—Counter issue.
Held that in an action of damages for slander the defender is not entitled to a counter issue of compensatio injuriarum.
Bertram v Pace, 1885, 12 R. 798; 22 S.L.R. 525.(5)
Husband and wife—Liability of husband for slander by wife.

Held that a husband is not liable in damages for slander uttered by his wife.

Milne v Smith, 1892, 20 R. 95; 30 S.L.R. 105.

Hook v McCallum, 1905, 7 F. 528; 42 S.L.R. 399; 12 S.L.T. 770.

Barr v Neilson, 1868, 6 M. 651; 40 J. 337; 5 S.L.R. 391.

(6)
Slander of husband by wife.
An action by a husband against his wife to recover damages for slander is incompetent.

Young v Young, 1903, 5 F. 330; 40 S.L.R. 301; 10 S.L.T. 570.

(7)
Continued slander.
In an action of damages for slander, raised in 1898, an issue was allowed for the trial of allegations of verbal slander said to have been uttered in 1888, and the same slander being alleged to have been repeatedly uttered during the intervening ten years, issues with respect to these subsequent occasions were allowed.

Winn v Quillan, 1899, 2 F. 322; 37 S.L.R. 38; 7 S.L.T. 183.

(8)
Publication—Confidentiality—Letter written by client to law agent.

At a meeting of justices of the peace for the granting of licences a letter containing matter defamatory of one of the applicants was read by A, a law agent, who had been employed to oppose the application. The letter had been written to A by B, one of the clients who so employed him. **Held** that the letter being a confidential communication from a client to his law agent, no action lay against B in respect of the mere writing of the letter.

Williamson v Umphray, 1890, 17 R. 905; 27 S.L.R. 742.

(9)
Slander not communicated to third party.

Slandorous statements, either oral or written, concerning the person to whom they are addressed, will found an action of damages at his instance although no third party has heard or read them.

MacKay v M'Cankie, 1883, 10 R. 537; 20 S.L.R. 357.

(10)
A firm made a business of supplying information to inquirers about the commercial credit of persons in business. A customer applied for information about a certain business man. By mischance the reply, which was of a defamatory nature, was sent by the firm, not to the inquirer, but to the business man himself, who brought an action of damages for slander. **Held** that the pursuer was entitled to an issue.
Gordon v Stubbs, Limited, (O.H.) 1895, 3 S.L.T. 10.

(11)

Innocent publication—Whether publication caused by defenders' acts.

A temperance organisation obtained requisition papers for a poll under the Temperance (Scotland) Act, 1913, canvassed electors to obtain their signatures, and, when the necessary number of signatures had been obtained, lodged the requisitions with the clerk of the local authority. These papers, after having been lodged, were available for inspection by any elector. In an action of damages against the temperance organisation the pursuer averred that these papers purported to bear her signature, that that signature was forged, that she was not aware who had forged her signature, that she was well known as holding views against the policy of "no licence," and that her acquaintances had inspected the papers and had seen her name there. **Held** that, although the papers might amount to a slander of the pursuer, the defenders were not responsible for its publication in that the discovery of the pursuer's name there by her acquaintances was not the necessary or inevitable consequence of the defenders' actings, and action dismissed.

Gibson v The National Citizens' Council, (O.H.) 1921, 1 S.L.T. 241.

(12)

Foreign—Lex loci delicti.

In an action of damages for slander brought by a firm in England against a firm in Scotland, the pursuers averred that the slander was contained in two letters and a telegram, sent from Scotland, by the defenders to the pursuers, and that the slander had been published in the sense of English law, in respect that the letters had been dictated to and type-written by the defenders' clerks, and that the telegram had passed through the hands of post office clerks. The names of the defenders' clerks and of the post office clerks were not given. The Court dismissed the action, in respect that there was no relevant averment of publication of defamatory matter in Scotland, and that it was admitted that by the law of England the statement to the pursuers themselves was not an actionable wrong.

Evans & Sons v Stein & Co., 1904, 7 F. 65; 42 S.L.R. 103; 12 S.L.T. 462.

(13)

Foreign—Newspaper.

Held (by Lord Kinnear, Ordinary) that neither the direct dispatch by post of an English newspaper from the publishing office in England to persons in Scotland, nor the sale of the newspaper in Scotland, is sufficient to give the Scots courts jurisdiction to entertain an action of damages for slander alleged to have been published in the newspaper.

Parnell v Walter, 1889, 16 R. 917; 27 S.L.R. 1.

(14)

Negligence—Newspaper—Advertisement.

A newspaper published an advertisement in the following terms:—"A criminal information for conspiracy to defraud is being prepared re the estate of "X" deceased, 74 Argyle Street. All persons having made payments at the above address since September, 1899, should send immediate information to "B. The advertisement was supplied to the newspaper by B. M., who was a trustee on X's estate, brought an action of damages for slander against B and the newspaper, averring that the advertisement was of and concerning him, and falsely represented that he had been involved in a fraudulent conspiracy with regard to the estate. The pursuer did not aver that the proprietors of the newspaper had been guilty of negligence in publishing the advertisement. **Held** that it was not necessary to aver negligence, although the pursuer would probably not succeed unless he could satisfy the jury that there was a certain recklessness on the part of the newspaper in publishing the advertisement.

M'Lean v Bernstein, (O.H.) 1900, 8 S.L.T. 42.

(15)

Ignorance of slander—Newspaper—False statement not ex facie slanderous—False notice of birth.

The publisher of a newspaper is not exempt from liability for damages merely because a statement of fact in regard to a private individual published by him is not ex facie defamatory, if, in the circumstances, it is defamatory. A newspaper, among the notices of births, stated that A B had given birth to a child at a certain date. A B sued the publisher for damages, on the ground that the statement was false, and was defamatory in respect that the date stated was within two months of her marriage. **Held** that the action was relevant, and that the pursuer was entitled to an issue.

Morrison v Ritchie & Co., 1902, 4 F. 645; 39 S.L.R. 432; 9 S.L.T. 476.

(16)

Damages—Aggravation of damages—Proof of circumstances in which slander uttered.

In an action of damages for slander, it is competent for the pursuer as well as for the defender to prove the circumstances in which the slander was written where the defender is the writer—or published where the defender is the publisher—as affecting the amount of damages.

Cunningham v Duncan & Jamieson, 1889, 16 R. 383; 26 S.L.R. 316.

(17)

Aggravation of damages—Conduct of trial by counsel.

Observed (per Lord Johnston and Lord Anderson) that the fact that counsel for the defender, in an action of damages for slander, leads evidence attacking the pursuer's conduct on occasions other than that put in issue, cannot be taken into consideration by a jury as an element in increasing the amount

of damage unless it be established that counsel is acting on the express instructions, or with the privity, of his client.

James v Baird, 1916 S.C. 510; 53 S.L.R. 324; 1916, 1 S.L.T. 138; judgment reversed on the merits, 1916 S.C. (H.L.) 158; 53 S.L.R. 392; 1916, 1 S.L.T. 331.

(18)

Mitigation of damages—Proof of circumstances in which slander uttered—Facts unknown to party publishing slander—Newspaper.

Where an action of damages is directed against the publisher of a slander, who is not the writer, he will not be allowed to prove in mitigation of damages circumstances which might have affected the writer but of which the defender was ignorant. This rule applies to the publisher of a newspaper who publishes a slander and refuses to disclose the name of the writer.

Browne v M'Farlane, 1889, 16 R. 368; 26 S.L.R. 289.

[See also DAMAGES I. 5.]

II. PROCEDURE—FORM OF ISSUES.

[See also PROCESS VIII. 2.]

(19)

Interdict—Threatened slander.

Held that the Court has power to interdict a threatened slander.

Martin v Nisbet, (O.H.) 1893, 1 S.L.T. 293 and 371.

(20)

Repetition of slander.

Held competent to bring a note of suspension and interdict to prevent the repetition of a slander.

Lindsay v Hastie, 1915, 2 S.L.T. 266.

(21)

Competency of action—Two pursuers claiming separate damages in one action—Issue.

Held (1) that it is competent for two persons alleging injury by one calumnious statement to claim damages in one action, provided the damages due to each are separately concluded for; and (2) that in such an action each pursuer must take a separate issue.

Mitchell v Grierson, 1894, 21 R. 367; 31 S.L.R. 301; 1 S.L.T. 448.

(22)

Competency of two actions in respect of one slander—Agent and client—Letters written by law agent on instructions of client—Agent identifying himself with slander.

A law agent wrote slanderous letters on the instructions of his client. Held that the person slandered was entitled to bring separate actions against (1) the client, and (2) the agent, in respect that the agent had identified himself with the slander.

Crawford v Adams, Crawford v Dunlop, 1900, 2 F. 987; 37 S.L.T. 767; 8 S.L.T. 62.

(23)

Foreign language—Slander uttered in Gaelic—Issue.

In an action of damages founded on a statement alleged to have been uttered in Gaelic, the pursuer proposed an issue which set forth the Gaelic words said to have been used, and proceeded, "which words, being translated into English, bear the following or similar meaning," and then followed the English translation. The Court, having indicated that the insertion of the Gaelic words were unnecessary, counsel agreed that they should be taken out, and the issue, as adjusted, put the question whether the defender said, "in Gaelic of and concerning the pursuer," and then followed the English translation of the words used.

Anderson v Hunter, 1891, 18 R. 467; 28 S.L.R. 324.

(24)

Slander uttered in foreign language—Innuendo—Proof.

Where the words complained of in an action of slander have been uttered in a foreign language, not only must they be set forth on record as spoken in that language, but their English equivalent must be set forth in the same way as an innuendo is set forth, and the pursuer must prove (first) that the words were actually spoken, and (second) that their English equivalent is that which he avers.

Bernhardt v Abrahams, 1912 S.C. 748; 49 S.L.R. 574; 1912, 1 S.L.T. 375.

(25)

Necessity of averring innuendo on record.

Sexton v Ritchie & Co., 1890, 17 R. 680; 27 S.L.R. 536; aff. 18 R. (H.L.) 20; 28 S.L.R. 945, No. 46, *infra*.

James v Baird, 1916 S.C. (H.L.) 158; 53 S.L.R. 392; 1916, 1 S.L.T. 331, No. 49, *infra*.

(26)

Relevancy—Specification—Date and place of slander—Latitude of time.

An averment that a slander had been uttered "on various occasions between the 4th and 7th May at various places in the city of Edinburgh, in presence of" three persons named, or of one or other of them, was held to be wanting in specification, and an issue refused.

Walker v Cumming, 1868, 6 M. 318; 40 J. 175; 5 S.L.R. 220.

(27)

Latitude of time.

The pursuer in an action of damages for slander proposed issues whether the defender slandered the pursuer (1) "in the month of May, June or July, 1868"; and (2) "in the latter end of summer or beginning of harvest, 1869." The Court disallowed both issues, but allowed an issue whether the defender slandered the pursuer "in or about the month of July, 1868."

Grant v Fraser, 1870, 8 M. 1011.

[Cf. Smith v Paton, 1913 S.C. 1203; 50 S.L.R. 394; 1913, 1 S.L.T. 147, No. 39, *infra*.]

(28)

Issue—Concurrence in and adoption of the slander of another.

In an action of damages for slander against A and B, the pursuer averred that the defenders called upon S to obtain his signature to a petition, and that A, in his presence, made certain false and calumnious and injurious statements regarding the pursuer; that B was then present and heard what A said, and concurred with him in said slanderous statement, which was uttered in pursuance of a malicious design. The pursuer proposed the issues—“(1) Whether A made the false and calumnious statement in presence of S and B? and (2) whether B falsely and calumniously concurred in and adopted the said statement falsely and calumniously made by A.” **Held** that the second issue could not be allowed, and that there should be one issue, viz., whether the defenders or either of them, and which of them, in presence and hearing of S, falsely and calumniously stated, &c.

Jack v Fleming, 1891, 19 R. 1; 29 S.L.R. 5.

(29)

General issue.

In an action of damages for slander the pursuer, who was a postmaster, proposed a general issue as to whether between 1885 and 1894 the defender had repeatedly made calumnious charges against him involving carelessness and dishonesty or untrustworthiness in his capacity as postmaster. Issue refused.

Turner v Carnachan, (O.H.) 1894, 2 S.L.T. 278.

(30)

General issue—Several slanders in reference to one controversy—Schedule of damages.

In an action of damages for slander by a minister against the proprietor of a newspaper, the pursuer averred that he had been slandered in six different issues of the paper. He averred that it was insinuated in one of the articles that the manse was an immoral house; in another that he had been guilty of wilful falsehood and was likely to commit perjury; while the other articles held him up to ridicule and contempt. The whole series of articles were written with reference to a controversy as to the introduction of an organ into the pursuer's church. On the pursuer minuting that he would not insist for damages in respect of the two special publications as separate slanders, the Court allowed a general issue whether the articles were published in pursuance of an intention to expose and did expose the pursuer to public hatred, contempt and ridicule, with one sum of damages scheduled thereto.

Cunningham v Phillips, 1868, 6 M. 926; 40 J. 533; 5 S.L.R. 602.

(31)

Verbal slander—Quotation of words of slanderous statement in issue.

Observed (per Lord Kincairney, Ordinary) that in cases of verbal slander “it is the usual practice to quote the de-

famatory words in the issue, but where it does not appear that the exact words could have been given, it has been held enough that the averments as to the defamatory language are sufficiently definite and precise so as to show that what is meant to be averred is what the defender said, not what the pursuer thought he intended by what he said, which is proper for the innuendo.”

Christie v Craik, (O.H.) 1899, 7 S.L.T. 67; affirmed on other points, 1900, 2 F. 380; 37 S.L.R. 285; 7 S.L.T. 321.

(32)

Schedule of damages.

In an action for payment of a sum as damages for slander in an anonymous letter in a newspaper, two issues were allowed relating to separate slanders in the article. **Held** that the sum for which the pursuer sued ought not to be divided between the issues in schedules appended to each, but ought to be stated in one sum at the end of the whole issues, as the jury, if they should find only one issue to be established, would be entitled to award any sum within the limits of the sum sued for.

Falconer v Docherty, 1893, 20 R. 765; 30 S.L.R. 688; 1 S.L.T. 55.

(33)

Newspaper article — Whole article printed in schedule.

In an action of damages for slander in respect of a statement contained in a newspaper article, the Lord Ordinary ordered the whole article to be printed in the schedule, so that the whole article should be placed before the jury.

Burns v Diamond, (O.H.) 1896, 3 S.L.T. 256; affirmed, 1896, 23 R. 507; 33 S.L.R. 402; 3 S.L.T. 274.

(34)

Amendment of issue by judge at trial—Malice.

Observed (per Lord M'Laren) that a judge might amend an issue as well as a record, so as to raise the true question between the parties, and that if he were trying the case, and it appeared that circumstances raising a case of privilege had been deliberately withheld in order to get an issue without inserting “maliciously,” he should at once alter it.

M'Keand v Maxwell, 1896, 3 S.L.T. 321.

Counter issue—Plea of veritas.

[See VI., infra.]

(35)

Fair report—Counter issue unnecessary.

In an action of damages against the proprietors of a newspaper for slander alleged to be contained in a report in the newspaper of proceedings in a Court of justice, the defenders proposed as a counter issue whether the report was a fair and accurate report of the proceedings. The Court disallowed the counter issue as unnecessary.

Wright & Greig v Outram & Co., 1889, 16 R. 1004; 26 S.L.R. 707.

(36)

Province of judge and of jury.

A person charged with having contravened the Weights and Measures Act, 1878, by having in his possession or using measures which were not of any Board of Trade standard, and were false or unjust, was convicted of the offence except in so far as it was charged that his measures were false or unjust. He afterwards brought an action of damages against the printer and publisher of a newspaper for slander contained in an article commenting on the case, which, upon the face of it, assumed that there had been a conviction upon both charges. There was no counter issue, and the defender admitted in the witness-box that the article charged the pursuer with dishonest conduct. The presiding judge directed the jury that it was for them to consider whether the article was false and calumnious, and no exception was taken to his charge. The jury having returned a verdict for the defender, the Court granted a new trial upon the ground that the verdict was contrary to evidence.

Ross v M'Kittrick, 1886, 14 R. 255; 24 S.L.R. 190.

(37)

Proof—Similar slander uttered on two occasions—One witness only to each occasion.

An action of damages for slander was tried upon two issues. These issues respectively concerned two separate occasions, on which two occasions the defender was alleged to have spoken different words to different persons, the words in each case being innuendo to bear the same defamatory meaning. Only one witness deposed to each of the separate occasions, but each witness attributed to the words the innuendo libelled. Held that there was evidence upon which the jury might return a verdict for the pursuer, the two witnesses having mutually corroborated each other.

M'Vicar v Barbour, 1916 S.C. 567; 53 S.L.R. 381; 1916, 1 S.L.T. 233.

(38)

Verdict—Discrepancy from issue.

In an action of damages for slander the issue submitted to the jury was whether a slander was uttered in the presence and hearing of C "and others." The jury returned a verdict for the pursuer, but added a finding that it was not proved that the slander was uttered in the presence and hearing of C. The Court entered up the verdict for the defenders.

Broomfield v Greig, 1868, 6 M. 992; 40 J. 568; 5 S.L.R. 635.

(39)

Discrepancy from issue—Latitude of time.

In an action of damages for slander the issue submitted to the jury was whether "on or about 12th March, 1912," the defender at or near a shop occupied by the pursuer and in presence and hearing of one of the pursuer's neighbours had made a slanderous

statement concerning the pursuer which imported that he was a thief. The jury having found that the slander had been uttered by the defender at the place and in the circumstances set forth in the issue, but that it had been so uttered in February, 1912, Lord President Dunedin directed that the verdict should be entered for the defender.

Smith v Paton, 1913 S.C. 1203; 50 S.L.R. 394; 1913, 1 S.L.T. 147.

(40)

Written slander—Production of writing complained of.

It is not necessary as a condition of an issue being allowed in an action for written slander that the writing complained of should be produced by the pursuer.

Ellis v National Free Labour Association, 1905, 7 F. 629; 42 S.L.R. 495; 13 S.L.T. 70.

(41)

Anonymous letter to newspaper—Refusal to disclose name of writer of letter—Diligence for recovery of original letter.

In an action of damages for slander against the proprietors of a newspaper founded on statements contained in an anonymous letter published in the newspaper, the pursuer, a parish minister, averred that the letter "was written or procured to be written by the defenders for publication in their newspaper in pursuance of a malicious design to injure the pursuer," and "to destroy his reputation" as a clergyman. The defenders refused to disclose the name of the writer of the letter, and the pursuer moved for a diligence for the recovery of the original letter. The Court refused the diligence.

Morrison v Smith & Co., 1897, 24 R. 471; 34 S.L.R. 370; 4 S.L.T. 261.

(42)

Anonymous letter to newspaper—Diligence to recover documents relating to authorship of letter—Aggravation of damages.

A town councillor of a royal burgh raised an action of damages against the publishers of a newspaper for slander contained in an editorial article, and in a series of letters signed with various pseudonyms, published in their paper, and charging him with dishonest conduct in his office. He averred that the letters and articles were part of a systematic plan to destroy his character, and that the defenders "either wrote the said letters or procured them to be written for publication in their said newspaper." Held that the pursuer, without putting in issue whether the letters were written by the defenders, was entitled to lead evidence upon that point, with a view to aggravation of damages, and that therefore he was entitled to a diligence to recover documents relating to the authorship, composition, or publication of the letters and article, though their recovery might lead to the disclosure of the names of anonymous correspondents who were not represented in the cause.

Cunningham v Duncan & Jamieson, 1889, 16 R. 383; 26 S.L.R. 316.

(43)

—Anonymous letter to newspaper—
Fair comment—Diligence for recovery of
writs—Recovery of communications to news-
paper.

A commercial firm brought an action of damages for slander against a newspaper which had published articles reflecting on the business methods of the firm. These articles contained statements of fact in regard to the methods of the firm and also contained quotations from letters which the newspaper alleged they had received from members of the public reflecting on the methods of the firm. The defenders pleaded "fair comment." The Court granted to the pursuers a diligence for the recovery of communications which the defenders quoted as having been received by them from particular members of the public, but refused a diligence for the recovery of other correspondence passing between the newspaper and the writers of these communications. In regard to certain statements of fact made by the newspaper on its own authority, the Court refused a diligence to the pursuers for the recovery of letters showing or tending to show "(1) whether the facts stated . . . are or are not truly stated by the defenders; (2) the defenders' knowledge of the truth or falsehood of the facts so stated; or (3) whether the facts so stated were stated by the defenders bona fide and in the public interest, or for their own purposes, or from other indirect motives."

Ogston & Tennant v The "Daily Record,"
Glasgow, 1909 S.C. 1000; 46 S.L.R. 703;
1909, 1 S.L.T. 551.

[See also PROCESS XII. 2 (8).]

III. INNUENDO—GENERAL QUESTIONS.

(44)

What language may be innuendoed.

In an action of damages for slander founded on words not in themselves libellous but innuendoed to be so, the Court will not allow of an issue unless the words founded on will fairly bear the innuendo put on them.

Fraser v Morris, 1888, 15 R. 454; 25 S.L.R. 331.

(45)

Province of judge and jury.

Per Lord Kinnear—"Before a question of libel or slander is submitted to a jury, the Court must be satisfied that the words complained of are capable of the defamatory meaning ascribed to them. That is a matter of law for the Court. If they are so, and also of a harmless meaning, it is a question of fact for a jury which meaning they did convey in the particular case."

Russell v Stubbs, Limited, 1913 S.C. (H.L.) 14; [1913] A.C. 336; 50 S.L.R. 676; 1913, 1 S.L.T. 428.

(46)

—Per Lord President Inglis—"In cases where a non-natural meaning is not sought to be ascribed to particular words or expressions, and the pursuer merely alleges

that the writing, though not free from ambiguity, is yet according to its fair construction a libel on his conduct and reputation, he is not necessarily required to state extrinsic facts from which to infer the construction for which he contends. All that is required of him in such cases is to state distinctly the libellous meaning which he attaches to the writing. In such a case the question of construction must be left to the proper tribunal; and, according to our law and practice, the question of libel or no libel belongs to the jury, in the first instance at least, subject no doubt to correction by the Court if the jury go flagrantly wrong."

Sexton v Ritchie & Co., 1890, 17 R. 680;
27 S.L.R. 536; aff. 18 R. (H.L.) 20; 28 S.L.R. 945.

(47)

—Statement not prima facie slanderous
—Facts and circumstances supporting innuendo.

In an action of damages for slander, the pursuer founded on a sentence taken from a letter written by the defender, and innuendoed it as charging him with a fraudulent attempt to obtain money. In his record he did not state any facts and circumstances to substantiate the innuendo, nor did he quote any part of the letter except the single sentence complained of. The Court refused an issue, on the ground (1) that the sentence complained of was not prima facie slanderous, and (2) that the pursuer was not entitled to an opportunity of proving facts and circumstances which would give to that sentence a slanderous meaning without specifically averring them, and without producing the rest of the letter.

Smith v Walker, 1912 S.C. 224; 49 S.L.R. 225; 1912, 1 S.L.T. 46.

(48)

—Statement not prima facie slanderous
—Averting that words understood in slanderous sense.

Circumstances in which an issue was allowed where prima facie the words complained of would not reasonably bear the innuendo proposed, but where the pursuer averred that the persons to whom the words were uttered all understood them in the sense suggested.

Williamson v McCann, 1908, 16 S.L.T. 221.

(49)

Respective duties of Court and pursuer—
Necessity of averring innuendo on record.

Observations on the duty of the Court and the pursuer respectively with regard to the framing of issues in actions of libel. In particular, observed that it is the pursuer's duty to state distinctly upon record the libellous meaning which he attaches to the writing of which he complains.

James v Baird, 1916 S.C. (H.L.) 158;
53 S.L.R. 392; 1916, 1 S.L.T. 331.

(50)

Terms of innuendo—Vagueness—Immoral conduct.

In an action of damages for slander, the

Lord Ordinary allowed an issue, "whether said statement was of and concerning the pursuer, and falsely and calumniously represented or was meant to represent that the pursuer had been guilty of immoral conduct with A B," but observed that the use of the phrase "immoral conduct" was bad, because vague.

Ewart v M'Laren, (O.H.) 1894, 2 S.L.T. 325.

(51)
 ———Vagueness—"Not worthy of being trusted in commercial dealings."

An issue containing the innuendo, "That the pursuer's character as a man of business is such that he is not worthy of being trusted by any one in commercial dealings, and, in particular, could not be trusted to repay a loan of £50 should such be made to him," disallowed, in respect that it was not sufficiently distinct and intelligible for an innuendo.

Mathieson v The Scottish Trade Protection Society, (O.H.) 1898, 5 S.L.T. 291; affirmed, 1898, 25 R. 683; 35 S.L.R. 532; 5 S.L.T. 344.

(52)
 ———"Likely to act dishonestly" in specified matter.

A, the manager of a butcher's shop, brought an action of damages against B for wrongful dispossession and slander. He averred that, although the shop had been transferred to him by B, the owner, by a verbal agreement, B had turned him out of the shop, and had inserted the following advertisement in a newspaper:—"Notice—A, of A & Co., on and after this date is not authorised by me to contract any debts on my account.—B." The pursuer proposed an issue with an innuendo that the pursuer was capable of acting dishonestly. The Lord Ordinary allowed an issue in which the alleged slanderous advertisement was innuendoed thus—"Whether the said advertisement is of and concerning the pursuer, and falsely and calumniously represents that he was an untrustworthy person who had acted, or was likely to act, dishonestly in the matter therein referred to."

Grainger v Stirling, (O.H.) 1898, 5 S.L.T. 272.

(53)
 ———Innuendo adding nothing to statement complained of—"Bribe"—Relevancy.

Gardner v Robertson, 1921 S.C. 132; 58 S.L.R. 124; 1921, 1 S.L.T. 71, No. 190, infra.

(54)
 ———Charge of fraud in general terms—Form of issue.

Costa v Lumley, (O.H.) 1907, 15 S.L.T. 230, No. 88, infra.

(55)
 ———Purpose of innuendo—Slander in long newspaper article.

In an action of damages for slander, the pursuer complained of statements made in a long newspaper article. Observed (per Lord President Inglis,—"The purpose and use of

an innuendo in such a case as this is to gather together the expressions which really are of a slanderous character, and which appear to give colour to the whole article, and so to bring before a jury in a condensed form the substance of what is complained of."

Neilson v Johnston, 1890, 17 R. 442; 27 S.L.R. 333.

(56)
 ———Construction of newspaper article.

In an action at the instance of a town councillor against a newspaper, the pursuer innuendoed a newspaper article as representing that he was unfaithful to his public trust, and had acted corruptly for his own personal benefit. Observed that the question in such cases is not the meaning to be derived from a critical reading of the words in question, but the meaning which the words used would convey to an ordinary reader reading them as newspaper articles are usually read.

Hunter v Ferguson & Co., 1906, 8 F. 574; 43 S.L.R. 451; 13 S.L.T. 886.

(57)
 ———Actions—Slander by actions.

Opinions that there may be an actionable wrong of the nature of slander based solely upon actions, provided that an innuendo can reasonably be drawn from them.

Drysdale v Earl of Rosebery, 1909 S.C. 1121; 46 S.L.R. 795; 1909, 2 S.L.T. 2.

[See also Adamson v Martin, 1916 S.C. 319; 53 S.L.R. 237; 1916, 1 S.L.T. 53, No. 225, infra.]

(58)
 ———Proof—Innuendo not proved by witnesses.

The pursuer in an action of slander put in issue a private letter, which he innuendoed as accusing him of dishonesty, and which he alleged had been shown by the defender to three persons. The Court set aside a verdict of a jury for the pursuer, and ordered a new trial, on the ground that the innuendo had not been put to any of these persons, and that none of them had testified that he considered that the letter contained an accusation of dishonesty.

Bernhardt v Abrahams, 1912 S.C. 748; 49 S.L.R. 574; 1912, 1 S.L.T. 375.

(59)
 ———Single witness—Similar slander uttered on two occasions—Each occasion spoken to by one witness—Each witness attributing same defamatory meaning to words used.

M'Vicar v Barbour, 1916 S.C. 567; 53 S.L.R. 381; 1916, 1 S.L.T. 233, No. 37, supra.

(60)
 ———Innuendo of words spoken while pursuer and defender alone together.

Observations on the possibility of an innuendo in a case where vague defamatory statements were made by the defender to the pursuer while they were alone together.

Pybus v Mackinnon, 1908, 45 S.L.R. 598; 15 S.L.T. 1066.

(61)

Hypothetical case stated to be imaginary.

A person, who conceived that his reputation had been unfairly attacked through questions put by a member of Parliament in the House of Commons, wrote to him, and sent to a newspaper a letter in which he denied the charges alleged against himself. He went on to put the case that he should induce one of the political opponents of the member addressed to put questions in the House of Commons implying that that member had had delirium tremens, and had been intoxicated in public. Such a course, the writer stated, would be as justifiable as the conduct of the member of Parliament had been to him. In his letter he also spoke of his illustrations of delirium tremens and drunkenness as "imaginary stories," adding "it is doubtless painful for you to hear of these stories as it is painful for me to imagine them true for the sake of bringing home to your mind the impropriety of your unfair questions." In an action of damages at the instance of the member of Parliament against the proprietor of the newspaper in which the letter was published, held that the pursuer was entitled to an issue whether the letter represented him as a drunkard; that meaning being capable of being put upon the letter, and it being for a jury to say whether there was or was not a libel.

Ritchie & Co. v Sexton, 1891, 18 R. (H.L.) 20; 23 S.L.R. 945.

IV. WHAT CONSTITUTES SLANDER.**1. "OF AND CONCERNING" THE PURSUER.**

(62)

Slander of a class.

Two grocers and wine merchants in a burgh, one of whom had been elected a magistrate, and the other dean of guild, raised actions of damages for slander against A, founded upon a letter published in a newspaper which the defender had written, in which he stated that the temperance party were neglecting their duty. Held on a construction of the whole letter, that while it contained intemperate and foolish language directed against the class of licence-holders, it was not a slander of the pursuers as individuals, and the action dismissed.

Wardlaw v Drysdale, 1898, 25 R. 879; 35 S.L.R. 693.

(63)

Title of individuals to sue—Province of jury.

A newspaper published an article on Ireland stating that in Queenstown instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants were to be discharged, and that a shopkeeper who had refused so to act had had his shop proclaimed and had been forced to close it. An action was brought by the Roman Catholic bishop at Queens-

town and six of his clergy (who averred that they were the Roman Catholic religious authorities referred to), in which they, suing as individuals, sought to recover separate sums of damages on account of the accusations in the article. Held (1) that the pursuers were entitled to sue for damages as individuals; and (2) that it was for the jury to determine whether they or any of them were the Roman Catholic religious authorities referred to.

Browne v Thomson & Co., 1912 S.C. 359; 49 S.L.R. 285; 1912, 1 S.L.T. 123.

(64)

Members of presbytery—Charge of intemperance.

The clerical members of a presbytery brought an action of damages for slander in respect of a passage in a newspaper article which they innuendoed as being of and concerning each of them, and representing that they were intemperate. The statement complained of did not refer to the pursuers individually, but an issue was allowed to each of the pursuers.

Macphail v Macleod, (O.H.) 1895, 3 S.L.T. 91.

(65)

Context excluding pursuer.

V, an unmarried woman, having threatened an action of damages for breach of promise of marriage against a client of B & Co., law agents, a correspondence followed between B & Co. and V's agent. One of B & Co.'s letters, after referring to certain entries of the births of certain illegitimate children in the public register of births, bore—"This last entry shows that the writer had been misinformed as to the particular child with which your client was to be credited; but this is not surprising, in view of the fecundity of the maidens of this family, and of their matrimonial and other relationships, as disclosed by the above, and sundry other entries in the registers." In an action of damages of slander brought by A (who was an unmarried sister of V, but whose name did not appear in the entries referred to), against B & Co., held that the words "maidens of this family" were shown by the context to refer only to persons whose names appeared in the entries in the registers, and defenders absolved.

A v B & Co., 1898, 25 R. 951; 35 S.L.R. 760; 6 S.L.T. 46.

(66)

Context excluding pursuer.

A ratepayer having made certain charges against the matron of a hospital, an inquiry was held, in which evidence was given by the matron and by other members of the hospital staff. The commissioner who conducted the inquiry reported adversely on the credibility of certain members of the staff, but stated his belief in the truthfulness of the matron, and exonerated her from the charges made against her. On this report being sent to the ratepayer, he acknowledged receipt of it in a letter, in which he said—

"I have but a languid interest in the question of which member of the staff lied the most." In an action of damages for defamation brought by the matron against the ratepayer, the pursuer sought to innuendo these words as representing that she had lied in giving evidence at the inquiry. **Held** that the words, construed along with the report of the commissioner, did not refer to the pursuer, and an issue disallowed.

Couper v Lord Balfour of Burleigh, 1914 S.C. 139; 51 S.L.R. 126; 1913, 2 S.L.T. 417.

(67)

Context not excluding pursuer.

A shipowner brought an action of damages against the proprietors of a newspaper for an alleged slander contained in a paragraph in an issue of the newspaper headed "Shipwreck by Arrangement." Neither the pursuer nor the ship was mentioned by name. Circumstances in which the Lord Ordinary allowed an issue, **holding** that, while primarily and critically there might be no accusation except against persons who were not owners, the paragraph was so expressed that it might reasonably be held by a cursory reader, not knowing the pursuer's exact relation to the ship, to apply to him. The Court adhered, **holding** that the paragraph might reasonably be read as a slander on the pursuer.

Briggs v The Amalgamated Press, 1910, 2 S.L.T. 334.

(68)

Pursuer not named in slanderous statement—Onus of proof.

A firm, which manufactured a coffee essence called "Camp" coffee, inserted in a newspaper an advertisement which narrated that complaints had been received that certain grocers (who were not named), when asked for "Camp" coffee, were by false statements deceiving the public and inducing them to buy an inferior coffee, and that the firm had taken proceedings against thirty-five of these grocers. In an action of damages for slander at the instance of one of the grocers proceeded against, the pursuer averred that the advertisement was of and concerning him. **Held** that the question whether the advertisement referred to the pursuer was for the jury, and **observed** that the onus of proof was on the pursuer, as he was not actually named.

Webster v Paterson & Sons, 1910 S.C. 459; 47 S.L.R. 307; 1910, 1 S.L.T. 173.

(69)

Comment on anonymous letter in newspaper.

In an action of damages for slander the pursuer averred that the defender, the minister of the parish of C, had—in commenting from the pulpit upon an anonymous letter which had appeared in a newspaper bearing the signature "a member of C parish kirk-session"—falsely and calumniously stated that it "bears internal evidence that it is a forgery, and that the editor had been imposed upon by a so-called member of session," meaning thereby that

the pursuer was the anonymous writer, and the "so-called member of session" to whom he was referring as having been guilty of forgery and imposition. It appeared from the pursuer's statement that on the day after that of the alleged libel the defender, at the pursuer's request, had by letter disclaimed any reference to the pursuer in the statement complained of. **Held** that the pursuer had not set forth a relevant case.

Caldwell v Monro, 1872, 10 M. 717; 44 J. 393; 9 S.L.R. 461.

(70)

Pursuer's name the same as that in slanderous article.

In an action of damages for slander by a music-hall artiste against newspaper proprietors the pursuer averred that a newspaper paragraph headed "A B shoots wife twice," was slanderous and of and concerning himself, his name being "A B." Issue allowed.

Wragg v Thomson & Co., 1909, 2 S.L.T. 409.

(71)

Pursuer's servants charged with improper conduct—Acts of servants not stated to be done with pursuer's authority.

During a parliamentary election a newspaper stated that it was alleged that a boat's crew from the yacht of one of the candidates was captured while poaching, and that it was affirmed that a boat's crew from his yacht had been seen fishing on a Sunday. **Held** that the candidate was not entitled to an issue, as the newspaper article did not say that the acts had been done with his authority.

Macfarlane v Black & Co., 1887, 14 R. 870; 24 S.L.R. 623.

2. FALSITY OF IMPUTATIONS.

[See also VI., infra.]

(72)

No averment that statements complained of were false.

A letter in a newspaper accused a parish minister of neglecting his duty by absenting himself from his charge for six of the busiest weeks of the year, during which the church was closed, and concluded by expressing a hope that the presbytery would do their duty "and not allow this part of their vineyard to be neglected," and would call him to account. In an action of damages for slander the minister did not allege that the statements of fact in the letter were false, but innuendoed it as representing that he had, in violation of his duty as a parish minister, neglected his parishioners and congregation, and had behaved in a manner unbecoming a minister of the gospel, and deserving of the admonition of the ecclesiastical courts. **Held** that the pursuer's averments were irrelevant in the absence of any denial on record of the truth of the statements of fact in the letter. **Observed**, per Lord President Inglis—"No man can

come into Court only on an innuendo—he must have a statement that the statements complained of are false.”

Campbell v Ferguson, 1882, 9 R. 467; 19 S.L.R. 404.

(73)
True statement of fact conveying false representation.

In an action of damages for slander held that, although a letter might contain a substantially accurate statement of facts, the jury might return a verdict for the pursuer if satisfied that the letter contained a representation with regard to the pursuer which was false and calumnious.

James v Baird, 1916 S.C. 510; 53 S.L.R. 324; 1916, 1 S.L.T. 138.

Reversed on another point, 1916 S.C. (H.L.) 158; 53 S.L.R. 392; 1916, 1 S.L.T. 331.

(74)
True statement made maliciously with design and result of injury.

Held that a statement true in fact, and not defamatory, is not actionable, even if made maliciously with the design and result of injuring a man in his trade or business.

Parlane v Templeton, (O.H.) 1896, 34 S.L.R. 234; 4 S.L.T. 153.

(75)
Truth of imputation appearing from pursuer's pleadings.

Carson v White, (O.H.) 1919, 2 S.L.T. 215, No. 254, *infra*.

3. DEFAMATORY IMPUTATIONS.

(1) IMPUTATIONS AGAINST CHARACTER.

(a) Imputations of Criminal or Dishonest Conduct.

(i.) Whether Defamatory.

(76)
“Prisoner” — Misdescription — Accused persons described as “prisoners.”

A person, who had been summoned to appear in a police court to answer to a complaint, in which he was charged with a breach of the licensing law, appeared in response to the citation, and was acquitted. A newspaper published a paragraph in which the police court proceedings were accurately described, but the paragraph was headed, “The Edinburgh Licensing Prosecution, Prisoners Acquitted.” The accused brought an action of damages for slander against the newspaper on the ground that, as he had not been apprehended, but had appeared in answer to a citation, and had then been acquitted, he had never been a prisoner. Held that in the circumstances the words “prisoners acquitted” were not slanderous, and action dismissed as irrelevant.

Leon v “Edinburgh Evening News,” 1909 S.C. 1014; 46 S.L.R. 705; 1909, 2 S.L.T. 65.

(77)

“Offender” — Misdescription.

Held that an action of damages for slander against the magistrates of a burgh was relevant where, in a report made by them with reference to a case in which the pursuer in the action of damages had been convicted of a police offence and the conviction quashed on appeal to the High Court of Justiciary, the pursuer was referred to as the “offender.”

Davidson v Anderson, (O.H.) 1905, 12 S.L.T. 679.

(78)

Suicide.

Opinion, per Lord Kincairney, Ordinary, that it is defamatory to say falsely of a person that he has committed suicide.

Broom v Ritchie & Co., 1904, 6 F. 942; 41 S.L.R. 723; 12 S.L.T. 205.

(79)

Travelling on railway without paying fare — Posting up sentence.

Buchan v North British Railway Co., 1894, 21 R. 379; 31 S.L.R. 273; 1 S.L.T. 450, No. 428, *infra*.

(80)

Abduction of girl under eighteen — Criminal Law Amendment Act, 1885, sec. 7.

In an action of damages for wrongous apprehension and slander the pursuer averred that he was apprehended in consequence of a telegram sent by the defender to the county police charging him with “having abducted” her daughter, who was a girl between seventeen and eighteen years of age. Held that the averment that the pursuer had been charged with abduction was not a relevant averment that he had been charged with a criminal offence, inasmuch as the abduction of a girl between seventeen and eighteen years of age was not a crime at common law, and was so under the 7th section of the Criminal Law Amendment Act, 1885, only if the intention was that she should be unlawfully known, and the pursuer did not aver that the defender had charged him with abduction with the intent expressed in the statute.

Abinet v Fleck, (O.H.) 1894, 2 S.L.T. 30.

(81)

Accusation of theft — Failure to pay for article bought.

A man who bought a coat, payable on delivery, failed to pay for it when it was delivered, and for some days thereafter. Held that a letter written to him by the seller stating that his action made the case one of theft was slanderous.

Handasyde v J. Hepworth & Son, (O.H.) 1907, 15 S.L.T. 180.

(82)

Poaching.

Opinion that it is slanderous to accuse a person of poaching.

Nelson v Irving, 1897, 24 R. 1054; 34 S.L.R. 786; 5 S.L.T. 78.

(83)

Held that it is libellous to say of a man that he is a poacher and does nothing but poach.

Cook v Spence, (O.H.) 1897, 4 S.L.T. 295.

(ii.) Innuendo.

(84)

Fraud—Giving wrong coin.

A shop assistant asked a customer—"Did you give me half a sovereign to change last night." On receiving an answer in the affirmative, she said—"This is what you gave me," and held up a farthing. Held that an innuendo that the pursuer had fraudulently tendered a farthing for half a sovereign and had induced the defenders to give goods and change therefor was not justified.

M'Leod v A. R. Ure & Young, (O.H.) 1915, 1 S.L.T. 151.

(85)

Travelling twice with same ticket.

The following statement by a ticket collector to a passenger, "You have travelled twice with the same ticket," held capable of bearing the innuendo that the passenger had knowingly defrauded the railway company.

Cumming v Great North of Scotland Railway Co., (O.H.) 1916, 1 S.L.T. 181.

(86)

Defrauding insurance company — Refusing admission to fire brigade on occasion of fire—Newspaper article.

Terms of a newspaper article headed—"Fire at Ayr Farina Mills—Singular Conduct of the Manager," which were held to entitle the manager of the works in question to an issue whether the article falsely and calumniously represented that he "had endeavoured to prevent the fire at the works referred to in the said article from being subdued, so as to cause destruction of the said works and stock therein, to the loss, injury, and damage of the pursuer."

Gudgeon v Outram & Co., 1888, 16 R. 183; 26 S.L.R. 130.

(87)

Defrauding insurance company — Alleged accident.

In an action of damages for slander by the holder of an accident insurance policy against the insurance company, the pursuer averred that with regard to a claim on his policy made by him against the company, the secretary of the company said to him—"The company are in no respect liable to you under the policy. I know that it was not an accident in your case at all, and that you fell and sustained your injuries because you were tipsy at the time." An issue allowed which innuendoed the statement complained of as meaning that the pursuer had put forward an unfounded claim under the policy with the view of defrauding the company.

Oliver v Laidlaw, (O.H.) 1895, 3 S.L.T. 142.

(88)

Running wrong whippet in race.

The owners of a whippet dog sued the promoter of race meetings for such dogs for slander on the ground that in refusing to allow the dog to run in a race for which it was entered he had said to one of the pursuers—"It's a wrong dog. Get off this track or I will have you arrested." It was admitted that the defender was in sole control of the races in every way. Held that the words could not be innuendoed as implying a charge of fraud, and that in any event the occasion was privileged.

Costa v Lumley, (O.H.) 1907, 15 S.L.T. 230.

(89)

"Misappropriation of money."

In an action of damages for slander, the pursuer averred that the defender had falsely, maliciously, and calumniously stated to the agent of a bank that the pursuer had misappropriated trust money, meaning thereby that the pursuer had dishonestly appropriated the money to his own uses. Held that the pursuer's averments relevantly set forth a case of verbal slander.

Smyth v Mackinnon, 1897, 24 R. 1086; 34 S.L.R. 762; 5 S.L.T. 97.

(90)

A law agent who was in charge of the winding up of an executry estate wrote to the cautioners for the executrix (an old lady of eighty), intimating that a son of the executrix was demanding payment of the whole estate in name of his mother, and advising them to withdraw their bond of caution "because I have reason to suspect that if the son who is demanding the whole estate gets hold of it, the other beneficiaries will never receive the share they are entitled to." In an action of damages for slander the son innuendoed the letter to mean that he was a person who would dishonestly appropriate money that did not belong to him. Held that the innuendo was not inadmissible and an issue allowed.

Stewart v Hannah, 1905, 8 F. 107; 43 S.L.R. 74; 13 S.L.T. 499.

(91)

Letter bearing to be part of a correspondence.

In an action of damages for slander the pursuer founded on a letter which bore to be part of a correspondence, and which the pursuer innuendoed as accusing him of dishonest appropriation of property. Held that, even in a question of relevancy, the whole correspondence must be looked at, and that when the correspondence was read as a whole the letter founded on would not bear the innuendo.

Smyth v Mackinnon, 1897, 24 R. 1086; 34 S.L.R. 762; 5 S.L.T. 97.

(92)

"Greatest liar and fraud."

The local agent for an insurance company, who was bound to account to the superintendent of the company, was in arrears with his

payments. In an action of damages for slander against the insurance company the agent averred that the superintendent called at the pursuer's house and stated that the pursuer was the greatest liar and fraud that ever came into the town, and that if the pursuer did not settle with him by the beginning of the week he would give the pursuer into the hands of the authorities. The pursuer innuendoed the statement as representing that he had been guilty of dishonest appropriation of the moneys in his hands belonging to the defenders. **Held** that to call a man a fraud did not in ordinary language mean that he had committed a fraud, and that the words "liar and fraud," verbally uttered, were not slanderous.

Agnew v British Legal Life Assurance Co., 1906, 8 F. 422; 43 S.L.R. 284; 13 S.L.T. 742.

(93)

Administration of funds of a charity.

Terms of a newspaper article commenting on an appeal by A and B for subscriptions to a charitable "home," and asking "what guarantee is there that the money subscribed does not go to the private profit of" A and B, which it was **held** could bear the innuendo that B was a person capable of appropriating funds collected for charity to his own purposes.

Boal v Scottish Catholic Printing Co., 1907 S.C. 1120; 44 S.L.R. 836; 15 S.L.T. 220.

(94)

Management of hospital funds.

Terms of an anonymous letter in a newspaper criticising the management of a hospital which were **held** to be incapable of bearing the innuendo that the secretary of the hospital was guilty of dishonest conduct in the application of the funds of the hospital, and was a person unfit to be entrusted with the management of public funds.

Green v Reid & Co., 1905, 7 F. 891; 42 S.L.R. 685; 13 S.L.T. 228.

(95)

Branch of trade union "paying money to themselves."

A statement by the secretary of a trade union to the effect that a branch committee had paid money to themselves **held** to be incapable of bearing an innuendo of a charge of dishonest appropriation of money against an individual member of the committee.

Quigley v Brown, 1913, 1 S.L.T. 61; 1913, 2 S.L.T. 391.

(96)

"Withholding moneys contrary to bye-laws" of association.

In an action for slander the pursuer complained of the circulation of a pamphlet by the defenders (a free labour association), in which it was stated that the pursuer had been dismissed by the defenders for, *inter alia*, "withholding moneys belonging to the" defenders "contrary to the bye-laws" of the association. The pursuer proposed an issue in which he innuendoed this expression as representing "that pursuer had been guilty of dishonestly appropriating money."

Held that the expression complained of could not reasonably bear the innuendo proposed, and issue disallowed.

Ellis v National Free Labour Association, 1905, 7 F. 629; 42 S.L.R. 495; 13 S.L.T. 70.

(97)

Evading payment of rent.

A political lecturer engaged a hall for the purposes of a lecture which he delivered. In a newspaper article commenting upon it, it was stated of him—"Now one of them has left the town. Any information as to his whereabouts will be thankfully received by a sorrowing landlord, the proprietor of the hall, who now concludes that a Tory Cleon is no more profitable as a tenant than a Socialist Boanerges." **Held** that that language was capable of bearing the innuendo that the lecturer, being liable for the rent of the hall, had secretly left without giving an address and without making provision for payment of the rent, with the view of defrauding the proprietor of the hall, and was therefore actionable.

Godfrey v W. & D. C. Thomson, 1890, 17 R. 1108; 27 S.L.R. 865.

(98)

Theft—"Thief"—Newspaper article.

Terms of a newspaper article on a consideration of which it was **held** that the word "thieves" as it occurred therein would not bear the innuendo that the pursuer had been guilty of theft.

Campbell v Ritchie & Co.—Hay v Ritchie & Co., 1907 S.C. 1097; 44 S.L.R. 766; 15 S.L.T. 165.

(99)

"Taking" articles belonging to another—Necessity for innuendo.

In an action of damages for slander by a housemaid in a hotel against a resident in the hotel, the pursuer averred that the defender had accused her of "having removed a quantity of whisky and claret from bottles belonging to him, and which were lying in his bedroom, during his absence at breakfast," and that upon her complaining to her mistress that she had been so accused, he had repeated the accusation, saying that it was the pursuer who "took" it. **Held** that, in order to make her averments relevant, she must add to them the innuendo "intending to represent, and representing, that the pursuer stole" liquor belonging to the defender.

Reid v Moore, 1893, 20 R. 712; 30 S.L.R. 628.

(100)

Failure of message girl to deliver goods sent from shop.

A message girl employed by a milliner was sent to deliver a cape to a customer. The customer stated on several occasions that the message girl had not delivered the cape to her. The cape was found in the customer's house and criminal proceedings which had been taken against the message girl were thereupon dropped. In an action of damages brought by the message girl against the customer the Court **held** that it

was not proved that the defender had charged the pursuer with stealing the cape, and that the statements proved were not slanderous.

Mitchell v Steele, 1874, 11 S.L.R. 364.

(101)

—Lodging information with police authorities.

Circumstances under which an issue was allowed where a threat to inform the police was innuendoed as implying a charge of theft.

Kennedy v John Henderson & Son, (O.H.) 1903, 11 S.L.T. 156.

(102)

—Words used in themselves inoffensive.

An inquiry as to missing property, accompanied by the searching of the pursuer, held to support an innuendo of theft, though the words used were in themselves inoffensive.

Adams v Templeton & Co., (O.H.) 1913, 2 S.L.T. 241.

(103)

—Law clerk removing his private papers on leaving office—Employer requesting information as to what clerk had removed.

A conveyancing clerk in a law office who had resigned his situation left the office taking with him two tin boxes which contained his private papers. After emptying them he returned them to the office. Some weeks afterwards the senior partner of the firm wrote a letter to the clerk asking him to explain what he had removed on the day when he left the office. Held that the letter would not bear an innuendo of dishonesty in the absence of extrinsic facts showing that it was intended to be defamatory.

Allen v Blair, (O.H.) 1895, 3 S.L.T. 126.

(104)

Forgery—Statement in pleadings that writ founded on as holograph of a party was not so.

The defender in an action of removing produced a missive of lease, which, he averred, was holograph of the pursuer, and was signed by the pursuer in presence of the defender and three witnesses. The pursuer denied that the missive of lease was in his writing. In an action of damages for slander, held that a jury were entitled to take the view that the denial was an accusation of forgery.

Logan v Weir, 1872, 10 S.L.R. 22.

(105)

—Forging and uttering promissory note—Letter by payee of note to one of the granters.

The creditor in a promissory note, granted as security for a debt payable by instalments, wrote to A, one of the granters, "The promissory note handed by you to me, signed by yourself, B & Co., and B, was presented to-day to B for payment of the instalment now past due. He repudiates all knowledge of the said note, and

I have therefore to inform you that unless the full amount of the promissory note is now paid to me before eleven o'clock to-morrow, I shall consider it necessary to hand the case in to the procurator-fiscal." Held that the letter was capable of bearing the innuendo that A had been guilty of forgery and uttering a forged document knowing it to be forged.

Mackay v M'Cankie, 1883, 10 R. 537; 20 S.L.R. 357.

(106)

Letter inciting to violence—Authorship attributed to pursuer—Issue.

In an action of damages the pursuer averred that the defenders, the publishers of a newspaper, had published an anonymous letter "intending to convey to members of the public that it was written by the pursuer," and had commented thereon. He stated that the letter was not written by him, and averred that the letter falsely and calumniously represented the pursuer as "longing for an opportunity of committing murder on his Roman Catholic fellow-citizens, or at all events of shedding their blood in civil commotion." On the terms of the letter the Lord Ordinary allowed an issue whether the letter designedly held the pursuer up to public hatred and contempt. The Court held (1) that the words could be innuendoed as an incitement to riot and bloodshed; and (2) that it was slanderous to attribute to the pursuer the authorship of the letter. Terms of the issue adjusted to try the cause.

Waugh v "Ayrshire Post," 1893, 21 R. 326; 31 S.L.R. 248; 1 S.L.T. 431.

(107)

"Deserving of imprisonment"—Farm servant dismissed—Innuendo of criminal offence against law for prevention of cruelty to animals.

A farm servant was dismissed by his master for alleged cruelty to a horse. The servant made a claim against the master, who wrote to his agents in reply—"He ought to be proud I did not give him six months' imprisonment, and he well deserved it." In an action of damages for slander by the servant against the master, an issue was allowed as to whether the defender sent the letter complained of "and whether the said letter is of and concerning the pursuer, and falsely, calumniously, and maliciously represents that the pursuer had committed a criminal offence against the laws for the prevention of cruelty to animals."

Campbell v M'Lachlan, (O.H.) 1896, 4 S.L.T. 143.

(108)

Adulteration of food.

In an action of damages for slander the pursuer, a baker, averred that the defender, who was a doctor and the chief magistrate of the town, had stated that he would probably have the pursuer's premises examined, as, according to the law, peace officers might, by warrants, search bakers' premises, and if any adulterated bread or flour were found, the same might be seized and dis-

posed of. The pursuer innuendoed this statement as representing that he kept, in violation of the law, adulterated bread or flour on his premises. **Held** that the innuendo was admissible, and that, as innuendoed, the statement amounted to a charge of dishonesty and was slanderous.

Broomfield v Greig, 1868, 6 M. 563; 40 J. 299; 5 S.L.R. 367.

(109)

Passing off inferior goods as goods of A.

A firm, which manufactured a coffee essence called "Camp" coffee, inserted in a newspaper an advertisement which began "Truth will prevail," and narrated that complaints had been received that certain grocers (who were not named), when they were asked for "Camp" coffee, were by false statements deceiving the public and inducing them to buy an inferior coffee, which was palmed off on the public as being the same as "Camp"; that no fewer than seventy-four grocers had made these statements or similar statements; and that the firm had taken proceedings against thirty-five of them. In an action of damages for slander at the instance of one of the grocers proceeded against, the pursuer averred that the advertisement was of and concerning him, and represented that he acted dishonestly in the conduct of his business. **Held** that the advertisement, read as a whole, was capable of bearing this innuendo, and an issue allowed.

Webster v Paterson & Sons, 1910 S.C. 459; 47 S.L.R. 307; 1910, 1 S.L.T. 173.

(110)

Deceit—Entering into contract under false pretences.

A theatre manager having cancelled an engagement between himself and an actor, alleging that the actor had not performed in first-class style, wrote to the actor in the course of certain subsequent correspondence in the following terms:—"You made your engagement under false pretences. You advertise what you are not capable of performing." In an action of damages by the actor against the manager, **held** that the letter being innuendoed to mean that the pursuer had wilfully deceived the defender was sufficient to found an issue.

Stuart v Moss, 1885, 13 R. 299; 23 S.L.R. 231.

(111)

Evading payment of debts.

An exciseman brought an action of damages for slander against a grocer in respect of certain statements contained in letters written by the defender, which the pursuer sought to innuendo as representing that the pursuer dishonestly intended to take advantage of the exemption of his salary as a civil servant from arrest to evade payment of his just debts. Circumstances in which the Lord Ordinary assoltized the defender, **holding** that there was no issuable matter in the record.

Williamson v Maclean, (O.H.) 1909, 2 S.L.T. 268.

(112)

Dishonourable character.

The proprietor of a house wrote to the agent of his tenant (Macrae), who had ceased to occupy the premises—"That horrid man Macrae will never get a penny from me, and you know that as long as he keeps the key he is liable for the rent. There were several applicants for the place at a reduced rent, on account of its being occupied by him. I do believe that he would be mobbed if he was appearing in the Strath. His statement of facts were a tissue of falsehoods." In an action of damages for slander by the tenant, **held** that the words would bear the innuendo "that the pursuer is of dishonourable character."

Macrae v Sutherland, 1889, 16 R. 476; 26 S.L.R. 335.

(113)

In a letter by a landlord to his tenant complaining of the failure of the latter to make immediate payment of a debt alleged to be due by him under a reference to an arbiter, the writer stated—"I am surprised at your conduct, which you must see is very dishonourable." **Held** that the letter was not actionable.

Turnbull v Oliver, 1891, 19 R. 154; 29 S.L.R. 138.

(114)

Conduct inferring hypocrisy, deceit, and treachery — Privilege — Malice — Sufficiency of averments of malice.

In an action of damages for slander brought by a Glasgow licence-holder against two other licence-holders in the city, the pursuer averred that, in view of the provisions of the Temperance (Scotland) Act, 1913, the licence-holders in the city had resolved, as their official policy, to seek to prevent the requisite number of signatures to requisition forms for a poll under that Act being obtained, by themselves abstaining from signing forms and by distributing leaflets urging others to abstain, and that the pursuer had actively and openly supported that policy. He further averred that the defenders acting in concert had, to his serious prejudice, falsely, calumniously, and maliciously circulated a statement, which they both knew to be untrue, to the effect that he had signed a requisition form, and that they had thereby represented that he was a hypocrite, and was acting deceitfully and treacherously to his colleagues in the trade, and that that had in fact been the interpretation placed upon the statement. The occasion on which the defenders made the statement was privileged. The defenders admitted making the statement, but averred that in so doing they had relied upon an admission made to one of them by the pursuer himself that he had signed a requisition form. The pursuer averred that the requisition forms were open to public inspection; and he denied that he had ever signed such a requisition form or had stated to any one that he had done so, and averred that both the defenders knew that he had never made such a statement.

Held (1) that, in the circumstances, the statement complained of was reasonably capable of the innuendo averred, and was defamatory; and (2) that malice had been relevantly averred.

Griffen v Divers, 1922 S.C. 605; 59 S.L.R. 453; 1922 S.L.T. 424.

(115)

Obtaining public contract by dishonest and improper means.

Terms of newspaper article which were held to be capable of bearing the innuendo that the lowest offerer for a public contract had secured the contract by dishonest and improper means.

Waddell v Roxburgh, 1894, 21 R. 883; 31 S.L.R. 721; 2 S.L.T. 85.

(116)

Corrupt acting in official capacity—Newspaper—Comments on matter of public interest—Criticism of position of architect to school board—Criticism of system or of individual.

An architect was employed by a school board under an agreement by which he acted as architect, and received the ordinary commission, in the case of alterations or enlargements of existing buildings, but where new buildings were erected the work was thrown open to public competition. An article in a newspaper, in commenting upon the proceedings at a meeting of the school board at which it appeared that the cost of certain proposed enlargements of an existing school according to the tenders received would be nearly double the estimate of cost prepared by the architect, referred to the large sums expended by the school board on enlargements, and added, with reference to the terms of the architect's employment—"The rule as interpreted is an absurdity, and it puts a premium upon a certain kind of advice." In an action of damages for slander, held that the statement was a fair criticism of the system and not a criticism of the pursuer as an individual, and that it would not bear an innuendo to the effect that the pursuer in his position of architect had acted corruptly for his personal benefit.

Langlands v John Leng & Co., 1916 S.C. (H.L.) 102; 53 S.L.R. 212; 1916, 1 S.L.T. 168.

(117)

Literary criticism—Charge of deceiving the public.

An atlas was published entitled "The Edinburgh Educational Atlas of Modern Geography, with complete index, by W. & A. K. Johnston" (being the firm under which the publisher carried on business). A review of the atlas contained a statement that the atlas, though bearing the name of A. Keith Johnston, was the work of neither the primus nor the secundus of that name and lacked their geographical acumen, and also went into severe criticism of it. The publisher of the atlas brought an action of

damages against the proprietor of the journal for slander, and averred that the article represented that the pursuer had falsely, and for the purpose of deceiving the public, issued as the work of A. Keith Johnston an atlas which was not the work of either the first or the second of that name, but of persons not skilled in making an atlas. An issue was allowed. The jury found for the pursuer. The Court refused to disturb the verdict as being contrary to the evidence.

Observed (per Lord Justice-Clerk Moncreiff) that if the critic, instead of stating as a matter of fact that the atlas was not the work of either the father or the son, and making that statement of fact the explanation of the inaccuracies which were found in it, had said that, looking to the abounding errors in the atlas, it could not be the work of these experienced men, the innuendo could not have been maintained.

Johnston v Dilke, &c., 1875, 2 R. 836; 12 S.L.R. 486.

(118)

Criticism of farm management.

Terms of a newspaper article criticising the management of a farm which were held to entitle the tenant of the farm to an issue "whether the said article . . . falsely and calumniously represents the pursuer as being dishonest, or makes similar false and calumnious representations of and concerning the pursuer."

Dun v Bain, 1877, 4 R. 317; 14 S.L.R. 248.

(119)

Threat to report matter to the authorities—Misappropriation of money—Letter from superior to subordinate in arrears.

The district superintendent of an insurance company wrote a letter to a district collector of the company (who was bound to account to the superintendent and was behindhand in his payments) ordering him to pay over every penny he had collected by a certain day, and stating that he (the superintendent) would be obliged to report the matter to the authorities. The collector averred that the letter represented that he had been guilty of dishonest misappropriation of money belonging to the insurance company. Held that this innuendo was inadmissible in view of the relationship between the superintendent and a collector who was in arrears.

Agnew v British Legal Life Assurance Co., 1906, 3 F. 422; 43 S.L.R. 284; 13 S.L.T. 742.

(120)

Two partners in a joint adventure had a dispute as to the settlement of the accounts of the joint adventure. Terms of letters written by the law agents of one of the parties to the law agents of the other threatening to communicate with the procurator-fiscal which, it was held, would not support an innuendo that the other party had acted dishonestly.

Hunt v Paton, (O.H.) 1904, 12 S.L.T. 553.

(121)

Misappropriation of money.

In an action of damages for slander the pursuer averred that his firm of Ramsay Brothers had been in the practice of collecting accounts for the firm of MacLay & Co., that on 28th December, 1888, and on 5th March, 1889, the cashier of Ramsay Brothers had collected two accounts due to MacLay & Co. by a customer for £5 5s. and £4 4s. respectively, and that these sums had been credited to MacLay & Co.; that Ramsay Brothers had been sequestrated on 6th May, 1889; that on 20th February, 1890, MacLay & Co. had written to the pursuer—"Should we be forced to insist on [the customer] paying us the accounts she has already paid to you . . . she threatens to place the affair in the hands of her law agent, and you may then find yourself in an awkward situation, as he will in all probability report to the fiscal. If you wish to save yourself from unpleasant consequences you will let us hear from you without delay." The pursuer innuendoed this letter to mean that he had dishonestly appropriated the money to his own purposes. The pursuer did not deny on record the liability of his firm to account, or their failure to do so, and could not explain what had become of the money. **Held** (1) that the pursuer was entitled to an issue; and (2) that the word "maliciously" should not be inserted therein.

Ramsay v MacLay & Co., 1890, 18 R. 130; 28 S.L.R. 101.

(122)

Misappropriation of money.

In an action of slander brought by a salesman in the employment of a milk company against the company, the pursuer averred that he had left his work on account of a dispute between himself and the company regarding an alleged shortage in his accounts; that he had received a visit from Bell, a foreman in the defenders' employment, who said to him—"I'll give you a piece of advice. If you are wise, you'll turn out to work, because I have been instructed by Mr. Watson" (the defenders' manager) "to place the matter in the hands of the police"; that by this statement Bell falsely and calumniously represented that the pursuer was guilty of dishonestly appropriating the money collected by him on behalf of the defenders, and had rendered himself liable to criminal prosecution on account thereof. **Held** that the action was irrelevant, in respect that the words would not bear the meaning sought to be put upon them and were not slanderous.

McAdam v City and Suburban Dairies, 1911 S.C. 430; 48 S.L.R. 318; 1911, 1 S.L.T. 99.

(123)

Theft.

In an action of damages for slander the pursuer averred that he had let a machine on hire to W, and that on W becoming insolvent, and granting a trust deed, he (the pursuer) had removed the machine from his premises; that the defender, the trustee's agent, wrote to the pursuer a letter threat-

ening, unless evidence of the pursuer's right to remove the machine was at once produced, to place the matter in the hands of the fiscal without further notice; and that the statements in the letter represented that the pursuer was guilty of the crime of theft. **Held** that the letter would bear the innuendo, and that the pursuer was entitled to an issue; that the word "maliciously" should not be put in the issue.

Wilson v Purvis, 1890, 18 R. 72; 28 S.L.R. 76.

(124)

Threat to "put" subordinate "in prison" for neglect of duty.

Cockburn v Reekie, 1890, 17 R. 568; 27 S.L.R. 454, No. 213, infra.

(b) Imputation of Immoral Conduct.

(125)

Exercising evil moral influence—"Source of evil."

In an action of damages for slander, the pursuer averred that the defender, a Roman Catholic priest, had said to the pursuer, who was one of the defender's parishioners—"You are a source of evil in the parish, and the sooner you are out of it the better"; and proposed an issue with the innuendo that the words complained of represented that the pursuer exercised an evil moral influence on those with whom he came in contact. **Held** that the words complained of were not in themselves defamatory, and that in the absence of any averment as to some particular moral fault or evil influence being referred to by the defender, the innuendo proposed was not sufficient to entitle the pursuer to an issue. **Observations** (per Lord McLaren) on actions for verbal slander.

Rooney v McNairney, 1909 S.C. 90; 46 S.L.R. 81; 16 S.L.T. 483.

(126)

Associating with a prostitute and attempting to pass her off as wife.

Averments in an action of slander by the husband of a woman, who had been called a prostitute and ordered to leave a theatre by the theatre manager, which were held irrelevant.

Finburgh v Moss' Empires, 1908 S.C. 928; 45 S.L.R. 792; 16 S.L.T. 116.

(127)

Keeping disreputable house—Anonymous letter.

A man wrote an anonymous letter to his sister-in-law, whose husband was at sea, in which he stated that Mrs. B, the person with whom she lived, had not been her friend in days past, and then "the writer hopes to hear of different behaviour and not going under the roof of any one but the one you should, viz., your mother, or go to some place where drink and your present companions won't get near you, so that temptation will be out of your way." **Held** that these words would not found an

innuendo that Mrs. B and her husband were keepers of a house of disreputable character.

Brydone v Brechin, 1881, 8 R. 697; 18 S.L.R. 497.

(128)

Prostitution—"Street walker"—Whether intended and understood in sense injurious to character.

A schoolmistress, acting on information that a pupil teacher of fifteen years under her care was in the habit of walking with young men in the street and of dressing gaudily, scolded her in the presence of the other teachers, calling her, as the girl alleged, a "street walker." The girl stayed for nearly two years in the school without complaint. After leaving it for another reason, she raised an action of damages for slander. **Held** that the words were not intended by the defender, and were not understood by the pursuer or others, to bear any meaning injurious to the character of the defender.

M'Neill v Forbes, 1883, 10 R. 867; 20 S.L.R. 580.

(129)

Unchastity — Newspaper — False birth notice.

The publisher of a newspaper is not exempt from liability for damages merely because a statement of fact in regard to a private individual published by him is not *ex facie* defamatory, if in the circumstances it is defamatory. A newspaper among the notices of births stated that A B had given birth to a child at a certain date. A B raised an action of damages against the publisher on the ground that the statement was false, and that it was defamatory in respect that the date stated was within two months of her marriage. **Held** that the action was relevant, and that the pursuer was entitled to an issue.

Morrison v Ritchie & Co., 1902, 4 F. 645; 39 S.L.R. 432; 9 S.L.T. 476.

(130)

False statement not *ex facie* libellous — Advertisement for wet nurse inserted in newspaper—Woman married five months previously.

A newspaper published an advertisement for a "wet nurse wanted immediately," application to be made at a certain public-house. The publican and his wife, who were the only married persons living on the premises, raised an action of damages against the publishers on the ground that, as they had been only five months married at the date of the advertisement, it contained an imputation on their character, and proposed the following issue:—Whether the defenders published the notice "meaning thereby that the female pursuer had within five months of her marriage given birth to a child of which the male pursuer was the father; that each of the pursuers had been guilty of antenuptial fornication and was of immoral character." The Court dismissed the action, **holding** that the words com-

plained of were not libellous in themselves, and would not bear the innuendo.

Wood v "Edinburgh Evening News," 1910 S.C. 895; 47 S.L.R. 786; 1910, 2 S.L.T. 93.

(131)

Want of womanly delicacy.

Terms of a magazine article which were held to entitle a pursuer, a girl of seventeen, to an issue bearing the innuendo "that the pursuer undressed and went to bed in the presence of strangers of both sexes, and was thus chargeable with want of proper womanly delicacy."

A B v William Blackwood & Sons, 1902, 5 F. 25; 40 S.L.R. 20; 10 S.L.T. 311.

(132)

Charge of circulating a defamatory statement—Charge of being the author of indecent language—Relevancy—Specification.

In an action of damages for slander, the pursuer alleged that scandalous rumours affecting the moral character of the defender had been in currency in the town of F, and that an obscene inscription, which he believed to be applicable to the defender, had been inscribed on a wall; that the defender had, in the presence of witnesses, accused the pursuer of circulating the rumours, and of being the author or writer of the obscene inscription. The pursuer did not state that the rumours were false. He proposed an issue whether the defender had, in presence of witnesses, falsely and calumniously accused him of circulating statements of a defamatory and incriminatory character, and of being the author or writer of lewd and immoral language regarding her. The Court dismissed the action as irrelevant.

Milne v Smith, 1892, 20 R. 95; 30 S.L.R. 105.

(c) Use of Opprobrious Epithets.

(133)

Using bad language—Complaint to committee of association for sport.

A referee at a football match complained by letter to the committee of the football union that one of the players had during the match made offensive remarks about him. At a meeting of the committee held to investigate the matter, the referee gave evidence in support of his complaint, and stated that the player had called him "a bloody little brute." In an action of damages for slander the player set forth several innuendoes as to the import of the same words. **Held** that the statements complained of were not *per se* defamatory, and that the pursuer had not set forth a proper innuendo of a different and libellous meaning.

Murdison v Scottish Football Union, 1896, 23 R. 449; 33 S.L.R. 337; 3 S.L.T. 273.

(134)

Censure by committee of sporting association—Order to apologise.

The committee of a football union passed a resolution that A, a player in a football

match, had during the match used offensive language to the referee, that he be severely censured and ordered to apologise to the referee. The resolution was published in the press. In an action of damages for slander at the instance of A the Court allowed an issue against the individual members of the committee.

Murdison v Scottish Football Union, 1896, 23 R. 449; 33 S.L.R. 337; 3 S.L.T. 273.

(135)

Drunkenness — Charge of being tipsy on specified occasion.

In an action of damages for slander by the holder of an accident insurance policy against the insurance company the pursuer averred that with regard to a claim on his policy made by him against the company, the secretary of the company said to him—"The company are in no respect liable to you under the policy. I know that it was not an accident in your case at all, and that you fell and sustained your injury because you were tipsy at the time." The Lord Ordinary allowed an issue which innuendoed the statement as meaning that on the day of the accident the pursuer had drunk alcoholic liquor to excess, in consequence of which he fell and sustained injuries.

Oliver v Laidlaw, (O.H.) 1895, 3 S.L.T. 142.

(136)

"Informer"—Irishman.

In an action of damages for slander raised on the allegation that the defender had called the pursuer an "informer," the pursuer averred that he was an Irishman, and that the use concerning him of that word imported and represented "that he was a man who had treacherously, for the sake of reward, or for similar and disreputable motives, given information to the Crown or its executive against Irishmen or others." Held that the action was relevant, and an issue with that innuendo allowed.

Winn v Quillan, 1899, 2 F. 322; 37 S.L.R. 38; 7 S.L.T. 183.

(137)

"Attempt at extortion" — Privilege — Letter written by law agent on behalf of client—Necessity for averment of malice.

One law agent writing to another repudiating on behalf of a client a claim put forward by the other on behalf of one of his clients, after dealing with the claim in detail, said—"We all regard Mr. E's claim as nothing less than an attempt at extortion. . . . But knowing your personal, family and professional reputation, we do not include you in any way in the reflections we make against Mr. E." In an action for slander by E, held (1) that the words used could not be innuendoed as slanderous; and (2) that in any event they were privileged, and there being no averments from which malice could be inferred, the action fell to be dismissed.

Edmondson v Cartner, (O.H.) 1905, 13 S.L.T. 78.

(138)

"Dirty low scum"—Unfitness to associate with respectable people.

Held that to call a law agent a "dirty low scum" was defamatory, and that to say to another person regarding him, "I am sorry to see you in such company" might be innuendoed as defamatory.

Shepherd v Elliot, (O.H.) 1895, 3 S.L.T. 115.

(139)

Charge of wilfully and persistently making false and malicious accusations.

Held that the statement, "Your house-keeper has been accusing me of charging you for more milk than I supplied. The accusation is untrue," would bear the innuendo "meaning thereby that the pursuer had wilfully and persistently made false and malicious accusations against the defender," but that the innuendo was not defamatory.

Paton v Edine, (O.H.) 1898, 6 S.L.T. 191.

(140)

Charge of having relative confined as lunatic, although knowing that he was not insane.

In an action of damages for slander the pursuer averred that (1) in a letter published in a newspaper the defender had falsely, calumniously, and maliciously represented the pursuer as having illegally and wrongfully had his father-in-law, A B, confined in a lunatic asylum as of unsound mind when A B was not of unsound mind, and had done this when he knew that A B was sane; and (2) had corruptly and illegally used his public position as chairman of a parish council for that object and with that effect. Issues disallowed on the ground that the article complained of did not admit of the innuendo that the pursuer knew that his father-in-law was not insane, and that quoad ultra the statements in the article were admitted to be true.

Mackenzie v Anderson, (O.H.) 1900, 7 S.L.T. 469.

(2) IMPUTATIONS RELATING TO BUSINESS OR PROFESSION.

(a) Imputations Affecting Credit.

(141)

Financial difficulties.

A newspaper report of certain proceedings in bankruptcy bore that the bankrupt stated in Court that the pursuers were very hard up and that he had financed them from time to time, and made advances to them from time to time to enable business to be carried on. The pursuers averred that the bankrupt made no such statements, and they innuendoed the statements to mean that they were in financial difficulties and were being financed by means of accommodation bills and advances of money by a certain person. Held that the innuendo was ad-

missible, and that as innuendoed the statement was defamatory.

Wright & Greig v Outram & Co., 1889,
16 R. 1004; 26 S.L.R. 707.

(142)

In an action of damages for slander the pursuers complained of a letter written by the defenders in response to an inquiry as to their credit, and which stated of the pursuers—"They do a fairly extensive trade, but the account, from various causes, is not regarded with much confidence in these markets, although in certain quarters they appear to be in receipt of moderate credit. The capital at command, however, is limited, and the payments of late years have been slow and unsatisfactory, but their settlements for years have always been dilatory. At the same time, several of their shops are not thought to be paying, and it is feared that credit transactions meanwhile represent more than an average risk." The letter also referred to two small debt decrees obtained against the pursuers. The pursuers innuendoed the letter as representing that they were in financial difficulties. **Held** that the letter was actionable.

Bayne & Thomson v Stubbs, Limited, 1901,
3 F. 408; 38 S.L.R. 308; 8 S.L.T. 412.

(143)

"Cleaned out and lost his all"—Solicitor.

In an action of damages for slander the pursuer, a solicitor in a county town holding several public appointments of trust, averred that the defender had stated that the pursuer had been "cleaned out and lost his all," and that in consequence the pursuer had suffered in his reputation and business. **Held** that the pursuer was entitled to an issue, on the ground that it was not unreasonable to suppose that the statement might have injured his reputation and credit.

A B v C D, 1904, 7 F. 22; 42 S.L.R.
37; 12 S.L.T. 395.

(144)

Financial embarrassment.

The pursuer negotiated with a firm of wine merchants for a loan to enable him to buy a hotel business. He represented to them that he was not indebted for an advance to any other wine merchant from whom he was bound to take his supplies, and they were willing to make the loan on the usual condition that he should take his supplies of wine and spirits from them. Thereafter, as the result of inquiries, the defenders wrote to the pursuer withdrawing the offer on the ground that "we have learned that you have bills running with other wine merchants in Leith, and as you expressly told us that you were not indebted to any wine merchant, we have decided that we must not give the advance that you require." **Held** that the letter would not bear an innuendo that it "re-

presented that the pursuer was in a state of financial embarrassment."

Robertson v John M. Scott & Co., (O.H.)
1903, 10 S.L.T. 575.

(145)

The defender, the owner of a hotel, agreed to let it to the pursuer. The pursuer negotiated for a loan from a firm of wine merchants to enable him to buy the hotel business, but the wine merchants refused to make the loan on learning that a representation that he had made to them to the effect that he was not indebted to any other wine merchants from whom he was bound to take his supplies was untrue. The wine merchants communicated the fact to the defender, who then telegraphed to the pursuer—"We agreed verbally to accept you as tenant of the hotel on certain representations. These representations are not right. We withdraw our consent to a lease." **Held** that the telegram would not bear an innuendo that it represented the pursuer as being in a state of financial embarrassment.

Robertson v Taylor, (O.H.) 1903, 10
S.L.T. 575.

(146)

Black list—List of names of persons against whom decree in absence pronounced.

A private firm instituted an agency for "enabling the trading classes to communicate one to another their knowledge of doubtful and habit and repute bad payers." The firm issued to their subscribers a list headed "List of Names," Edinburgh, 1885, and containing simply names and addresses. The list contained the names (to a certain extent selected) of persons against whom decree in absence had been granted in the Small Debt Court of the county during several months previous to publication. Prefixed to the list was a leaflet headed "Caution," which stated, "It is possible that there are names contained in this list of people to whom credit under certain circumstances might be given, but it is recommended that use be made of the inquiry department of the agency before the entailing the risk." In an action of damages for slander, raised by a person whose name appeared in the list, against the firm, **held** that the defenders had slandered the pursuer.

Andrews v Drummond & Graham, 1887,
14 R. 568; 24 S.L.R. 415.

(147)

Representation that person is unworthy of commercial credit—List of names and addresses compiled from "black list."

A local association of traders issued to its members a list of the names and addresses of certain persons in the district. The list bore no title and contained no comment, but it was admittedly compiled from the "black lists." A person brought an action of damages for slander against the association, in which he averred that the list was known in the district as the "black list," and that the defenders by inserting

his name in it had represented that he was unworthy of business credit. **Held** that the publication of the pursuer's name was defamatory.

Barr v Musselburgh Merchants' Association, 1912 S.C. 174; 49 S.L.R. 102; 1911, 2 S.L.T. 402.

(148)

—List of decrees in absence—Insolvency—Erroneous entry.

In an action of damages by a firm of tradesmen against the publishers of a newspaper called "Stubbs' Weekly Gazette," the pursuers averred that the defenders carried on for profit a business which they described in their advertisements as a means of enabling traders to avoid making bad debts; that the publication had a special portion devoted to the publication of names of traders and others by and against whom decrees in absence had been taken; that the name of any trader appearing in that list was looked on with grave suspicion as to solvency; that the defenders, on 21st February, 1895, had published in a list of persons against whom decrees in absence had been taken the names of the pursuers, the decree having in fact been a decree in foro; and that by the statement thus made the defenders falsely represented that the pursuers were unable to pay their debts, and were in insolvent circumstances or pecuniary embarrassment. **Held** that taking the averments of fact with the innuendo, the pursuers had set forth a relevant case and were entitled to an issue.

Crabbe & Robertson v Stubbs, Limited, 1895, 22 R. 360; 32 S.L.R. 650; 3 S.L.T. 73.

(149)

—List of decrees in absence—Erroneous entry.

In an action of damages for slander, the pursuers obtained an issue whether the publication of their name as defenders in a list of decrees in absence in "Stubbs' Weekly Gazette" falsely represented that they were unable to pay their debts. It was proved that the "Gazette" was a publication for the purpose of giving traders information as to persons who were in financial difficulties, and that the list of decrees in absence was prefixed by a note which bore—"In no case does the publication of the decree imply inability to pay on the part of the persons named." The Sheriff Court books showed that the decree in question was not in absence, but of consent. **Held** that the jury were entitled to take the view that the publication was a representation that the person named was unable to pay his debts; and that the same inference would not have arisen if the defenders had stated, as was the fact, that the decree was of consent.

Hunter & Co. v Stubbs, Limited, 1903, 5 F. 920; 40 S.L.R. 681; 11 S.L.T. 142.

(150)

—List of decrees in absence—Erroneous entry.

An issue of a trade journal known as

"Stubbs' Weekly Gazette" contained a list headed "Extracts from the Court books of decrees in absence in the Small Debt Courts. Note.—It is probable that some of the decrees have been sisted, settled, or paid; and in no case does publication of the decree imply inability to pay on the part of any one named, or anything more than the fact that the entry published appeared in the Court books." In an action of damages for slander at the instance of a tradesman, whose name was erroneously included in the list in respect of a decree for £9 19s. 6d., the facts being that the debt had been paid and the action dismissed, the pursuer innuendoed the entry as falsely and calumniously representing that he was unable to pay his debts. **Held** that the entry, when read in conjunction with the explanatory note, would not bear the innuendo suggested.

Russell v Stubbs, Limited, 1913 S.C. (H.L.) 14; [1913] A.C. 386; 50 S.L.R. 676; 1913, 1 S.L.T. 428.

(151)

—List of decrees in absence—Erroneous entry—Imputation against credit.

An issue of a trade journal known as "Stubbs' Weekly Gazette" contained a list headed "Extracts from the Court Books of Decrees in Absence in the Small Debt Courts. Note.— . . . It is probable that some of the decrees have been sisted, settled, or paid; and in no case does publication of the decree imply inability to pay on the part of any one named, or anything more than the fact that the entry published appeared in the Court books." A tradesman, whose name was included in this list by error, as no decree had been pronounced against him, brought an action of damages for slander against the proprietors of the journal, in which the entry was innuendoed as falsely representing "that the pursuer was given to or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given." **Held** that the entry would bear the innuendo put upon it.

Mazure v Stubbs, Limited, 1919 S.C. (H.L.) 112; [1920] A.C. 66; 56 S.L.R. 535; 1919, 2 S.L.T. 160.

(152)

—List of decrees in absence.

In an action of damages by a commission agent against the publishers of "Stubbs' Weekly Gazette" for publishing, under the heading of "Extracts of decrees pronounced in absence of the defenders, although appearance may have been made by them or on their behalf at the original or adjourned diet," a notice of a decree against him for £2 0s. 10d. in the Small Debt Court, bearing to be in absence, the pursuer averred that the notice was not complete; that it omitted to set forth entries in the record of the decree in the Small Debt Court book which showed that the sum sued for was £2 5s., and that the decree for £2 0s. 10d. was pronounced, not at the first diet but at an

adjourned diet; that consequently it was not a fair and full report of the Small Debt Court proceedings, but conveyed, and was intended to convey, to the readers of this "Gazette" that the pursuer was unable to pay his debts. **Held** that the pursuer had failed to set forth a relevant case, in respect that the excerpt published in the "Gazette" was an accurate representation of those items of the record in the Small Debt Court book which it set forth, and that the omission of the items averred by the pursuer was not to his prejudice.

M'Lintock v Stubbs, Limited, 1902, 5 F. 1; 40 S.L.R. 10; 10 S.L.T. 267.

(153)

Insurance company—Statement that company to be taken over by rival.

Held that to say of an insurance company that it was about to be taken over with all its business by a rival company would not amount to a slander although it might be injurious to the company's business.

General Accident Assurance Corporation v Miller, (O.H.) 1902, 9 S.L.T. 510.

(b) Imputations of Unfitness for Duties.

(154)

Officer—False statement that a commanding officer gave an order to his men to surrender—Newspaper.

A newspaper published an article purporting to be based on the experiences of a corporal in a Highland regiment which surrendered in the retreat from Mons in 1914. The article stated that, during an engagement in the retreat, Colonel G, of that regiment, after saying that further fighting was only a useless sacrifice of life, ordered the men under his command to throw down their arms and surrender. In an action of damages for slander brought by Colonel G against the proprietors of the newspaper, the defenders accepted the pursuer's statement that no order to surrender had been given by him. **Averments** upon which **held** (1) that the pursuer was entitled to an issue, but (2) that an innuendo must be set forth in the issue; and an issue approved containing the innuendo that the statements falsely and calumniously represented that the pursuer was the officer responsible for the surrender, and that he had failed in his duty as a soldier.

Gordon v John Leng & Co., 1919 S.C. 415; 56 S.L.R. 310; 1919, 1 S.L.T. 242.

(155)

Assistant minister—Charge of being insubordinate, inefficient, and unfit for position.

Held that a statement contained in a letter written by a minister to his elders regarding his assistant to the effect that "he has done what I expressly forbade him to do; he has neglected to do what I specially desired him to do," was not defamatory and would not bear the innuendo that the assistant was "insubordinate, inefficient, careless, and neglectful of his duties, and

unfit for the position which he occupied as assistant minister."

Barclay v Manuel, (O.H.) 1902, 10 S.L.T. 450.

(156)

Schoolmaster—Charge of incompetence—Anonymous letter in newspaper.

Terms of an anonymous letter in a newspaper with reference to the state of a public school which were **held** to entitle the master of the school to an issue whether it represented that the pursuer was unfit for his post, and that it was the duty of the board to dismiss him.

M'Kerchar v Cameron, 1892, 19 R. 383; 29 S.L.R. 320.

(157)

Inspector of poor—Unfitness owing to drunken habits.

An inspector of poor and registrar for a parish brought an action for slander against a member of the parish council. A special meeting of the parish council had been called to consider a motion to rescind a resolution passed at a prior meeting to the effect that the pursuer should be asked to resign his position as clerk to the council, and before the vote was taken the defender stated that when out shooting on a certain date the pursuer was so drunk that he lost himself and the party he was with and joined another party. The Lord Ordinary approved an issue containing an innuendo to the effect that the pursuer was, owing to drunken habits, unfit to occupy a public position.

Tait v Morrison, (O.H.) 1913, 2 S.L.T. 325.

(158)

Accountant—Unfitness for office of trustee for creditors.

At a meeting of creditors an accountant was nominated trustee on the debtor's estate. **Held** that a statement that he was unfit for the post was *prima facie* defamatory.

Oliver v Barnet, (O.H.) 1895, 3 S.L.T. 163.

(159)

Shepherd—Charge of incompetence—Master and servant.

A farmer, charged in a sheriff court with failure to give notice of sheep scab among his sheep, pleaded guilty, and, before sentence, handed to the sheriff a written statement containing, *inter alia*, these words—"I left the management of my sheep stock entirely in the hands of my shepherd, who did not inform me that there were any signs of scab among them." In an action of damages the shepherd innuendoed the statement as branding him with neglect of his duties, and with unfitness and incompetence as a shepherd. **Held** that the words of the statement could not reasonably bear the innuendo.

M'Donald v M'Lachlan, 1907 S.C. 203; 44 S.L.R. 182; 14 S.L.T. 577.

(160)

Farmer—Charge of unskilful farming.

In an action of damages for slander the pursuer innuendoed the words complained of

as representing that he, in the "course of his tenancy, worked a farm carelessly and unskilfully, and that the farm was left in an exhausted condition." The Court allowed an issue.

M'Keand v Maxwell, 1896, 3 S.L.T. 321.

(161)

Superintendent of lunatic asylum—Allegation of professional incapacity—"Quack."

In an action of damages for slander at the instance of C, the superintendent of a district lunatic asylum (who was admittedly not a qualified medical practitioner), complaining that the defender had said of him—"What does that mannie C know about treating lunatics? He is just a quack. We will sack him yet," held that the pursuer was entitled to an issue with the innuendo that these words represented "that he was unfit for his duties as superintendent, that he did not know his work, was not properly qualified for the work in which he was engaged, and ought to be dismissed from his post."

Chisholm v Grant, 1914 S.C. 239; 51 S.L.R. 202; 1914, 1 S.L.T. 63.

(162)

Engineer—Incompetence.

An engineer in the employment of a firm of shipbuilders brought an action of damages for slander against the assistant manager of the firm. The statement complained of was made by the defender in the course of evidence before a court of arbitration under the Munitions of War Act, 1915, and was to the effect that the pursuer was dismissed because he did work which cost £180 to put right. The pursuer innuendoed the statement to mean that he had been grossly incompetent and lacking in skill as an engineer. Held that, as innuendoed, the statement complained of was defamatory.

Slack v Barr, (O.H.) 1918, 1 S.L.T. 133.

(163)

Criticism by customer of tradesman's employee—Skirt cutter—Unskilfulness.

The pursuer in a slander action (a skirt cutter) averred that the defender, while she was having a skirt fitted at a ladies' tailor's shop where the pursuer was employed, stated in the presence and hearing of the manager of the shop that the pursuer "was grossly unfit for her duties, and that her services should be dispensed with," and that "A B (another ladies' tailor) has got a splendid skirt fitter. Why don't you try and get her to come here?" On another occasion, while again having the skirt fitted, she stated to the manager in the presence and hearing of the pursuer—"She cannot cut a skirt. She does not even know how to begin to fit a skirt. She does not know her business at all." The pursuer sought to innuendo the words used by the lady as meaning that she was unfit to hold the post of a skirt cutter and fitter. The Lord Ordinary dismissed the action as irrelevant.

Wallace v Ford, (O.H.) 1903, 10 S.L.T. 555.

(164)

Master and servant—Criticism by master of servant's skill.

Observed (per Lord Stormonth-Darling, Ordinary)—"When a master confines himself to merely expressing an opinion about the incompetency or unskilfulness of a servant, it seems to me it would be dangerous to the proper carrying on of the work of society that he should be liable to an action of damages for slander."

Munro v Mudie, (O.H.) 1901, 9 S.L.T. 91.

(165)

Manager—Inattention and neglect—Issue—Malice.

The proprietor of several shops under different managers after dismissing B, one of his managers, sent a letter to his other managers (about fifty in number) stating with reference to B, whom he named—"I was greatly pained to find that a manager who had always been well treated was causing me loss by his inattention and lack of interest, and I was reluctantly compelled in the interests of my business to dismiss him." In an action of damages for slander raised by B against the proprietor the Court held that in the special circumstances B was entitled to an issue, but, as the letter was privileged, malice must be put in the issue. The issue allowed was in these terms—Whether the letter "falsely, calumniously, and maliciously represented that the pursuer had been guilty of such inattention and neglect of defender's interests, as manager of the defender's shop in Glasgow, that the defender had been compelled to dismiss him?"

Bryant v Edgar, 1909 S.C. 1080; 46 S.L.R. 802; 1909, 1 S.L.T. 527.

(166)

Imputation by master against character of servant—Factor—Unfaithful in discharge of duty—Unfit to be trusted with custody of employer's property.

In an action of damages for defamation the pursuer, formerly a factor on the defender's estate, averred that the defender, by his law agent, presented to him a letter desiring him to give the law agent possession of all books, &c., and all the contents of the office safe, and that the law agent, on being asked for an explanation, said that the defender wished "to hold an investigation"; that the law agent thereupon demanded the keys of the repositories, and (the key of the safe being in possession of the pursuer's cashier, who was absent) proceeded to seal up the safe; that two days later two clerks, bearing a letter of authority from the law agent, arrived at the estate office, broke the seals, removed books, &c., from the safe, searched the whole premises, and thereafter took away with them books, papers, &c., all in presence of certain persons named; that the law agent's statements and actings were made and done on the defender's instructions, and represented to the pursuer and to the persons named that the pursuer had been unfaithful in the discharge of his duty, and

was unfit to be trusted with the custody of the defender's books, papers, or money. **Held** that the actings set forth were in themselves legal, and would not bear the innuendo sought to be put upon them by the pursuer.

Drysdale v Earl of Rosebery, 1909 S.C. 1121; 46 S.L.R. 795; 1909, 2 S.L.T. 2.

(167)

Servant — "Unjust steward" — Lack of specification.

A master in the course of a conversation with his servant on a privileged occasion said to the servant that he had been an unjust steward and unfaithful. Averments **held** to be too vague to be admitted to probation.

Pybus v Mackinnon, 1908, 45 S.L.R. 598; 15 S.L.T. 1066.

(c) Imputations of Improper Conduct.

(168)

Minister—Charge of dishonourable conduct unbecoming a minister—Terrible revelations.

Held that a letter published in a church magazine by the minister to the effect that he had "terrible revelations" to make regarding his assistant was defamatory, and that the words would bear the innuendo that "the pursuer had been guilty of conduct of a dishonourable nature unbecoming the character and sacred profession of a minister of the gospel."

Barclay v Manuel, (O.H.) 1902, 10 S.L.T. 450.

(169)

Assistant minister—"Broken . . . solemn pledges"—Innuendo.

Held that a statement contained in a letter written by a minister to his elders concerning his assistant, to the effect that the assistant had "broken every one of the solemn pledges which he gave me," was not defamatory and would not bear the innuendo that the assistant was "persistently untruthful and unfaithful to his solemn promise."

Barclay v Manuel, (O.H.) 1902, 10 S.L.T. 450.

(170)

Doctor—Professional negligence.

Where a letter reflected on a doctor's treatment of a patient the Lord Ordinary allowed an issue containing an innuendo that the letter represented the pursuer as guilty of gross professional negligence or unskillfulness in his treatment of the patient.

Simmers v Morton, (O.H.) 1900, 8 S.L.T. 285.

(171)

Baker—Statement that his bread was unfit for human food.

The pursuer, a baker, averred that the defender, a doctor practising in the same town, had stated that the bread baked by the pursuer was injurious to the health of those who consumed it, and unfit for human food. **Held** that the statement was not slanderous.

Broomfield v Greig, 1868, 6 M. 563; 40 J. 299; 5 S.L.R. 367.

(172)

Hotel-keeper overcharging at hotel—Necessity for innuendo.

The following paragraph appeared in the "variety" column of a newspaper—"I shall not sup again in the Albany Hotel. The other evening I was charged there 4s. 6d. for supper, consisting of an omelette, with certainly not more than half-a-dozen eggs, and the quality was by no means consistent with the price." In an action of damages for slander by the proprietor of the hotel against the publisher of the newspaper, **held** that the pursuer was entitled to an issue, and that an innuendo was not necessary.

Macrae v Wicks, 1886, 13 R. 732; 23 S.L.R. 490.

(173)

Licence-holder—Charge of breach of certificate.

The chief constable of a burgh wrote to the manager of a hotel in the burgh in the following terms:—"It has come to my knowledge that on two occasions recently in connection with special licences in the Palace Hotel the neighbourhood was disturbed by the firing of shots or fireworks there, and I think it right to give notice that if there is any repetition of this or any other breach of the conditions of the licence, I will consider it my duty to strenuously oppose the granting of any special licences to the house in future." **Held** that the letter did not contain a charge of breach of the conditions of the licence and was not libellous.

Opinion (per Lord Trayner) that it is slanderous to charge an innkeeper with having committed a breach of his licence.

Menzies v Macdonald, 1899, 1 F. 977; 36 S.L.R. 769; 7 S.L.T. 66.

(174)

Charge of conducting business in a disorderly and illegal manner.

Terms of a newspaper article which were **held** to be incapable of bearing an innuendo that a publican had conducted his business in a disorderly and illegal manner.

Meikle v Wright, 1893, 20 R. 928; 30 S.L.R. 816; 1 S.L.T. 139.

(175)

Charge of shebeening.

A newspaper contained a letter to the editor in which the writer, after criticising the action of the licensing authorities of the district in taking away a licence in B, and referring to a conviction of another licence-holder in B of shebeening, continued—"I should like to ask if this was the first conviction against the same party." In an action of damages for slander, a publican in B averred that he had once been convicted of shebeening, and that the letter falsely represented that he had been more than once convicted of shebeening. **Held** that the pursuer was entitled to an issue whether the letter falsely represented that he had

been more than once convicted of shebeen-ing.

Lumsden v West Lothian Printing and Publishing Co., 1905, 7 F. 1006; 42 S.L.R. 804; 13 S.L.T. 266.

(176)

—Charge of conducting a "shebeen"

—Veritas.

Cook v Gray, 1891, 29 S.L.R. 247, No. 195, *infra*.

(177)

—Charge of conduct inferring hypocrisy, deceit, and treachery towards other licence-holders—Signing requisition form under Temperance (Scotland) Act, 1913.

Griffen v Divers, 1922 S.C. 605; 59 S.L.R. 453; 1922 S.L.T. 424, No. 114, *supra*.

(178)

Police officer—Slander by chief constable in dismissing police officer.

Words used by a chief constable in dismissing a police officer which were held in the circumstances not to be slanderous.

Brown v Magistrates of Edinburgh, 1907 S.C. 256; 44 S.L.R. 213; 14 S.L.T. 610.

(179)

Schoolmaster—Brutal treatment of pupil.

In an action of damages for slander by a schoolmaster against the parent of a pupil in respect of an alleged slander contained in a letter sent to two newspapers for publication, the Lord Ordinary allowed an issue as to whether the statement complained of falsely and calumniously represented that the pursuer thrashed a boy (giving his name) on a certain date in a brutal fashion.

Wright v Steel, (O.H.) 1909, 2 S.L.T. 265.

(180)

Publisher—Charge of deceiving the public as to authorship of atlas—Literary criticism.

Johnston v Dilke, 1875, 2 R. 836; 12 S.L.R. 486, No. 117, *supra*.

(181)

Newspaper proprietor—Writing offensive articles—Counter issue.

In an action of damages for slander the pursuer complained of a certain article in a newspaper owned and published by the defender, which stated, with regard to another newspaper—"It said some things in such offensive terms about so many people in the town that it is well to bear it in mind. We knew all the while the particular gentleman in whose interest the paper was run, and who wrote its most offensive articles, although that gentleman took every opportunity to deny all knowledge and connection with" it. "Little wonder that he did; the articles written by the editor and financier of the concern were such that any man holding a respectable, not to say responsible position, might well be ashamed of. We are in possession of the whole story from start to finish, and may publish it all some day, revealing the name of the gentleman who lay behind the hedge and shot his poisonous darts at well-known public men in

this town." The defender admitted that this article in part referred to the pursuer, and averred that the newspaper alluded to was under the pursuer's control, and was financed by him; that certain articles specified by date and title which appeared in it were of an offensive character and were written by the pursuer, and that on various specified occasions the pursuer had denied all connection with it. The Court (1) allowed an issue whether the article complained of represented that the pursuer was editor and financier of the newspaper in question; that he wrote for that paper offensive articles of such a disreputable character that any respectable man would be ashamed of having written them; that he used the said paper as a means of anonymously defaming public men, and that notwithstanding he took opportunity falsely to deny all knowledge of and connection on his part with the said paper; and (2) allowed a counter issue whether the pursuer wrote the articles specified by the defender, and specifically referred to (but not set forth ad longum) in the schedule to the counter issue; whether they or some of them were offensive to well-known men in the town where they were published, and of such a character that a man in the pursuer's position ought to have been ashamed of having written them; and whether on several occasions he nevertheless denied any connection with that newspaper.

A v B, 1899, 36 S.L.R. 533.

(182)

Signalman acting unfairly to fellow servants.

A paragraph in a railway magazine animadverted on the "fluffing" tactics of a signalman. The signalman brought an action of damages for slander, in which he sought to innuendo the paragraph as meaning that he was "guilty of practices which are unfair to his fellow servants, interfere with the efficient discharge of his duties as a signalman, and call for the animadversion and interference of his employers in the interests of his fellow servants of the railway company and of the safety of the public." Held that the proposed issue did not disclose a slander.

Dobson v The Amalgamated Society of Railway Servants, (O.H.) 1901, 8 S.L.T. 378.

(3) IMPUTATIONS AGAINST PUBLIC CHARACTER.

(183)

Candidate for Parliament—Charge of being a scoffer at religion—Newspaper article.

During a contest for a seat in Parliament a newspaper published an article concerning one of the candidates in which he was described as a "scoffer" who talked in a "morally offensive way" and spoke sarcastically about "God Almighty's earth." In an action of damages against the proprietor of the newspaper, held that the expression "scoffer" was *prima facie* defamatory, and that the candidate was entitled to an issue, whether the article represented him as a

"scoffer" at religion, as morally offensive in his public addresses, and as sneering at divine government and providence.

Macfarlane v Black & Co., 1887, 14 R. 870; 24 S.L.R. 623.

(184)

Candidate at municipal election—Slander of candidate by elector—Charge of dishonest and disreputable bankruptcy.

In an action of damages for slander the pursuer averred that in the course of a municipal election in which he had been a candidate, the defender, who was an elector, had falsely stated that the pursuer had been bankrupt, and that he had made a very bad failure, meaning thereby that it was a dishonest and disreputable failure, and that his creditors had received only 1s. 6d. per £, and that the pursuer was in consequence an unsuitable person to represent the electors. Held that the words alleged to have been used by the defender might reasonably bear the innuendo put upon them.

Bruce v Leisk, 1892, 19 R. 482; 29 S.L.R. 412.

(185)

Candidate for office—Criticism of qualifications of candidate.

Observations as to how far adverse criticisms on the qualifications of a candidate for a public office are actionable where no special privilege can be pleaded.

Auld v Shairp, 1875, 2 R. 940; 12 S.L.R. 611.

(186)

Candidate for office in Good Templar Lodge—Charge of "deceitful and dishonourable conduct"—"Sharp practice"—"Crooked ways."

A newspaper published a report of a meeting of a Good Templar Lodge, headed "Mr. A's Crooked Ways," and referring to certain conduct of his as "sharp practice." The news-bill of the day also contained the words—"Mr. A and his crooked ways." Terms of the article which were held to be incapable of bearing the innuendo that Mr. A had been guilty of deceitful and dishonourable conduct, and that he habitually indulged in conduct that was unfair, deceitful, and dishonourable.

Archer v Ritchie & Co., 1891, 18 R. 719; 28 S.L.R. 547.

(187)

Justice of the peace—Charge of unfaithfulness to public trust.

Observed (per Lord President Robertson) that a charge of infidelity on the part of a justice of the peace to the public trust is slanderous.

Mitchell v Grierson, 1894, 21 R. 367; 31 S.L.R. 301; 1 S.L.T. 448.

(188)

Magistrate—Newspaper criticism.

In an action of damages for slander against the publisher of a newspaper, on account of statements as to the manner in which the pursuer, who was a burgh magistrate, discharged the duties of that office,

held that the issue for trial of the case must contain an innuendo that he was by these statements represented "to be a person who had been guilty of wilful falsehood and of dishonesty, and as a magistrate who disgraced that office, and who used it for the purpose of gratifying his private spite." Form of issue adjusted.

Coghill v Docherty, (O.H.) 1881, 19 S.L.R. 96.

(189)

Town councillor—Corruption by town councillor—Newspaper.

Terms of a newspaper article which were held capable of bearing an innuendo that a town councillor took advantage of his position to throw the burden of repairing the footpaths of property belonging to himself upon the burgh, while he caused footpaths belonging to other proprietors to be reconstructed at their expense; that he was unfaithful to the public trust reposed in him; and that he acted corruptly for his own benefit. Observed that the question in such cases is not the meaning to be derived from a critical reading of the words in question, but the meaning which the words used would convey to an ordinary reader reading them as newspaper articles are usually read.

Hunter v Ferguson & Co., 1906, 8 F. 574; 43 S.L.R. 451; 13 S.L.T. 886.

(190)

"Bribe"—Offering a bribe for information—Words.

A town council, who owned a pier and who suspected leakage of pier dues collected by the pier master, adopted a resolution designed to prevent leakage, proposed by a councillor who was a member of the pier committee. Another councillor then stated that he had something to say regarding the proposer of the resolution, and he hoped the press would take a note of his statement; he had, he continued, been informed by two seamen that the proposer of the resolution had offered them a bribe to give him information about the pier master's absence from duty; and that their captain had told them that, if they carried any information to the proposer of the resolution, he would instantly dismiss them. In an action of damages for slander at the instance of the proposer of the resolution, the pursuer averred that the statement represented, and was intended to represent, that he committed the dishonourable action of endeavouring to bribe two seamen in order to induce them to make a statement to him by means of which he might charge the pier master with neglect of his duties. Held (1) that the statement complained of, taken in its context, was not in itself necessarily slanderous; and (2) that, as the innuendo suggested by the pursuer merely paraphrased and did not add anything to the statement, the action was irrelevant for want of any averment instructing the use of the word "bribe" in a slanderous sense. Import of the word "bribe" considered.

Gardner v Robertson, 1921 S.C. 132; 58 S.L.R. 124; 1921, 1 S.L.T. 71.

(191)

Member of school board—Imputation of dishonourable conduct—Prejudice.

Lyal v Henderson, 1916 S.C. (H.L.) 167; 53 S.L.R. 557; 1916, 2 S.L.T. 2, No. 261, *infra*.

(192)

Architect—Unfairness in quasi judicial position—Architect of building in course of erection—Acting from personal spite in condemning work.

The architect of a building in course of erection condemned some of the joiner work. The law agent of the joiner wrote a letter to the architect, in which he stated—"I understand that you are attempting to annoy" the joiner "for some old grudge you have against him." The agent also sent a copy of this letter to the employers and in the covering letter referred to the architect's "spleen" towards the joiner. The architect innuendoed the letters as meaning that he had condemned the joiner work not because he believed it to be dis-conform to contract but because of personal spite which he entertained towards the joiner. **Held** that the innuendo was ad-missible, and issue allowed.

Crawford v Adams; Crawford v Dunlop, 1900, 2 F. 987; 37 S.L.R. 767; 8 S.L.T. 62.

(193)

Acting corruptly in official capacity—Criticism of position of architect of school board—Criticism of system or of individual.

Langlands v John Leng & Co., 1916 S.C. (H.L.) 102; 53 S.L.R. 212; 1916, 1 S.L.T. 168, No. 207, *infra*.

(194)

Clergyman—Abuse of religious influence—Newspaper article.

A newspaper published an article on Ireland stating that in Queenstown instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants should be discharged, and that a shopkeeper who had refused so to act had had his shop proclaimed, and had been forced to close it. In an action of damages the article was innuendoed as charging the pursuers with abusing their religious influence to procure the indiscriminate dismissal of Protestant shop assistants, and with ruining a shopkeeper's business. **Held** that the article would bear the innuendo.

Browne v Thomson & Co., 1912 S.C. 359; 49 S.L.R. 285; 1912, 1 S.L.T. 123.

(195)

Trustee—Breach of trust—"Shebeen"—Veritas.

The proprietrix of a hotel obtained a certificate and excise licence therefor from Whitsunday, 1889, to Whitsunday, 1890. She died in October, 1889, and her trustees carried on the business without obtaining a transfer of the certificate until March, 1890. On 6th December, 1889, a letter appeared in a local newspaper which suggested that the police superintendent "might inquire into the truth or untruth of the report at pre-

sent current that an old public-house in the Guestrow is being personally conducted as a shebeen—in point of strict law—waiting the convenience of an ex-bailie and a town councillor who are both about to become joint proprietors of the place when a licence has been secured." The trustees in possession of the hotel, who were the parties referred to in the letter, sued the writer thereof for damages. **Held** that the letter was not libellous as (1) in strict law the public-house was a shebeen; and (2) the letter would not bear an innuendo of breach of trust.

Cook v Gray, 1891, 29 S.L.R. 247.

(196)

Trustee of charitable trust—"Not a trustworthy trustee"—"Capable of appropriating funds"—"Acting corruptly in administration of trust."

Terms of an anonymous letter published in a newspaper relating to the administration of a charitable bequest, of which the minister of the parish was sole trustee, which were **held** (1) to be capable of the innuendo that the pursuer was not "a trustworthy trustee and administrator" of the bequest, and was "a person capable of appropriating the funds" of the bequest "to his own uses"; but (2) not to be capable of the innuendo that he had "acted corruptly in the administration" of the bequest.

Falconer v Docherty, 1893, 20 R. 765; 30 S.L.R. 688; 1 S.L.T. 55.

(197)

Political lecturer—Charge of sacrificing political convictions in order to secure an audience.

Terms of a newspaper article—representing that a Conservative lecturer had arranged with a Socialist lecturer to hold a joint meeting, and to divide the proceeds—which were **held** not to entitle the former to an issue, whether the article represented that he from mercenary motives entered into a plot or dishonest arrangement with the Socialist speaker under which he was to sacrifice for the time being his political principles in order to secure a sufficient audience.

Godfrey v W. & D. C. Thomson, 1890, 17 R. 1108; 27 S.L.R. 865.

(198)

Sanitary inspector—Newspaper article.

Terms of a newspaper article with innuendo which the Court **held** to support the following issue in an action of damages against the newspaper proprietor—"Whether the defender published . . . the statements complained of, and whether the statements . . . falsely and calumniously represent that the pursuer in his capacity of sanitary inspector for the town of F had maliciously endeavoured to falsely discredit another official . . . appointed by the . . . town council . . . and in order to gratify his spite and malice against the said official had reck-

lessly spent the money of the community to their prejudice, to the loss, &c., of the pursuer?"

Neilson v Johnston, 1890, 17 R. 442; 27 S.L.R. 333.

(4) STATEMENTS BY POLICE IN COURSE OF THEIR DUTIES.

(199)

Police constable—Removal of persons of bad character from paddock at racecourse.

The pursuer, who had on 15th August, 1884, paid for admission to the paddock at Paisley races, was forcibly removed therefrom by the defender, who was the constable on duty there, and had instructions to remove bad characters from the enclosure. In doing so the defender stated to another police constable who came to his assistance, and in hearing of the public, that the pursuer was "a resetter from Glasgow." It was also proved that the pursuer had, in 1861 and 1876 been convicted of theft, and from 1877 to 1880 had undergone a period of police supervision; that he was reputed a resetter by the Glasgow police, but that they had never obtained evidence to warrant a prosecution. **Held** that the instructions given to the defender to remove persons of bad character from the enclosure were lawful, and that in the circumstances the defender did not slander the pursuer.

Wallace v Mooney, 1885, 12 R. 710; 22 S.L.R. 454.

(200)

Statement to another policeman while taking person to police office.

In an action of damages for alleged slander, brought by a woman against a detective officer, the pursuer averred that the defender came to her house and insisted on her accompanying him to the police office, and repeatedly, and in a loud voice, in the presence and hearing of another detective and of her two sons, called her a "resetter" of certain articles which one of her sons had found in the street. The Court dismissed the action as irrelevant.

Malcolm v Duncan, 1897, 24 R. 747; 34 S.L.R. 625; 4 S.L.T. 353.

4. COMMENT AS SLANDER.

(201)

Comment on facts truly stated.

Observed (per Lord M'Laren)—"The expression of an opinion as to a state of facts truly set forth is not actionable even when that opinion is couched in vituperative or contumelious language."

Archer v Ritchie & Co., 1891, 18 R. 719; 28 S.L.R. 547.

(202)

The medical superintendent of a hospital brought an action against the proprietors of a newspaper for damages on account of slander alleged to be contained in an article in the newspaper. The article set forth the facts regarding the treatment of a patient

with substantial accuracy, and described them as a "cruel proceeding" and "pure red tape." The Court dismissed the action as irrelevant, in respect that the article in so far as it set forth facts was not false, and in so far as it consisted of comment was not an actionable wrong.

Bruce v Ross & Co., 1901, 4 F. 171; 39 S.L.R. 130; 9 S.L.T. 270.

(203)

A newspaper published a letter to the editor, in which it was stated that, though the magistrates of the burgh where the newspaper was published had recommended the publicans there to close their premises on New Year's Day, A, a publican, had kept his shop open till 10 p.m., and a leading article stating that most of the publicans in the city closed early on that day, but "there were one or two black sheep, and a correspondent calls attention to the disgraceful scenes which occurred at" A's premises. "The magistrates, we hope, will deal with this gentleman." In an action against the publishers of the newspaper for slander, in respect of the statements in the leading article, A did not deny the facts stated in the letter. **Held** that the leading article was merely a comment upon the facts stated in the letter, and was not in itself slanderous.

Meikle v Wright, 1893, 20 R. 928; 30 S.L.R. 816; 1 S.L.T. 139.

(204)

A letter in a newspaper accused a parish minister of neglecting his duty by absenting himself from his charge for six of the busiest weeks of the year, during which the church was closed, and concluded by expressing a hope that the presbytery would do their duty and call him to account. In an action of damages for slander the minister did not allege that the statements of fact in the letter were false, but innuendoed the letter as representing that he had, in violation of his duty as a parish minister, neglected his parishioners and congregation, and had behaved in a manner unbecoming a minister of the gospel, and deserving of the admonition of the ecclesiastical courts. **Held** that, in the absence of any denial on record of the truth of the statements of fact in the letter, the pursuer's averments were not relevant, and action dismissed.

Campbell v Ferguson, 1882, 9 R. 467; 19 S.L.R. 404.

(205)

Fair comment — Newspaper — Anonymous letter—Diligence to recover letter.

Ogston & Tennant v "Daily Record," Glasgow, 1909 S.C. 1000; 46 S.L.R. 703; 1909, 1 S.L.T. 551, No. 43, supra.

(206)

Criticism of official by member of town council.

At a meeting of a town council a member made a speech, which the burgh sanitary inspector, who had been appointed to inspect carcases of animals killed in the burgh

slaughter-house, innuendoed as meaning that the inspector, with shameful indifference to the health of the community, had been guilty of a breach of duty in not calling in professional assistance, and in consequence had culpably passed as sound carcasses which were unfit for human food. The Court refused an issue, **holding** that the speech was merely a criticism upon the conduct of an official of the town council, which the member of the town council was quite entitled to make.

Neilson v Johnston, 1890, 17 R. 442; 27 S.L.R. 333.

(207)

Newspaper—Comments on matter of public interest—Criticism of position of architect to school board—Criticism of system or of individual.

An architect was employed by a school board under an agreement by which he acted as architect, and received the ordinary commission, in the case of alterations or enlargements of existing buildings, but where new buildings were erected the work was thrown open to public competition. An article in a newspaper, in commenting upon the proceedings at a meeting of the school board at which it appeared that the cost of certain proposed enlargements of an existing school according to the tenders received would be nearly double the estimate of cost prepared by the architect, referred to the large sums expended by the school board on enlargements, and added with reference to the terms of the architect's employment—"The rule as interpreted is an absurdity, and it puts a premium upon a certain kind of advice." In an action of damages for slander **held** that the statement was a fair criticism of the system and not a criticism of the pursuer as an individual, and that it would not bear an innuendo to the effect that the pursuer in his position of architect had acted corruptly for his personal benefit.

Langlands v John Leng & Co., 1916 S.C. (H.L.) 102; 53 S.L.R. 212; 1916, 1 S.L.T. 168.

(208)

Master and servant—Criticism by master of servant's skill.

Observed (per Lord Stormonth-Darling, Ordinary)—"When a master confines himself to merely expressing an opinion about the incompetency or unskilfulness of a servant, it seems to me it would be dangerous to the proper carrying on of the work of society that he should be liable to an action of damages for slander."

Munro v Mudie, (O.H.) 1901, 9 S.L.T. 91.

5. RIXA—VITUPERATIVE EPITHETS.

(209)

"Blackguard"—"Scoundrel."

In an action of damages for slander **held** that general opprobrious and contumelious epithets, such as "scoundrel" and "blackguard," which imputed no specific charge against character when uttered under provocation and in rixa, did not amount to slander.

Mackintosh v Squair, 1868, 40 J. 561; 5 S.L.R. 635.

(210)

"Damned puppy."

In an action of damages for slander **held** that the words "damned puppy" were not actionable.

Jameson v Bonthronne, 1873, 11 M. 703; 45 J. 437; 10 S.L.R. 474.

(211)

"Low, treacherous fellow."

Held that the statement that the pursuer was "a low, treacherous fellow, whose conduct was known throughout the length and breadth of the land," was actionable, and that it was not necessary to insert an innuendo in the issue.

Grierson v Harvey, 1871, 43 J. 190.

(212)

"Greatest liar and fraud."

In an action of damages for slander raised by a local agent of an insurance company against the company, the pursuer alleged that a superintendent of the company, who shortly before had by letter threatened to report the matter of the defender's collections to the authorities, called at his house, and stated that he was the greatest liar and fraud that ever came into the town. **Held** that to call a man a fraud did not in ordinary language mean that he had committed a fraud, and that the words "liar and fraud," verbally uttered, were not slanderous; and action dismissed as irrelevant.

Agnew v British Legal Life Assurance Co., 1906, 8 F. 422; 43 S.L.R. 284; 13 S.L.T. 742.

(213)

Threat to "put" subordinate "in prison" on account of neglect of duty.

In a quarrel which took place between a managing clerk and a subordinate, arising out of charges of neglect of duty made by the former against the latter, the managing clerk said, "I will put you in prison," or used words to the same effect. The other raised an action of damages against him for slander, and sought to attach to these words the innuendo that the defender thereby falsely and calumniously represented that the pursuer had been guilty of such criminal misconduct as would warrant his being apprehended on a criminal charge and thereafter imprisoned. **Held** that, in the circumstances of the case, the innuendo was forced and unreasonable, and that the pursuer had no ground of action.

Cockburn v Reekie, 1890, 17 R. 568; 27 S.L.R. 454.

(214)

"Drunk"—Statement by master that servant drunk.

The head cook in a hotel raised an action of damages against her master, alleging that, being in a violent temper with her for asking for additional assistants in the kitchen, he had called out to her in a loud voice several times in a public part of the hotel, and in presence of several of her fellow-servants, "You are drunk and must go at once"; and further averring that

these statements were made by the defender without taking the trouble to ascertain whether they were true or not, and "simply to browbeat" the pursuer. **Held** that the action was irrelevant.

Macdonald v Rupprecht, 1894, 21 R. 389; 31 S.L.R. 317; 1 S.L.T. 479.

(215)

"Liar"—"Damned liar."

The inspector of water meters in a burgh, in the mistaken belief that a certain millowner was improperly using the town water, charged the millowner at his premises with the abstraction of the water. The millowner thereupon called him a "liar," and a "damned liar." Subsequently, at a public meeting held for the purpose of nominating candidates for the police commission, the inspector stated that a stream of water which used to keep clean the public drain near his house had been let to the millowner the year before, and that the water having been diverted by the millowner for his own purposes, the drain had become so filthy that the inspector's family had been attacked with fever, and he asked the candidates whether they would restore the water to the drain again and thus place the health of the community before a question of money to a trader. The millowner then charged the inspector with telling a deliberate falsehood, and according to the account of some of those present called the inspector "a liar." In an action of damages for slander by the inspector against the millowner, the Court set aside a verdict for the pursuer on the ground that the evidence showed that the expressions were used in the heat of the moment, and were not intended to be defamatory.

Watson v Duncan, 1890, 17 R. 404; 27 S.L.R. 319.

(216)

"Liar"—"Swindler"—Bystanders asked to hear accusations as witnesses.

A, in denial of a statement by B that A was due an account to B, said that B was a liar. Ten months afterwards A again met B, and in the presence of two bystanders called him a liar and a swindler, and stated that hell was too good for him. He then added, "I repeat it before two respectable witnesses." B having raised an action for damages for slander against A, **held**, after a proof, that while A's statement on the first occasion was made in rixa, and not in a defamatory sense, the words used by A on the second occasion must be held to have been used in a defamatory sense, and not in rixa, and that B was entitled to damages.

Mackay v Grant, 1903, 41 S.L.R. 18; 11 S.L.T. 380.

(217)

"Should have been in hands of police twenty times during the past five years."

At a sale by auction two bidders, A and B, each thought that a particular horse had been knocked down to him. On A proceeding to lead away the horse, B charged him with attempting to steal it, whereupon

a quarrel ensued, in the course of which A said that B "should have been in the hands of the police twenty times during the past five years." B having raised an action of damages for slander against A, **held**, after a proof, that the words used by A were not used in a defamatory sense, and were not so understood by the persons in whose hearing they were uttered. The Court assailed the defender.

Christie v Robertson, 1899, 1 F. 1155; 36 S.L.R. 899; 7 S.L.T. 143.

6. SARCASM.

(218)

Terms of letters which were held to be only sarcastic and not defamatory, the recipient of the letters having replied in a similar strain.

Bell v Haldane, (O.H.) 1894, 2 S.L.T. 320.

7. SLANDER OF PROPERTY.

(219)

Statement that patent is invalid.

The publication of a circular that a patent is invalid is a good ground for an action of damages for slander of title.

Montgomerie v Paterson, 1894, 11 R.P.C. 635.

(220)

Special damage—Necessity for innuendo—Issue.

A newspaper published a paragraph disparaging a building. The owner raised an action of damages for slander in which he averred that the paragraph was false, and that the reputation of the building in question had suffered by reason of the publication of the paragraph, which had prevented the letting of the building, and greatly depreciated its selling value; but he made no specific averments of damage. **Held** that the action was relevant and that an innuendo was unnecessary. Form of issue approved.

Bruce v J. M. Smith, Limited, 1898, 1 F. 327; 36 S.L.R. 243; 6 S.L.T. 247.

(221)

—Necessity for averring special damage—Suspension and interdict against infringement of patent—Patent invalid.

A raised an action of damages against B for alleged damage caused by B having raised a suspension and interdict to have A interdicted from infringing certain letters patent for machinery for pressing oil out of seed. Issue disallowed on the ground that in so far as the damage claimed was damage for slander of title, the pursuer must aver special damage.

Harpers, Limited v Greenwood & Batley, (O.H.) 1896, 4 S.L.T. 116.

(222)

Onus of proving falsity of statements.

Opinion (per Lord Kincairney, Ordinary) that the pursuer must prove that the statements complained of are false, there being

no room for the presumption of falsity which is recognised in actions of slander of character.

Bruce v J. M. Smith, Limited, 1898, 1 F. 327; 36 S.L.R. 243; 6 S.L.T. 247.

(223)

Slander of title — Statement as to legal rights—No false statement as to fact.

The law agent of the proprietor of a house attended a sale of the tenant's furniture and stated to the auctioneer in the hearing of the persons present at the sale that he had come to stop the sale, that he was to apply for a sheriff's warrant to stop the sale, that purchasers would not be allowed to remove articles purchased, and that he desired payment of or security for the rent of the following year. The auctioneer stated that the current year's rent had been paid, and produced the receipt, and asked the law agent to exhibit his warrant for stopping the sale, which he failed to do. In consequence of the statement various persons were deterred from bidding, and the sale realised less money than it would otherwise have done. **Opinion** (per Lord Barcaple, Ordinary) that the statements were not actionable, being merely statements as to the legal rights of the landlord in the circumstances of the case.

Yeo v Wallace, (O.H.) 1868, 5 S.L.R. 253.

8. SLANDER BY ACTINGS.

(224)

Innuendo.

Opinions that there may be an actionable wrong of the nature of slander solely based upon actions, provided an innuendo can reasonably be drawn from them.

Drysdale v Earl of Rosebery, 1909 S.C. 1121; 46 S.L.R. 795; 1909, 2 S.L.T. 2.

(225)

Inserting photograph in criminal records.

Opinion that a detective officer who inserts in the criminal records a photograph and finger impressions of an accused person illegally obtained lays himself open to an action of damages on the ground of slander.

Adamson v Martin, 1916 S.C. 319; 53 S.L.R. 237; 1916, 1 S.L.T. 53.

V. VERBAL INJURY.

(226)

Holding up to public hatred — Issues — Counter issue—Veritas.

In an action of damages for verbal injury, on the ground that the defender had, with the design of exposing the pursuer to public hatred, falsely attributed to him certain statements, a counter issue whether the pursuer had in fact made these statements was allowed by the Lord Ordinary and acquiesced in. At the trial the jury affirmed the counter issue, and the judge directed that this was a verdict for the defender. **Held** that, in the circumstances, the judge was right in so directing. **Question**, whether a counter issue

should be allowed in an action for verbal injury.

Andrew v Macara, 1917 S.C. 247; 54 S.L.R. 200; 1917, 1 S.L.T. 83.

(227)

Holding up to public hatred and contempt.

In an action of damages, the pursuer averred that the defender had, at a meeting of a school board, and afterwards at a meeting for the nomination of candidates for municipal election, stated that the pursuer had at a meeting of the governors of a certain college, of whom he was one, expressed the opinion that the children of the board schools would, if admitted to the college, "contaminate the genteel children" attending it; that the pursuer had never expressed any such opinion; that the defender's statements were falsely made, with the design of injuring the pursuer in the opinion of the citizens of the town in which he lived, and of which he was the chief magistrate; and that they had in fact so injured him. **Held** that the statements alleged to have been made by the defender were not slanderous; but that the pursuer was entitled to an issue "whether the said statements are false, and were made with the design of exposing, and did expose, the pursuer to public hatred and contempt."

Paterson v Welch, 1893, 20 R. 744; 30 S.L.R. 668; 1 S.L.T. 55.

(228)

Charge of changing religion.

A newspaper article charged a man with changing his religion. In an action of damages for slander, issue disallowed on the ground that a charge of change of religion does not expose one to public hatred and contempt.

Burns v Diamond, (O.H.) 1896, 3 S.L.T. 256.

(229)

Letter inciting to violence.

Waugh v "Ayrshire Post," 1893, 21 R. 326; 31 S.L.R. 248; 1 S.L.T. 431, No. 106, *supra*.

(230)

Design of injuring the pursuer.

A newspaper, commenting on the manner in which a contract for printing a register of voters had been secured, said—"This contract was secured by the lowest offerer in a mean and contemptible manner. We attach no blame to any of the burgh officials, but to the unfair advantage taken by the successful offerer to secure the contract." The successful offerer brought an action against the printer and publisher of the newspaper, in which he innuendoed the statement to mean that he had obtained the contract by dishonest and improper means. He also averred that the statement had been made with the design and the result of injuring him. The Court **held** that the statement would bear the innuendo put upon it, and allowed the pursuer an issue of slander, but **held** that the pursuer was not entitled to an issue of verbal injury.

Waddell v Roxburgh, 1894, 21 R. 883; 31 S.L.R. 721; 2 S.L.T. 85.

(231)

Public ridicule and contempt.

In an action of damages by a burgh magistrate against the proprietors and publishers of a local newspaper, the pursuer averred that the defenders had published a series of articles (which he set forth) with the purpose and effect of exposing him to public ridicule and contempt. The Court, in respect that the articles referred to the public conduct of the pursuer, and did not impute anything that was dishonest or immoral in his character or actions, refused an issue, and assolizied the defenders.

M'Laughlan v Orr, Pollock & Co., 1894, 22 R. 38; 32 S.L.R. 36; 2 S.L.T. 275.

(232)

Exposing to public odium and contempt.

A commercial firm brought an action against the proprietors of a newspaper for reparation for injuries alleged to have been suffered in consequence of articles published in the newspaper reflecting on the business methods of the firm. The pursuers proposed two issues—(1) whether the articles falsely and calumniously represented that the pursuers had deceived the public “by dishonest methods and practices in business, to the loss, injury, and damage of the pursuers”; (2) whether the articles were published “with the design of exposing, and did expose the pursuers to public odium and contempt, to the loss, injury, and damage of the pursuers.” The Court granted the first issue, but disallowed the second.

Lever Brothers v The “Daily Record,” Glasgow, 1909 S.C. 1004; 46 S.L.R. 725; 1909, 1 S.L.T. 553.

VI. VERITAS.

(233)

Competency of plea—Falsity of slanderous statements admitted in letter of apology—Action of slander for subsequent repetition of same statements.

Held that the defender in an action of damages for slander was not barred from pleading veritas by having, on a former occasion, written a letter of apology, admitting that similar statements then made by her were false, and undertaking not to repeat them.

R v S, 1914 S.C. 193; 51 S.L.R. 161; 1914, 1 S.L.T. 3.

(234)

Necessity of counter issue—Form of issue.

The defender in an action of damages for slander cannot prove veritas either by the evidence of the pursuer or otherwise without a counter issue.

Observations on the form of counter issue of justification, and as to the cases in which it is necessary to express the innuendo in the counter issue.

Torrance v Weddel, 1868, 7 M. 243; 41 J. 149; 6 S.L.R. 180.

(235)

Mitigation of damages.

In an action of damages for slander, where no counter issue of veritas is taken, it is incompetent to lead evidence for the purpose of showing the truth of the alleged slander, even for the purpose of mitigation of damages.

Craig v Jex-Blake, 1871, 9 M. 973; 43 J. 524; 8 S.L.R. 616.

(236)

Mitigation of damages—Circumstances in which slander uttered.

Where an action of damages is directed against the publisher of a slander, who is not the writer, he will not be allowed to prove in mitigation of damages circumstances which might have affected the writer, but of which the defender was ignorant, and this rule applies to the publisher of a newspaper who publishes a slander and refuses to disclose the name of the writer. In an action of damages against the publisher of a Scottish newspaper for slander contained in a paragraph published in it, the defender stated in evidence that he received the paragraph from his regular correspondent in Ireland, whose name he refused to disclose. There was no counter issue of veritas. Evidence as to the circumstances in which the paragraph was written, of which the defender admittedly knew nothing, held not admissible.

Browne v M'Farlane, 1889, 16 R. 368; 26 S.L.R. 289.

(237)

Mitigation of damages—Provocation.

In an action of damages for slander the writings complained of were letters accusing the pursuer of having used murderous threats against the defender. The letters were admitted, and it was stated in defence that the pursuer had, on various specified occasions, used violent and abusive language concerning the defender, threatening him with bodily harm, which induced him to write the letters complained of. No counter issue of veritas was taken. Held that the defender was not entitled to lead evidence in proof of his statements in order to show provocation or in mitigation of damages, as such evidence could not, in the circumstances, be distinguished from evidence of veritas.

Paul v Jackson, 1884, 11 R. 460; 21 S.L.R. 304.

(238)

Statement admitted but innuendo denied—Evidence as to statement without counter issue.

In an action of damages for slander the pursuer obtained an issue whether the defender falsely and calumniously stated that a clause in an agreement between a client of the pursuer and the police commissioners of a burgh had been added by the pursuer to the agreement after its execution by the commissioners, meaning thereby that the clause had been fraudulently interpolated in the agreement by the pursuer after exe-

cution. The defender admitted that he had made the statement, and stated that it was true, but denied the innuendo. **Held** that the defender was entitled to adduce evidence at the trial to show that the clause was added after execution by the commissioners.

Henderson v Russell, 1895, 23 R. 25; 33 S.L.R. 14; 3 S.L.T. 118.

(239)

Whether counter issue meets issue—Issue as innuendoed.

When, in an action of damages for slander, the principal issue contains an innuendo, it is sufficient for a defender pleading veritas to put in a counter issue facts which would justify the language complained of as explained in the innuendo, although they might not justify the language complained of apart from the innuendo.

Christie v Craik, 1900, 2 F. 380; 37 S.L.R. 285; 7 S.L.T. 321.

(240)

In an action by an insurance company for damages for slander, the pursuers obtained an issue "whether the said statements falsely and calumniously represent that the accounts issued by the pursuers had been falsified, and that their financial position was at the date" when the statements were made "unsound." The defender pleaded veritas, and proposed as counter issues—(1) whether the pursuers knowingly deposited with the Board of Trade accounts and valuations which were calculated and intended to mislead the public; (2) whether the pursuers' financial position is unsound? The Court disallowed the counter issues as not meeting the pursuers' issues.

British Workman's and General Assurance Co. v Stewart, 1897, 24 R. 624; 34 S.L.R. 476; 4 S.L.T. 302.

(241)

In an action of damages for slander at the instance of a gamekeeper, the pursuer obtained an issue, "whether the defender did falsely and calumniously say of and concerning the pursuer that he, the defender, had repeatedly sold and disposed of game for and on behalf of the pursuer and paid him the proceeds thereof, meaning thereby that the pursuer had taken game off the estate of F, belonging to his employer, and had sold the same and appropriated the proceeds thereof to his own uses and purposes, and had thus been guilty of dishonesty and a breach of the trust reposed in him by his employer." The defender pleaded veritas, and proposed as a counter issue, "whether on various occasions the pursuer . . . left at the defender's house for the purpose of being sold, or otherwise disposed of, hares, &c., and whether the defender handed or transmitted to the pursuer . . . the money received by defender for the said hares," &c. The counter issue was disallowed on the ground that

it did not impute dishonesty to the pursuer, and therefore did not meet the issue.

Bertram v Pace, 1885, 12 R. 798; 22 S.L.R. 525.

(242)

M wrote a letter to a newspaper, in which he stated that he had detected W, who had contracted to supply groceries to a school of which M was superintendent, in trying to send a different, and, he believed, a cheaper brand of coffee than that contracted for. W replied by a letter to a newspaper. M raised an action of damages for slander against W, and obtained an issue whether the defender's letter represented that the pursuer "had no regard for truth and was a liar." **Held** that the defender was not entitled to a counter issue whether the pursuer's statement as to the coffee contract was a lie, as not fully meeting the issue.

Milne v Walker, 1893, 21 R. 155; 31 S.L.R. 149; 1 S.L.T. 323.

(243)

In an action of damages for slander, the pursuer obtained the following issue:—Whether, within the ring or paddock of a race meeting the defender "falsely and calumniously said of and concerning the pursuer, 'this is the man who owes me money,' or used words of similar import, meaning that the pursuer was owing him money on betting transactions which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock, to the loss, injury, and damage of the pursuer?" The defender proposed the following counter issue:—"whether the pursuer was owing the defender money on betting transactions which he dishonourably refused to pay?" The pursuer contended that the words "and was a person who ought not to be allowed to remain in the said ring or paddock" should be added to the counter issue. The Court **held** that those words should be added to the counter issue.

Blasquez v Lothians Racing Club, 1889, 16 R. 893; 26 S.L.R. 633.

(244)

—A visitor to a hotel wrote in the visitor's book that he had visited most of the hotels in Scotland, but had nowhere "encountered so much drinking or so much squalid untidiness or dirt." In an action of damages for slander by the innkeeper, the visitor pleaded veritas. The pursuer obtained an issue whether the entry represented that he kept his hotel in a state of squalid untidiness and dirt and permitted persons to drink therein to excess all to such a degree as to distinguish it in these respects from most hotels in Scotland, and to cause discomfort and annoyance to visitors to and residents in the hotel. **Held** that the defender only required to put into his counter issue whether about the date of the entry there was an excessive amount of drinking in the hotel, and whether at that

time the hotel was in a state of much squalid untidiness and dirt.

M'Iver v M'Neill, 1873, 11 M. 777; 45 J. 510.

(245)

General accusation averred — Issues limited to specific charges.

In an action of damages for alleged slander, the pursuer averred that two leaflets, issued by the defender, represented him to be a dishonest and disreputable person, but only proposed to put in issue certain specific charges of dishonesty out of various charges which the leaflets contained. The defender pleaded veritas, averred a number of instances in which he alleged the pursuer to have acted dishonestly, and proposed issues in justification. **Held** that the pursuer was entitled to limit his issues to certain of the specific charges of dishonesty contained in the leaflets, although these were only given in illustration of the general attack on his character, and that the counter issues must be limited to these specific charges.

Powell v Long, 1896, 23 R. 534; 33 S.L.R. 380; 3 S.L.T. 290.

(246)

Whole terms of issue not represented.

The defender in an action of damages for slander had referred to the pursuer, a justice of the peace, as having made a dastardly and cowardly attack upon A. The pursuer obtained an issue whether the letter falsely and calumniously represented that he had been guilty of the crime of assaulting A in a dastardly and cowardly manner, and was unfit to hold the office of justice of the peace. The defender pleaded veritas, and the counter issue allowed by the Court was whether the pursuer, being a justice of the peace, assaulted A in a dastardly and cowardly manner.

Ogilvy v Paul, 1873, 11 M. 776; 45 J. 511.

(247)

Averment to support counter issue.

In an action of damages for slander in respect that the defender had called the pursuer "a swindler and a thief," and "a questionable character," the defender admitted having said that the pursuer's conduct "was little removed from thieving," but stated that the pursuer had made fraudulent representations to the defender regarding a proposed mining company, and thus induced the defender to contribute to the capital of the company, in the promotion of which the pursuer was pecuniarily interested as vendor; that the pursuer further falsely represented to the defender that the run upon the shares had been so great that it would be necessary for the defender to take more shares in order to make sure of an allotment, and the defender was thus induced to take additional shares; and that the pursuer as vendor was dependent for the carrying out of the sale on a suffi-

cient number of shares being applied for. The Court allowed counter issues.

MacLeod v Marshall, 1891, 18 R. 811; 28 S.L.R. 626.

(248)

Statement that pursuer seven times convicted of theft—Averment of two convictions for petty theft in boyhood to support counter issue.

In a newspaper notice of a conviction for assault it was stated that the panel "had been seven times previously convicted of theft," the word "theft" having been inserted by a clerical error instead of "assault." In an action of damages at the instance of the panel against the proprietors of the newspaper, a jury awarded damages. The defenders moved for a new trial on the ground that they had discovered that twenty-three years before, the pursuer, when a boy of fourteen, had been twice convicted of petty theft. **Held** that the new facts would not be sufficient to justify a counter issue of veritas, and motion for a new trial refused.

Fletcher v Wilson, 1885, 12 R. 683; 22 S.L.R. 433.

(249)

Charge of untruthfulness—No averments of specific acts of untruthfulness.

In an action of damages for slander in respect of an alleged charge of untruthfulness, the pursuer asked for a counter issue of veritas, without, however, specifying on record any detailed acts of untruthfulness on the part of the pursuer. The counter issue refused.

Hamilton v Wright, (O.H.) 1895, 3 S.L.T. 10.

(250)

Charge of drunkenness—Averment of particular occasions.

In an action of damages for slander brought by an elder against a parish minister, the pursuer obtained an issue whether certain statements made by the defender on 16th July, 1893, falsely and calumniously represented that the pursuer was addicted to taking strong drink to excess, and that this was notorious to the parishioners. The defender, who pleaded veritas, and set forth on record a number of occasions, giving dates and places from 1887 onwards, on which he alleged that the pursuer had been intoxicated, proposed a counter issue in general terms. The Court, having regard to the specific averments on record to which the proof would be limited, allowed the counter issue.

Hunter v MacNanghton, 1894, 21 R. 850; 31 S.L.R. 713; 2 S.L.T. 53.

(251)

Charge of keeping mistress—Averment of two occasions on which adultery committed with her.

The pursuer in an action of damages for slander obtained an issue whether at a certain time and place "the defender falsely and calumniously said to . . . that the

pursuer was a man of immoral character, and kept a mistress. . . .” The defender on record pleaded veritas, and averred that “the pursuer is a man of immoral character, and during the last two years has associated and has committed adultery with” A, but he only averred two occasions prior to the date of the alleged slander on which adultery had been committed. **Held** that the defender’s averments did not entitle him to the counter issue “whether, during the period of two years prior to the raising of the action, the pursuer has repeatedly committed adultery with” A.

Burnet v Gow, 1886, 24 R. 156; 34 S.L.R. 125; 4 S.L.T. 169.

(252)

Charge that pursuer, a married woman, had committed adultery with defender—Averments by defender of pursuer’s misconduct with third parties—Relevancy.

In an action of damages for slander brought by a married woman against a man who had in a letter to her stated that she had committed adultery with him, the defender pleaded veritas. The defender stated that the pursuer had also committed adultery with “A,” and had allowed “B” and “C” to take indecent familiarities with her. He did not mention on record the names of A, B, and C, but sent the names and addresses to the pursuer’s agents. **Held** that the defender’s statements in regard to third parties were irrelevant, and fell to be deleted.

H v P, 1905, 8 F. 232; 43 S.L.R. 258; 13 S.L.T. 615.

(253)

Charge of misconducting public-house.

A publican brought an action of damages for slander alleged to have been uttered at a Licensing Court, to the effect that he was not conducting his public-house in a satisfactory manner, “in respect that dissolute men and women of loose habits and easy virtue are allowed to frequent the premises.” Averments as to the pursuer’s method of conducting his public-house which were held sufficient to entitle the defender to a counter issue of veritas.

Goodall v Forbes, 1909 S.C. 1300; 46 S.L.R. 934; 1909, 2 S.L.T. 177.

(254)

Veritas established from pursuer’s pleadings.

Held that the pursuer’s pleadings contained sufficient admissions to establish, in conjunction with the documents produced, the plea of veritas, and action dismissed as irrelevant.

Carson v White, (O.H.) 1919, 2 S.L.T. 215.

(255)

Action for verbal injury.

Question, whether a counter issue should be allowed in an action for verbal injury.

Andrew v Macara, 1917 S.C. 247; 54 S.L.R. 200; 1917, 1 S.L.T. 83.

VII. PRIVILEGE.

1. GENERALLY.

(256)

Duty giving rise to privilege.

Per Lord Macnaghten—“To protect those who are unable to protect themselves is a duty which every one owes to society.”

James v Baird, 1916 S.C. (H.L.) 158; 53 S.L.R. 392; 1916, 1 S.L.T. 331.

(257)

Statement made in bona fide but erroneous belief that occasion privileged.

An occasion, which in point of fact is not privileged, does not become so because the person making the slanderous statement bona fide believes that the occasion is privileged.

Observed (per Lord Buckmaster, Lord Chancellor)—“It is quite true that no protection can be afforded to a person who wrongly assumes the facts which constitute a privileged occasion. No person can, even with the best of good faith, assume relationships which do not in fact exist, or think that they possess duties which the real facts of the case show were no duties at all.”

James v Baird, 1916 S.C. (H.L.) 158; 53 S.L.R. 392; 1916, 1 S.L.T. 331.

(258)

No averment of malice—Ruling at trial that slander privileged—No motion to withdraw case from jury—Proof of malice led—Motion for new trial.

Where in an action of damages for written slander malice is not averred, and the judge at the trial rules that the writings are privileged, the defender ought then to ask the judge to direct the jury to return a verdict in his favour, in respect that malice has not been averred; and in the event of the defender failing to do so, and allowing proof of malice to proceed, he will be barred from raising the question on a motion for a new trial.

Ritchie & Son v Barton, 1883, 10 R. 813; 20 S.L.R. 530.

(259)

Privilege disclosed at trial—Malice averred on record but not inserted in issue—Competency of proving malice.

Held that when the pursuer in an action of damages for slander has averred malice on record, it is competent for him to meet the defence of privilege by proof of malice at the trial, though malice is not in the issue.

M’Bride v Williams, 1869, 7 M. 427; 41 J. 241; 6 S.L.R. 273.

(260)

Privilege not disclosed on record—Admission by counsel at bar.

An auctioneer brought an action of damages for slander against a law agent, in respect of a slanderous statement alleged to

have been made by the defender to a bank agent. The defender averred that the bank agent was his father and partner in business, and at the hearing in the Inner House the pursuer's counsel stated in answer to a question from the bench that he understood the averment was accurate. **Held** that as the pursuer's record did not disclose a case of privilege, malice ought not to go into the issue, but that the question of privilege must be left to be dealt with by the presiding judge at the trial.

Smyth v Mackinnon, 1897, 24 R. 1086; 34 S.L.R. 762; 5 S.L.T. 97.

2. MALICE.

(1) WHAT AMOUNTS TO MALICE.

(261)

Evidence of malice—Intrinsic evidence of malice—Undue violence of statement.

Observed (per Lord Buckmaster, L.C.)—"To submit the language used on privileged occasions to a strict scrutiny, and to hold all excess beyond the actual exigencies of the occasion to be evidence of express malice, would greatly limit, if not altogether defeat, the protection which the law gives to statements so made. . . . The real question is whether, having regard to the circumstances, the statement is so violent as to afford evidence that it could not have been fairly and honestly made; for the very essence of a privileged occasion is that it protects statements that are defamatory and false, when, apart from the protection, the very character of the statement itself carries with it the implication of malice. If once the privilege be established, unless there be extrinsic evidence of malice, there must be something so extreme in the words used as to rebut the presumption of innocence and to afford evidence that there was a wrong and an indirect motive prompting the publication." At a meeting of a school board the chairman drew the attention of the meeting to the fact that a member moving a certain amendment adverse to the headmaster had, as defender in an action of damages for slander at the instance of the headmaster, been found liable in the sum of £400, and moved that this fact should be recorded in the minutes as showing that the member, in moving the amendment, was a prejudiced party. In an action of damages for slander against the chairman at the instance of the member, the pursuer innuendoed the statement and motion of the defender as representing that the pursuer was actuated, not by a sense of public duty, but by private animosity, and was thereby guilty of dishonourable conduct. **Held** that there was no evidence in the statement itself or in the circumstances in which it was made, to infer malice. **Question**, whether the statement was capable of bearing the innuendo placed upon it.

Lyal v Henderson, 1916 S.C. (H.L.) 167; 53 S.L.R. 557; 1916, 2 S.L.T. 2.

(262)

Violence of language—Refusal to hear explanations—Accusation of immorality made by master against servant.

The manager of an engineering firm, having observed that two clerks in the drawing office had spent about ten minutes together in a water-closet in the works with the door closed, summarily dismissed them, refusing to hear explanations and using the words—"When two men are discovered under those circumstances, there is only one inference to be made from their conduct." On the following day the manager addressed the drawing office staff and told them: "Two of your number were dismissed yesterday at a moment's notice; they left without a shred of character; they are not men, they are beasts." In actions of damages for slander by both men against the manager, in which it was admitted that both occasions were privileged, **held** that malice could not be inferred either from the language used by the defender or from the fact that he held no inquiry and refused to hear any explanation; and actions dismissed.

A B v X Y, 1917 S.C. 15; 54 S.L.R. 37; 1916, 2 S.L.T. 210.

(263)

Failure to make inquiry—Violent terms of statements—Refusal to withdraw.

The matron of a hospital belonging to certain local authorities brought an action of damages against a ratepayer within the hospital district for defamatory statements contained in two letters. The first of these letters was sent by him to the clerk of one of the local authorities, reporting certain information received by him as to the pursuer's conduct as a matron (which he stated, if true, pointed, in his opinion, to criminal conduct), and demanding an inquiry. The second letter was sent by him to the Local Government Board, and expressed dissatisfaction with the result of two inquiries in which the pursuer had been absolved of blame, and made another charge, based on fresh information, against the pursuer, and craved a further inquiry. A third inquiry was held in which the pursuer was again absolved. The defender, however, refused to apologise or withdraw the charges. The pursuer maintained that malice sufficiently appeared from (1) the violent terms in which the statements in the letters were couched; (2) the fact that they were made without prior inquiry; (3) the reiteration of them; and (4) the defender's adherence to them and refusal to apologise. **Held** that these facts and circumstances were not sufficient to infer malice; and action dismissed as irrelevant.

Couper v Lord Balfour of Burleigh, 1913 S.C. 492; 50 S.L.R. 320; 1913, 1 S.L.T. 122.

(264)

In an action of damages for slander the pursuer, an office cleaner, averred that she had been dismissed by the defender, her employers' manager, and that upon her ask-

ing for an explanation he accused her of theft in an intemperate manner; that he had made no inquiries to ascertain whether these statements were well or ill-founded; and that they were false, and were uttered maliciously and without probable cause. **Held** that there was a relevant averment of facts inferring malice.

Lee v Ritchie, 1904, 6 F. 642; 41 S.L.R. 509; 12 S.L.T. 35.

(265)

Knowledge that statement false.

The matron of a hospital belonging to certain local authorities brought an action of damages against a ratepayer for defamatory statements regarding her conduct, contained in letters addressed by him to the county council and to the Local Government Board, reporting information which he alleged he had received with regard to the management of the hospital, and demanding an inquiry. The pursuer averred that the defamatory statements were deliberately invented by the defender, although he had information in his possession which disproved them; that they were made maliciously and with the intention of injuring her; that the defender had never received the alleged information; and that the letter to the Local Government Board was accompanied by a private letter from the defender to a member of the Board, designed to influence him against the pursuer, and that the defender declined to produce this letter. **Held** that, while the defender's letters were privileged, facts and circumstances sufficient to infer malice were averred; and issues allowed.

Couper v Lord Balfour of Burleigh, 1914 S.C. 139; 51 S.L.R. 126; 1913, 2 S.L.T. 417.

[See also Griffen v Divers, 1922 S.C. 605; 59 S.L.R. 453; 1922 S.L.T. 424, No. 114, supra.]

(266)

Judicial slander—Defamatory statements on record—Sufficiency of averments of malice.

In an action of damages for breach of a contract for the purchase by the defender of shares in a company, the defender, who averred and eventually succeeded in establishing that there was no concluded agreement, also averred upon record that the alleged agreement was induced by gross fraud and misrepresentation on the part of the pursuer. The pursuer brought an action of damages for slander against the defender, in which he averred that the defender made the statements as to fraud and misrepresentation, well knowing them to be false; that he made no inquiry regarding their truth; that he had no precognition on which to base them; that he led no evidence in support of them; that he never intended to establish any of them; and that they were put on record, not with the view of maintaining his defence, but for the oblique purpose of intimidating the pursuer, and compelling him to abandon his action rather

than allow the statements to become widely circulated and be made the subject of public comment. **Held** that the pursuer had averred facts and circumstances from which malice could be inferred; and an issue allowed. **Observed** that, where malice must be averred, it is necessary to examine the whole averments in the case before estimating the weight to be attached to a statement by the pursuer that the defender knew the words complained of to be false when he uttered them.

Mitchell v Smith, 1919 S.C. 664; 56 S.L.R. 578; 1919, 2 S.L.T. 115.

(267)

Averments inferring malice.

A brought an action of damages for defamation against B, in respect of a certain statement alleged to have been made by B on two different occasions. In regard to the first occasion, it was averred that the statement was made "in the knowledge that it was wholly unfounded," but this averment was not repeated with regard to the second occasion. B pleaded that his statement on the second occasion alleged, if made, was privileged. **Held** that the averment in question might be read as applying to the second occasion as well as the first, and was a sufficient averment of particular circumstances inferring malice. **Observations** (per Lord Kincairney) on the necessity of averring facts and circumstances from which malice may be inferred in an action on a defamatory statement when a plea of privilege is taken.

Tweedie v Forrest, (O.H.) 1898, 36 S.L.R. 628; 6 S.L.T. 185.

(268)

In an action against two police constables, the pursuer averred that he had been charged by the defenders with assaulting them, convicted on their evidence, and sentenced to imprisonment; that on the day of the alleged assault he was in another town; that after his conviction he was liberated on that ground, and the conviction subsequently quashed by the High Court of Justiciary; and that he was well known to the defenders before and at the date of the alleged assault, and that their charges and evidence against him were false to their knowledge, and were malicious and without just or probable cause. **Held** that malice was relevantly averred.

M'Ternan v Bennett, 1898, 1 F. 333; 36 S.L.R. 239.

(269)

Recklessness amounting in law to malice.

A tenant while removing some flooring from his house was stopped by his landlord on the street, and, having refused to return with the flooring, which he claimed as his own, was given into custody by the landlord, but on being taken to the police office was at once liberated. **Held** that the landlord had been guilty of such recklessness in

giving the tenant into custody as to amount in law to malice.

Denholm v Thomson, 1880, 8 R. 31; 18 S.L.R. 11.

(270)

Evidence of malice—Conduct of trial by counsel.

Observed (per Lord Johnston and Lord Anderson) that the fact that counsel for the defence in an action of damages for slander leads evidence attacking the pursuer's conduct on occasions other than that put in issue cannot be taken into consideration by a jury as an element either in proving malice, unless it be established that counsel is acting on the express instructions, or with the privity of his client.

James v Baird, 1916 S.C. 510; 53 S.L.R. 324; 1916, 1 S.L.T. 138; judgment reversed on the merits, 1916 S.C. (H.L.) 158; 53 S.L.R. 392; 1916, 1 S.L.T. 331.

(2) AVERMENT OF MALICE—FACTS AND CIRCUMSTANCES.

(271)

Observations (per Lord President Inglis) on the distinction between the class of cases in which a general averment of malice is sufficient and the class of cases in which particular averments of malice are required.

Innes v Adamson, 1889, 17 R. 11; 27 S.L.R. 26.

(272)

Observations (per Lord Young) on the circumstances in which a pursuer requires to make specific averments of facts and circumstances from which malice is to be inferred.

M'Ternan v Bennett, 1898, 1 F. 333; 36 S.L.R. 239.

(273)

Observations (per Lord Dunedin) on the class of cases in which averments of facts and circumstances inferring malice are necessary.

Shields v Shearer, 1914 S.C. (H.L.) 33; [1914] A.C. 808; 51 S.L.R. 403; 1914, 1 S.L.T. 360.

(274)

Definite and special duty or right.

Observed (per Lord Kyllachy, Ordinary)—The rule which requires an averment of facts and circumstances inferring malice in certain cases of privilege must be taken to apply "to all cases where a defamatory statement is made in pursuance of any definite and special duty, whether to the public or to an individual, including any duty owed to the aggrieved person himself."

Sheriff v Denholm, 1897, 5 S.L.T. 234, 346.

(275)

Observed (per Lord President Kinross and concurred in by Lord Kinnear)—"It might be proper to add to this statement of the

rule the words 'or in the exercise of any right.'"

Macdonald v M'Coll, 1901, 3 F. 1082; 38 S.L.R. 781; 9 S.L.T. 146.

(276)

Sufficiency of averments of malice—Necessity for averring facts and circumstances inferring malice.

The general rule laid down by Lord President Kinross in Macdonald v M'Coll, No. 275, supra, and followed in subsequent decisions, as to the necessity in cases of privilege of averring facts and circumstances from which malice can be inferred, doubted (per Lord Skerrington).

Suzor v M'Lachlan, 1914 S.C. 306; 51 S.L.R. 313; 1914, 1 S.L.T. 149.

(277)

Exclusion of possibility of good faith.

A wrote a letter to B containing statements inferring dishonesty on the part of C. The occasion of writing the letter was privileged. **Held** that to make an averment of malice relevant it must be such as to exclude the possibility of the statements having been made in good faith.

Graeme-Hunter v The Glasgow Iron and Steel Co., (O.H.) 1908, 16 S.L.T. 72.

(278)

Creditor and trustee on debtor's estate.

An accountant was nominated trustee on a debtor's estate at a meeting of the creditors. One of the creditors made statements to the effect that the accountant was unfit for the post. In an action of damages by the accountant against the creditor, **held** that the defender was privileged, but that a general averment of malice was sufficient.

Oliver v Barnet, (O.H.) 1895, 3 S.L.T. 163.

(279)

Averments irrelevant.

A B brought an action against C D for slander, consisting of a statement alleged to have been uttered at an interview between the pursuer and defender that A B had had immoral relations with a woman named on record. The defender pleaded that the occasion was privileged. At adjustment the pursuer added an averment that defender had used indecent liberties or attempted to use indecent liberties with other women named who were in the defender's employment. **Held** that the pursuer's averments were irrelevant to displace privilege or to infer malice, and should be struck out of the record.

A B v C D, (O.H.) 1919, 2 S.L.T. 46.

(280)

Evidence of malice—Sufficiency of evidence.

In an action by a midwife against a medical practitioner the jury returned a verdict for the pursuer on the first and fourth issues, which were in these terms—(1) Whether on 15th October, 1891, the defender falsely and calumniously stated to

Stephen Moore that the pursuer had poisoned his wife, Mrs. Agnes Moore." . . . (4) Whether on 20th October, 1891, . . . the defender falsely, calumniously, and maliciously, and without probable cause, stated to Archibald Mackenzie, detective officer, that Mrs. Moore, wife of Stephen Moore, had been poisoned by a drug given to her by the pursuer, which had caused her death. . . . The judge directed the jury that the statements contained in the first issue were privileged, and that malice must be proved, and no objection was made by the pursuer. The only evidence of malice adduced by the pursuer as affecting either the first or the fourth issue was the evidence of Mackenzie, who proved that the statements made to him were not volunteered by the defender, but were used in the course of the defender's replies to Mackenzie's inquiries made officially by him. **Held** that the verdict was unsupported by evidence, and a new trial granted.

Observations (by Lord Trayner) as to the limits within which the existence of malice at an earlier date may be inferred from proof of malice at a later date.

Reid v Coyle, 1892, 30 S.L.R. 335.

3. WANT OF PROBABLE CAUSE.

(281)

Inappropriate to actions of slander.

Observed (per Lord President Dunedin) that the words "without probable cause" have no relation to actions of damages for slander, but were meant to deal with a different class of circumstances where a person has done something, as, for instance, executing a diligence or denouncing a person to the police authorities.

Webster v Paterson & Sons, 1910 S.C. 459; 47 S.L.R. 307; 1910, 1 S.L.T. 173.

(282)

Observations (by Lord M'Laren) on the cases in which the defence of "probable cause" was appropriate.

Milne v Smith, 1892, 20 R. 95; 30 S.L.R. 105.

(283)

Judicial slander—Statement in defences to action.

In an action of damages for slander in respect of a statement made in the defences to an action, **held** that the issue must contain that the statement was inserted in the defences "maliciously and without probable cause."

Douglas v Ferguson, (O.H.) 1896, 4 S.L.T. 200.

(284)

Arbitration proceedings—Statements by litigant in pleadings.

A firm went into liquidation, and it was agreed that disputes arising out of the liquidation should be referred to the sheriff-substitute. A dispute as to the liquidator's remuneration having been referred to the sheriff-substitute, one of the partners of the

firm lodged a note in the reference in which he stated (1) that the liquidator "dishonourably made use of his position of liquidator to endeavour to obtain for himself business which had previously belonged to the firm"; and (2) that the liquidator "grossly neglected his work and apparently temporised, whether instigated to do so or with the idea of drawing larger remuneration is best known to himself." In an action of damages by the liquidator, **held** that want of probable cause must go into the issue. **Held**, further, that the pursuer's averments showed that the defender had probable cause for making the statements complained of, and action dismissed as irrelevant.

Hay v Cameron, (O.H.) 1898, 6 S.L.T. 48.

(285)

Private prosecutor — Game prosecution—Charge of poaching.

A shooting tenant caused a complaint at his own instance to be served on a land steward charging him with having committed a trespass within the meaning of the Day Trespass Act, 1832. After trial, the land steward was acquitted. The land steward then brought an action of damages for slander against the shooting tenant, in which it was **held** that malice and want of probable cause must go into the issue, the fact that the prosecution was by a private prosecutor for his private interest not taking the case out of the general rule.

Cook v Spence, (O.H.) 1897, 4 S.L.T. 295.

(286)

Relevancy — Probable cause disclosed in pursuer's pleading.

A pursuer will not be allowed an issue of malice and want of probable cause when the Court are satisfied from the pursuer's own statements that the defender had probable cause.

Craig v Peebles, 1876, 3 R. 441; 13 S.L.R. 287.

(287)

Slander of municipal candidate at election meeting.

Held that, in an action of damages for slander in respect of defamatory language used about a town councillor who was seeking re-election at a meeting held in reference to the election of town councillors, an averment of want of probable cause was not necessary.

Christie v Craik, (O.H.) 1899, 7 S.L.T. 67; affirmed on other points, 1900, 2 F. 380; 37 S.L.R. 285; 7 S.L.T. 321.

(288)

Master and servant—Dismissal of servant—Charge of indecency.

Newall v Bennett, (O.H.) 1896, 3 S.L.T. 268, No. 395, *infra*.

(289)

Law agent inquiring into A's financial position on behalf of clients—Statements by law agent reflecting on A's financial position.

Watson v Ross, (O.H.) 1897, 5 S.L.T. 182, No. 415, *infra*.

4. ABSOLUTE PRIVILEGE.

(290)

Judge.

A judge—whether of the Supreme Courts or of an inferior Court—has with respect to words uttered by him, in the course of judicial proceedings, with reference to the case before him, an absolute privilege.

Primrose v Waterston, 1902, 4 F. 783; 39 S.L.R. 475; 10 S.L.T. 37.

(291)

Sheriff-substitute.

An action of damages against a sheriff-substitute for slander alleged to have been uttered by him while sitting in judgment is incompetent.

Harvey v Dyce, 1876, 4 R. 265; 14 S.L.R. 178.

(292)

Advocate.

The privilege of a person exercising the function of an advocate is absolute, whether the pleading containing the alleged defamatory statement is oral or in writing.

Rome v Watson, 1898, 25 R. 733; 35 S.L.R. 561; 5 S.L.T. 377.

(293)

Law agent as procurator.

At a meeting of justices of the peace for the granting of licences, a letter containing matter defamatory of one of the applicants was read by A, a law agent, who had been employed to oppose the application. The letter had been written to A by B, one of the clients who so employed him. Held (1) that as A had read the letter in Court as agent for B, and upon his instructions, A had an absolute privilege, and no action lay against him.

Williamson v Umphray, 1890, 17 R. 905; 27 S.L.R. 742.

(294)

Law agent—Statement made outwith presence of judge and Court officials—Counter issue.

In an action of damages for slander by a person against whom a petition for cessio had been presented, against the agent of the petitioner, the pursuer alleged that the defender had, in the Sheriff Court buildings, Edinburgh, used words to and of the pursuer, which represented that the pursuer had been guilty of a crime and offence under the Debtors Act, 1880; and that the words (which were in the form of a question) were used by the defender in the absence of the sheriff or of any official of Court of any kind. The defender denied these averments, and stated that he had asked no questions, except such as were pertinent to the cause and in the line of his duty. The Court allowed the pursuer an issue, but refused the defender a counter issue of privilege, on the ground that he had not set forth on record that the words were used in circumstances raising a case of privilege, but observed that if such circumstances were

disclosed at the trial it would be the duty of the presiding judge to direct the jury accordingly.

Scott v Johnston, 1885, 12 R. 1022; 22 S.L.R. 546.

(295)

Statement by agent while conducting case.

An agent objected to another agent appearing for a party in the Sheriff Court, giving as the ground of his objection that the other agent's name did not appear on the law agents' roll. Held that the occasion was privileged.

Clark v Haddon, (O.H.) 1895, 3 S.L.T. 85.

(296)

Irregularity in proceedings—Absence of judge—Statutory examination of bankrupt—Statement by trustee in bankruptcy.

Thomson v Munro & Jamieson, (O.H.) 1900, 8 S.L.T. 327, No. 302, *infra*.

(297)

Witness—Party as witness.

In an action against a medical man for alleged wrongful granting of a certificate that the pursuer was insane, the defender was examined as a witness for the pursuer. Held that the privilege of the witness was absolute, and that an action of damages for slander founded on what the defender stated in evidence could not be made relevant by any allegation of malice.

Mackintosh v Weir, 1875, 2 R. 877.

(298)

Voluntary appearance before Arbitration Court.

Held that a statement, made by a voluntary witness before a Court of Arbitration under the Munitions of War Act, 1915, which had reference to the questions under consideration by the Court, to the effect that it cost £180 to put right work which a workman had done, was absolutely privileged.

Slack v Barr, (O.H.) 1918, 1 S.L.T. 133.

(299)

Privilege in precognition.

Held that the privilege of a witness in giving evidence extends to statements made by a person on precognition with a view to his giving evidence.

Watson v M'Ewan, 1905, 7 F. (H.L.) 109; [1905] A.C. 480; 42 S.L.R. 837; 13 S.L.T. 340.

5. QUALIFIED PRIVILEGE.

(1) JUDICIAL SLANDER—PRIVILEGE OF LITIGANT.

(300)

General rule.

A litigant is entitled to a certain freedom of speech, and may with impunity say many things which may be painful and injurious to his opponent or to third parties. But if he descends to false statements known to

himself to be false, and makes these not for the legitimate purpose of maintaining his suit, but for the gratification of his own spite and malice, he is liable to an action of damages.

Williamson v Umphray, 1890, 17 R. 905; 27 S.L.R. 742.

(301)

Privileged occasion—Whole subject-matter of cause.

Held that an action of damages for judicial slander is relevant although the matter alleged to be libellous formed the whole subject-matter of the original action.

Gordon v British and Foreign Metaline Co., 1886, 14 R. 75; 24 S.L.R. 60.

(302)

Irregularity in proceedings—Absence of judge—Statutory examination of bankrupt—Statement by trustee in bankruptcy—Newspaper report.

The statutory examination of a bankrupt was taken in the sheriff-clerk's room and in part outwith the presence of the sheriff. The trustee used slanderous words with reference to the law agent of the bankrupt. Held that the statements made, though made in the course of judicial proceedings, had no relation to the proceedings, and that a newspaper report of the incident was not privileged.

Thomson v Munro & Jamieson, (O.H.) 1900, 8 S.L.T. 327.

(303)

Statement in note of objections to election of trustee in sequestration.

A was elected trustee on a sequestrated estate at a meeting of creditors. B, a defeated rival, lodged a note of objections with the sheriff-clerk which contained a statement that A had promised to give C a consideration in money in respect of a vote in favour of A's election as trustee. Held that the statement, being made in a judicial process and being pertinent to the issue, was privileged, and that, there being no proof of malice, the defender was entitled to absolvitor.

McCaig v Moscrip, 1872, 10 S.L.R. 140.

(304)

Arbitration proceedings—Malice—Necessity for averments of facts inferring malice—Want of probable cause.

A firm was in liquidation and it was agreed that disputes arising out of the liquidation should be referred to the sheriff-substitute. A dispute having arisen with regard to the amount of the liquidator's remuneration, a submission was made to the sheriff-substitute, in the course of which one of the partners lodged a note of objections in which he stated—" (1) A B (the liquidator) dishonourably made use of his position of liquidator to endeavour to obtain for himself business which had previously belonged to the firm"; (2) "A B grossly neglected his work and apparently temporised, whether instigated to do so, or with

the idea of drawing larger remuneration, is best known to himself." The liquidator brought an action of damages for slander. The action was dismissed as irrelevant on the grounds that (1) the case fell within the rules of judicial slander; (2) the pursuer must aver malice and facts and circumstances from which it might be inferred; (3) the pursuer must aver and put in issue want of probable cause; but (4) the admissions on record and documents showed that the defender had probable cause for making the statements complained of.

Hay v Cameron, (O.H.) 1898, 6 S.L.T. 48.

(305)

Arbitration proceedings—Malice—Issue.

In an action of damages for slander the pursuer averred that during the course of arbitration proceedings to which the defender was a party and in which the pursuer was called by the arbiter to give information, after a statement by the pursuer to the arbiter, the defender stated to the arbiter "that man cannot speak one word of truth, and all that he has stated just now is lies from beginning to end." Held that the occasion was privileged, and that malice must be put in issue.

Neill v Henderson, 1901, 3 F. 387; 38 S.L.R. 286; 8 S.L.T. 377.

(306)

Private prosecutor—Game prosecution—Want of probable cause.

Cook v Spence, (O.H.) 1897, 4 S.L.T. 295, No. 83, supra.

(307)

Pertinent though irrelevant statement—Malice—Sufficiency of averments—Facts and circumstances.

In an action of damages for judicial slander, where the statement complained of is relevant to the action in which it is made, the pursuer must aver facts and circumstances from which malice can be inferred. So held in an action of damages for slander founded on statements made on record in a previous action.

Observed (per Lord President Inglis) that the pursuer must aver such facts and circumstances, even if the statement complained of is irrelevant, unless it is also not pertinent to the action in which it is made.

Scott v Turnbull, 1884, 11 R. 1131; 21 S.L.R. 749.

(308)

Malice—Sufficiency of averments—Slander of person not a party to the litigation—Statement pertinent to litigation.

In an action by a tenant against his landlord for damages for breach of contract in taking possession before the expiration of the lease of the shop let to the pursuer, the defender, inter alia, averred that the tenant had gone to England, and had left the shop in charge of J S, that J S "was seldom sober" during the time he was on the premises. In an action of damages for

slander raised by J S against the landlord, held that the defamatory statement made by the landlord in the other action, being pertinent to the cause, was privileged, and that as the pursuer had failed to set forth facts from which malice could be inferred, the action fell to be dismissed.

Selbie v Saint, 1890, 18 R. 88; 28 S.L.R. 84.

(309)

Malice—Sufficiency of averments—Statements made by defender to pursuer's agent in reply to a threat of legal proceedings.

In reply to a letter from the pursuer's law agent threatening legal proceedings against the defender to recover damages for wrongous dismissal, the defender stated that his reason for dismissing the pursuer was that he had dishonestly appropriated to his own use butter belonging to the defender. Held that the statements, being made in reply to a threat of legal proceedings, and being a relevant defence to such proceedings, fell within the degree of protection accorded to judicial slanders made upon record, and were only actionable on an averment of facts and circumstances sufficient to infer malice. Averments which were held not to be relevant averments of malice.

Campbell v Cochrane, 1905, 8 F. 205; 43 S.L.R. 221; 13 S.L.T. 691.

(310)

Letter written by client to law agent—Law agent reading letter in Court on instructions of client.

At a meeting of justices of the peace for the granting of licences a letter containing matter defamatory of one of the applicants was read by A, a law agent, who had been employed to oppose the application. The letter had been written to A by B, one of the clients who so employed him. In an action of damages for slander by the applicant against A and B the pursuer averred that the defenders knew that the statements in the letter were untrue, that they had made them maliciously for the purpose of defaming the pursuer, and that B had maliciously instructed A to read them in open Court for the purpose of defaming the pursuer's character. Held that the pursuer was entitled to an issue against B, putting, *inter alia*, the questions whether he wrote the letter and maliciously instructed A to read it in Court, and whether it was read by A acting on the instructions so maliciously given.

Williamson v Umphray, 1890, 17 R. 905; 27 S.L.R. 742.

(311)

Malice—Sufficiency of averments—Facts and circumstances.

In an action of damages for judicial slander the pursuer must aver facts and circumstances from which the jury may reasonably infer malice.

Averments of facts and circumstances

which were held relevant to support an issue for judicial slander.

Gordon v British and Foreign Metaline Co., 1886, 14 R. 75; 24 S.L.R. 60.

(312)

Sufficiency of averments—Facts and circumstances.

In an action of damages for judicial slander the statements complained of were admittedly pertinent to the questions raised in the proceedings in which they were made, and were therefore privileged. The pursuer averred that the defender knew that the statements in question were untrue. Held that in the circumstances there were no relevant averments of malice on the part of the defender.

Stevenson v Wilson, 1903, 5 F. 309; 40 S.L.R. 286; 10 S.L.T. 546.

(313)

Sufficiency of averments—Knowledge that statements are untrue.

Mitchell v Smith, 1919 S.C. 664; 56 S.L.R. 578; 1919, 2 S.L.T. 115, No. 266, *supra*.

(314)

Sufficiency of averments of malice.

P & Sons, a firm which manufactured a coffee essence called "Camp" coffee, raised an action of interdict and damages against W, a grocer, craving to have him interdicted from making statements that "Kit" coffee was the same as "Camp," and from selling "Kit" coffee for "Camp." In that action P & Sons averred that by making such statements W was inducing his customers to purchase "Kit" coffee instead of "Camp"; that the said statements were made fraudulently and maliciously with the intent of damaging the reputation of P & Sons' coffee, and encouraging the sale of "Kit" coffee, because the manufacturers of the latter offered better terms to the grocer than did P & Sons; and that W was acting in collusion with a quondam partner of P & Sons. The action, which was eventually abandoned, was one of thirty-five actions of interdict and damages raised by P & Sons against grocers. Thereafter W brought an action against P & Sons for damages for slander contained in their averments in the action of interdict, in which he set forth that the action of interdict was raised for the purpose of advertising "Camp" coffee, and of intimidating him from buying or selling "Kit" coffee; that the averments therein were (as P & Sons knew) false, and were made falsely, maliciously, and calumniously; and that the action of interdict was raised in pursuance of a fraudulent and malicious scheme conceived by P & Sons of using legal process for the purpose of advertising their "Camp" coffee, and of intimidating grocers from dealing in "Kit" coffee. Held that W had set forth sufficient facts and circumstances from which a jury might infer malice; and that an issue must be allowed. Observed (per Lord President

Dunedin) that the words "without probable cause" are not appropriate to the issue in an action on slander.

Webster v Paterson & Sons, 1910 S.C. 459; 47 S.L.R. 307; 1910, 1 S.L.T. 173.

(315)

Sufficiency of averments of malice—Averments regarding co-defender in divorce action.

In an action of divorce for adultery brought by a husband against his wife, the wife's alleged paramour was called as co-defender. The Lord Ordinary granted decree of divorce against the wife, on the ground of her adultery with the co-defender, but assoltized the co-defender, with expenses. Thereafter the co-defender brought an action against the husband for damages for the slander contained in statements made in the record in the divorce action. **Held** that this being a case of judicial slander, it was necessary for the pursuer to set forth facts and circumstances from which malice could be inferred, and that, as he had failed to do so, the action was irrelevant.

M v H, 1908 S.C. 1130; 45 S.L.R. 874; 16 S.L.T. 307.

(316)

Sufficiency of averments of malice—Want of probable cause.

In an action of damages for slander contained in the defences to an action in the Sheriff Court, **held** that the issue must include the words "maliciously and without probable cause," and that certain averments of malice were sufficiently specific.

Douglas v Ferguson, (O.H.) 1896, 4 S.L.T. 200.

(317)

Proof of malice.

The defender in an action of removing produced a missive of lease which, he stated, was written and signed by the pursuer when sober, and in the presence of the defender and three witnesses. The pursuer denied that the missive was in his writing, after being warned that the denial imported a charge of forgery. The pursuer repeated the denial in a subsequent Court of Session process between the same parties, and persisted in the denial even after warning in Court. **Held**, in an action of damages for slander, that the jury were entitled to infer that the charge of forgery was made maliciously.

Logan v Weir, 1872, 10 S.L.R. 22.

(2) PRIVILEGE OF PUBLIC OFFICIALS.

(318)

Privileged occasion—Chairman of public health committee.

The chairman of the public health committee of a local authority stated, at a meeting of the committee, that a case of typhoid fever had been reported to him by a medical man, "who said that it was probably to be traced to the milk supplied" by a certain dairyman. In an action of damages against

him by the dairyman, it was proved that the medical man had not been of that opinion, and had not said so; but that the defender, had misunderstood a conversation which he had held with him, and had made the statement in the belief of its truth and in the discharge of his public duty. **Held** that, in these circumstances, the defender was entitled to be assoltized. **Observations** (per Lord Justice-Clerk Macdonald) on the circumstances in which the groundless character of an allegation against another may infer malice.

M'Lean v Adam, 1888, 16 R. 175; 26 S.L.R. 118.

(319)

Chairman of war pensions committee—Duty to communicate—Interest to receive communication—Letter of complaint by servants of public authority against fellow-employee—Letter read by chairman to sub-committee appointed to deal with different matter—Presence of representatives of head office not members of sub-committee—Malice.

In an action of damages for slander, brought by the secretary of a war pensions committee against the vice-chairman, the pursuer averred that the defender, while presiding at a meeting of a sub-committee, read a letter, addressed to the chairman of the war pensions committee by certain employees, which contained defamatory statements regarding the pursuer's conduct as an official. As showing that the occasion was not privileged, the pursuer founded on averments that the sub-committee was appointed only to consider questions as to a reduction of the staff; that the defender was not in fact a member of the sub-committee, and had no authority to attend the meeting or to act as chairman; and that, in addition to the members of the sub-committee, there were present at the meeting the regional director and two members of the region office of the Ministry of Pensions. **Held** that the averments disclosed a case of privilege, and that, as the pursuer had failed to make relevant averments of malice, the action fell to be dismissed.

Cochrane v Young, 1922 S.C. 696; 59 S.L.R. 487; 1922 S.L.T. 551.

(320)

Member of burgh police commission.

At a meeting of police commissioners of a burgh, a member, who had heard complaints regarding the conduct of a sheriff officer who had charge of collecting arrears of water rates, made a motion as to employing a different system for the collection of police rates, and, in the course of a speech supporting the motion, made statements imputing drunkenness to the sheriff officer. In an action of damages against him by the sheriff officer for slander, **held** that the defender was privileged in expressing himself as he did, in respect that he was versans in officio, and that, as it was not proved that he was actuated by malice, he was entitled to absolvitor.

Shaw v Morgan, 1888, 15 R. 865; 25 S.L.R. 620.

(321)

Town councillor—Criticism of burgh official.

Neilson v Johnston, 1890, 17 R. 442; 27 S.L.R. 333, No. 206, supra.

(322)

Charge of corruption against burgh official.

At a meeting of the electric lighting committee of a town council, a town councillor charged the burgh electrical engineer with corruption. In an action of damages for slander by the burgh engineer against the town councillor, **held** that the defender's privilege was not absolute, but was qualified, and an issue containing "maliciously" allowed.

Teague v Russell, (O.H.) 1900, 8 S.L.T. 253.

(323)

Convener of town council committee—Reflection on contractor in conversation about another contract.

In an action of damages for slander by a contractor against the convener of a town council committee, the pursuer averred that the pursuer had said that the defender had robbed the town over a certain contract. The slander was uttered at a street corner in the presence of a town chamberlain and a partner of the firm of engineers for the contract in the course of a conversation relative to another contract. **Held** that prima facie the defender was not privileged, as in cases of this description it was necessary, in order to determine whether or not a statement was privileged, to keep in view not only the relationship of the parties, but the occasion on which the slander was uttered.

Reid v Little, (O.H.) 1894, 2 S.L.T. 244.

(324)

Distress committee—Report to committee by man of skill.

The distress committee of the city of Edinburgh owned a number of small holdings, which they leased to tenants. The committee instructed a man of skill to make a report upon the condition of the holdings, and the report was printed for circulation among the members of the committee. A tenant brought an action for slander against the distress committee and their reporter, in respect of certain statements in the report, which he sought to innuendo as meaning that he was an unskilful and negligent market gardener. **Held** that the reporter in returning the report, and the committee in dealing with it, were privileged, and that malice was not relevantly averred.

Cadzow v Distress Committee of City of Edinburgh, (O.H.) 1914, 1 S.L.T. 493.

(325)

Member of school board—Attack on schoolmaster at public meeting.

A schoolmaster brought an action of damages for slander against a former member of

the school board. The pursuer averred that the defender, while still a member of the school board, called and addressed a public meeting, at which he announced his intention to retire and charged the pursuer with unfitness to perform the duties of his office. **Held** that the occasion was not privileged.

Leitch v Lyal, (O.H.) 1903, 11 S.L.T. 394.

(326)

Principal of college—Malice.

The patron of a college chair of humanity having announced his intention to appoint A to the chair on the occurrence of a vacancy, the principal of the college wrote to the patron stating, in strong terms, that A was unfit for the post. *Inter alia*, he stated that A had notoriously failed as a classical teacher in a school. Some years previously the principal had given A a testimonial, in which he had spoken favourably of him as a teacher. **Held** that the principal was privileged in writing the letter. **Held**, also, that malice was not proved.

Auld v Shairp, 1875, 2 R. 940; 12 S.L.R. 611.

(327)

Parish minister—Minister alleging misconduct by co-presbyter—Malice—Want of probable cause.

Held (by Lord Wellwood, Ordinary) (1) that a parish minister is privileged in bringing before his presbytery a charge of misconduct against another minister in the presbytery; (2) that he does not forfeit his privilege by failure to comply with the recommendation given by the forms of process of 1707 to communicate first with the accused minister and with some of the "most prudent" of his co-presbyters, though such failure may aid in a proof of malice; and (3) that accordingly malice and want of probable cause must be put in issue in an action of damages based on statements alleged to have been made by a minister at a meeting of the presbytery to which he belonged regarding the conduct of another minister in the same presbytery.

A v B, (O.H.) 1895, 22 R. 984; 32 S.L.R. 514; 2 S.L.T. 500.

(328)

Minister communicating to candidate for eldership report as to candidate's character—Malice—Sufficiency of averments of malice—Want of probable cause.

In an action of damages for slander the pursuer, a candidate for eldership, averred that the defender, the parish minister, had written a letter to him in which he informed him that a third party had made a serious charge against him, and that the defender could not ordain the pursuer as elder with such a charge against his character. Circumstances in which **held** that the occasion was privileged, and that the pursuer had failed to aver facts and circumstances from which malice could be inferred. **Opinion** (per Lord President Strathclyde and Lord Skerrington) that the pursuer was bound to

put in issue want of probable cause as well as malice.

Murray v Wyllie, 1916 S.C. 356; 53 S.L.R. 263; 1916, 1 S.L.T. 87.

(329)

—Parish minister—Malice—Want of probable cause.

In an action of damages for slander, the pursuer alleged that the defender, the minister of the parish in which the pursuer resided, had, by letters written by him to the inspector of poor of another parish and to the Board of Supervision, represented the pursuer as grossly unfit to have the charge of pauper children boarded with him by the parochial board of that other parish. **Held** that the pursuer was bound to put in issue want of probable cause as well as malice.

Croucher v Inglis, 1889, 16 R. 774; 26 S.L.R. 587.

(330)

—Chief constable—Duty to admonish subordinate — Malice — Sufficiency of averments.

A police constable brought an action of damages for slander against a chief constable, his superior officer, stating that the defender had, in the presence of two police officers, maliciously and without probable cause, slandered him by saying that he had given in a false report, that that report was a lie, and that instead of attending to his duties he had merely been putting off his time. The Court dismissed the action as irrelevant, **holding** (1) that it appeared from the pursuer's statement that the defender was acting within his duty in admonishing his inferior officer in regard to the report, and that his statement was privileged; and (2) that the pursuer in averring malice had failed to state specifically facts and circumstances from which malice was to be inferred. **Observed** that in certain cases of privilege a general averment of malice is sufficient.

Innes v Adamson, 1889, 17 R. 11; 27 S.L.R. 26.

(331)

—Police inspector—Malice—Sufficiency of averments of malice.

A police officer brought an action of damages for slander against an inspector of police, stating that he had maliciously and without probable cause prepared and sent to the pursuer's superior officer, the chief constable of the county, a report, falsely stating that rumours were current in the county that he had been guilty of immoral conduct, and that an official investigation as to his conduct was required. **Held** that, having regard to the nature of the report and its privileged character, a specific statement of the grounds on which malice was to be inferred was required, and that such not being given, the action was irrelevant. **Opinion** (per Lord Young) that an action will not lie against a public officer in respect of defamatory statements made in a report sent in

the discharge of his duty to his superior officer.

M'Murchy v Campbell, 1887, 14 R. 725; 24 S.L.R. 514.

(332)

—Police constable—Sufficiency of averments of malice—Knowledge that statement false.

In an action against two police constables, the pursuer averred that he had been charged by the defenders with assaulting them, convicted on their evidence, and sentenced to imprisonment; that on the day of the alleged assault he was in another town; that after his conviction he was liberated on that ground, and his conviction subsequently quashed by the High Court of Justiciary; and that he was well known to the defenders before and at the date of the alleged assault, and that their charges against him were false to their knowledge, and were malicious and without just or probable cause. **Held** that malice was relevantly averred.

M'Ternan v Bennett, 1898, 1 F. 333; 36 S.L.R. 239.

(333)

—Police surgeon—Statement regarding illness of police constable—Malice—Sufficiency of averments.

In an action of damages for slander brought by a police constable against a police surgeon who had attended him for illness, the pursuer averred that the defender, without sufficient examination, had erroneously stated that the pursuer was suffering from the effects of venereal disease, and had repeated that statement to the chief constable; that he had persisted in that statement though informed that other medical men disagreed with his view; and that, in doing so, he had used violent and abusive language towards the pursuer. **Held** that the facts and circumstances averred by the pursuer were insufficient to infer malice, and that, the occasion being privileged, the action fell to be dismissed as irrelevant.

A v B, 1907 S.C. 1154; 44 S.L.R. 870; 15 S.L.T. 327.

(3) STATEMENTS MADE—

(a) To the Police.

Threat to give information to the police.

[See IV. 3 (1) (a) (ii), supra.]

(334)

Privileged occasion — Malice and want of probable cause in issue.

"When it comes to the knowledge of any one that a crime has been committed, a duty is laid on that person, as a citizen of the country, to state to the authorities what he knows respecting the commission of the crime, and if he states only what he knows and honestly believes, he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is . . . not guilty

of the crime. It is necessary for any one raising an action of damages against a person who has given such information to aver that the information was given maliciously and without probable cause. . . . In order to make out malice, . . . it is necessary for the pursuer to prove that, in making the statements or giving the information respecting the commission of the crime, the defender acted, not in discharge of his public duty, but from an illegitimate motive; . . . the pursuer must also prove that the statements were made or the information given without any reasonable grounds of belief" (per Lord President Inglis).

Lightbody v Gordon, 1882, 9 R. 934; 19 S.L.R. 703.

(335)

In an action of damages for giving wrongous information to the police, the pursuer is entitled to have his innocence presumed; but he must prove that there was a want of reasonable and probable cause for giving the information, or that the circumstances of the case were such as to be, in the eyes of the jury, inconsistent with the existence of reasonable and probable cause; and also that the proceedings complained of were taken in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice (per Lord President Dunedin, approving dicta of Lord Justice Bowen in *Abrath v North-Eastern Railway Co.*, 11 Q.B.D. 440).

Mills v Kelvin & James White, 1913 S.C. 521; 50 S.L.R. 331; 1913, 1 S.L.T. 153.

(336)

—Statements to police constable on duty.

In an action of damages for slander brought against a lady who occupied a villa on the outskirts of a town, the pursuer averred that the defender had made statements to two police constables to the effect that the pursuer was concerned in a theft from an adjoining villa. There was no allegation of malice and want of probable cause. The defender denied having made the statements complained of, and also pleaded privilege. A proof was allowed, from which it appeared that the statements were made to the police constables on duty. Held that the statements were privileged, and that, in the absence of averment or proof of malice and want of probable cause, the defender was entitled to absolvitor.

Green v Chalmers, 1878, 6 R. 318; 16 S.L.R. 213.

(337)

—Repetition of information laid before police.

In an action of damages for repeating to members of the public an accusation of the commission of a crime of which the defender had informed the police, held that the occasion was not privileged, and that malice and want of probable cause need not be averred.

Walker v Cumming, 1868, 6 M. 318; 40 J. 175; 5 S.L.R. 220.

(338)

—Public repetition of charge after informing police.

In an action of damages for wrongous apprehension and slander, the pursuer averred that he and the defender, having travelled in the same railway carriage, had gone on board the same steamer; that while on board the steamer the defender had stated to a police constable that the pursuer had stolen the defender's watch; that the constable had thereupon apprehended the pursuer; and that the defender had frequently, from the time of the pursuer's apprehension till the vessel reached its destination, in a loud voice continued to say, in the presence of certain passengers, that the pursuer had stolen her watch. Held that the pursuer was entitled to an issue whether the defender falsely and calumniously stated, in the presence of the persons named, that the pursuer had stolen the defender's watch.

Douglas v Main, 1893, 20 R. 793; 30 S.L.R. 726; 1 S.L.T. 72.

(339)

—Circulating crimen falsi petition.

Held that persons who had signed a crimen falsi petition to the Lord Advocate craving that criminal proceedings should be taken against certain persons for conspiracy and perjury, were privileged so far as regarded the signature of the document, but were not privileged in instigating the circulation of the document among the public with a view to getting other signatures.

Dowgray v Gilmour, (O.H.) 1906, 14 S.L.T. 104.

(340)

—Statement made in presence of bystanders before police summoned—Res gestæ—Malice and want of probable cause.

In an action of damages for slander and wrongous apprehension, it was proved that the pursuer, while walking on the street with his mother and sister, had, in their presence, been charged by the defender, who mistook him for another person, with fraudulent imposition; that the defender then went for a policeman, and ten minutes after gave him into custody. Held that the statement made to the police was privileged, and that, on the evidence, malice and want of probable cause had not been proved; that as the whole res gestæ formed only one occurrence, the pursuer was not entitled to damages in respect of the statements made to him before the police were called.

Hassan v Paterson, 1885, 12 R. 1164; 22 S.L.R. 775.

(341)

—Charge of theft—Question of civil right.

The pursuer of an action of damages for slander, who was a former employee of the defenders, had certain goods of the defenders in his hands when he left their service. He refused to return the goods until certain charges which he claimed for work done on the goods had been paid. The defenders lodged a charge of theft against the pursuer

with the police authorities. **Held** that the occasion was not privileged.

Kennedy v John Henderson & Son, (O.H.) 1903, 11 S.L.T. 156.

(342)

———**Letter leading up to prosecution — Separate issue on letter.**

The pursuer, a wholesale bottler, received a letter from the solicitor for the defenders, a firm of wholesale brewers, charging him with adulteration of stout issued to him by the defenders. In a prosecution which followed, the pursuer was acquitted. **Held** that, as the letter merely led up to, and formed a step in, the prosecution, the pursuer was not entitled to an issue founded on the letter apart from the prosecution.

Chalmers v Barclay, Perkins & Co., 1912 S.C. 521; 49 S.L.R. 465; 1912, 1 S.L.T. 189.

(343)

———**Malice and want of probable cause—Slander and wrongous apprehension—Form of issue.**

In an action of damages by a railway clerk against a goods manager of the railway for calling the pursuer a thief in the presence of other railway officials, and thereafter giving him into the custody of the police, the pursuer proposed two issues, one for the alleged slander and another for wrongous apprehension. **Held** that the whole *res gestæ* formed only one occurrence, and that one issue only should be allowed, with malice and want of probable cause inserted.

Gray v Maitland, (O.H.) 1896, 4 S.L.T. 38.

(344)

———**Threat to report to procurator-fiscal.**

Wilson v Purvis, 1890, 18 R. 72; 28 S.L.R. 76, No. 123, supra.

Ramsay v MacLay & Co., 1890, 18 R. 130; 28 S.L.R. 101, No. 121, supra.

(345)

Malice—Sufficiency of averment.

Circumstances in which a general averment of malice was held sufficient to support an issue in an action of damages for slander on account of information given to the police.

Currie v Weir, 1900, 2 F. 522; 37 S.L.R. 382.

(346)

———**Sufficiency of averment—Form of issue.**

In an action at the instance of a dismissed employee against the manager of the employers' firm for damages on account of wrongous information given by the defender to the police, the pursuer averred circumstances connected with his dismissal, which, he stated, had given rise to ill-will against him on the part of the defenders. Averments which were held relevant to infer malice. Form of issue allowed.

Shaw v Burns, 1911 S.C. 537; 48 S.L.R. 432; 1911, 1 S.L.T. 184.

(347)

———**Want of probable cause—Sufficiency**

of averment—Knowledge of falsity of charge.

A plasterer brought an action against a builder for damages on account of the defender having given information to the police, in consequence of which the pursuer was tried in the police court on a charge of having stolen five cornice moulds and a plan from the defender, but was acquitted; he averred that the defender was well aware that said cornice moulds, or at least the zinc portions thereof, were the property of the pursuer, yet he maliciously withheld this information from the police; that the defender was well aware that said plan had been treated by both parties as valueless, yet he maliciously included it in the said charge. The defender pleaded that the pursuer's averments were irrelevant, in respect that he had not made a sufficient averment of facts and circumstances inferring malice, and, further, in respect that the pursuer's averments showed that the defender had probable cause for giving information to the police. **Held** that the pursuer's averments were relevant, and issue allowed.

Brown v Fraser, 1906, 8 F. 1000; 43 S.L.R. 741; 14 S.L.T. 148.

(348)

———**Proof of malice—Charge of theft—Recklessness.**

A tenant, while removing some flooring from his house was stopped by his landlord on the street; the tenant having refused to return with the flooring, which he claimed as his own, was given into custody by the landlord, but on being taken to the police office was at once liberated. **Held** that the landlord had been guilty of such recklessness in giving the tenant into custody as to amount in law to malice.

Denholm v Thomson, 1880, 8 R. 31; 18 S.L.R. 11.

(349)

———**Want of probable cause—Charge of presenting forged cheque.**

A crossed cheque bearing a forged indorsation was presented at a bank. G, the bank agent, believing that he recognised the person who presented it as L, the servant of the customer whose name G understood to be indorsed on it, cashed the cheque. The indorsation was unlike the customer's usual signature. On the forgery being discovered G went to the customer, and stated that he believed L was the person who had presented the cheque. G then gave information to the police. L was in consequence put on trial, but the charge against him was found not proven. **Held** that the foregoing facts were not evidence of malice and want of probable cause.

Lightbody v Gordon, 1882, 9 R. 934; 19 S.L.R. 703.

(350)

———**Want of probable cause—Complaint by hotel proprietor that guest had left without paying bill.**

A guest at a country hotel left early in

the morning without paying her bill, which had been handed to her late on the previous night, alleging as her reason for not paying it that she had not had time to check it. The hotel proprietor sent a letter to the local constable in the following terms:—"Mrs. West left without paying bill, £69 4s. 2d. Please detain." In an action of damages by the guest against the hotel proprietor, a jury found for the pursuer on an issue whether the defender had falsely, calumniously, maliciously, and without probable cause, represented that the pursuer had attempted to defraud the defender. Circumstances in which the Court set aside the verdict, on the ground that there was no evidence either of malice or of want of probable cause, and in the exercise of their powers under sec. 2 of the Jury Trials Amendment Act, 1910, instead of allowing a new trial, entered judgment for the defender.

West v Mackenzie, 1917 S.C. 513; 54 S.L.R. 456; 1917, 1 S.L.T. 309.

(351)

Want of probable cause—Proof of statements in trade circular.

In an action of damages, at the instance of a discharged employee against his former employers, a jury found for the pursuer on issues whether the defenders had maliciously and without probable cause lodged with the criminal authorities charges of theft and of fraud against the pursuer, and whether they had caused to be circulated amongst certain business firms a circular in which they maliciously represented that the pursuer had been guilty of fraudulent practices. Circumstances in which the Court set aside the verdict on the ground that there was no evidence before the jury either of want of probable cause or of malice.

Millis v Kelvin & James White, 1913 S.C. 521; 50 S.L.R. 331; 1913, 1 S.L.T. 153.

(352)

Want of probable cause—Averment to rebut—Grounds on which defender lodged information.

A brought an action of damages for slander against B, his former partner, upon the ground that B had falsely, maliciously, and without probable cause lodged an information with the criminal authorities charging him with embezzling a certain sum of money. B stated that he had laid the facts as to A's actings in the matter in question, and also as to A's actings in other matters, before the criminal authorities, and set forth in detail the whole information which he submitted, and the grounds on which he submitted it. Held that B was entitled to prove the grounds on and circumstances in which he lodged the whole information in order to show that he had not acted maliciously or without probable cause.

Kufner v Berstecher, 1907 S.C. 797; 44 S.L.R. 508; 14 S.L.T. 890.

(353)

Form of issue.

Form of issue allowed in an action of damages for slander where the pursuer averred that the defender "went to the police office and lodged information against the pursuer" and charged him with forgery.

Macdonald v Raitt, (O.H.) 1900, 7 S.L.T. 436.

(b) To Master or Official Superior of Person Slandered.

(354)

Privileged occasion—Statement made to parish council with regard to medical officer—Statement made by president of nursing association with reference to non-employment of nurse—Statement made in the interest of the poor.

The president of a district nursing association sent to the parish council a letter calling their attention to the fact that the parish medical officer had failed to obtain the services of the association's nurse for one of his patients, Mrs. H, who was an old-age pensioner, but not a pauper. The letter, which narrated with substantial accuracy the facts which had occurred, made no specific charge against the medical officer, but it concluded with these words—"I venture to bring Mrs. H's case to your notice, as one who should have been given help which was within reach, and to which she was entitled." The parish council had on two occasions issued instructions to their medical officer to call in the services of the association's nurse where required. The medical officer, who had been attending Mrs. H as a private practitioner, and not in his capacity as medical officer, brought an action of damages for slander against the writer of the letter. Held (1) that the defender's position as president of the nursing association, coupled with the general interest which she took in the welfare of the poor, would have made the occasion privileged even had the parish council owed no special duty towards the patient; but (2) that the parish council had a duty of affording medical relief to old-age pensioners which per se rendered the occasion privileged.

James v Baird, 1916 S.C. (H.L.) 158; 53 S.L.R. 392; 1916, 1 S.L.T. 331.

(355)

Communication to chief constable regarding official conduct of police sergeant.

Held that a statement made to a chief constable regarding the official conduct of a police sergeant was privileged.

Cassidy v Connochie, 1907 S.C. 1112; 44 S.L.R. 831; 15 S.L.T. 195.

(356)

Statement regarding servant made to employer by former employer—Malice—Issue.

A farm servant brought an action of damages for slander against a company, alleging that the defenders had written a letter to the pursuer's employer stating that the pursuer

had maliciously injured a horse belonging to them, and that they brought the matter under the notice of pursuer's employer because his horses might possibly be subjected to similar treatment, and that the statements in the said letter were false, calumnious, and malicious. **Held** that the question whether there was privilege or not would depend on the evidence, and must be left for determination at the trial, and that malice need not be put in the issue. **Observations** (per Lord Justice-Clerk Macdonald) as to the class of cases in which malice must be inserted in the issue.

M'Callum v M'Diarmid & Co., 1900, 2 F. 357; 37 S.L.R. 267; 7 S.L.T. 77.

(357)

Charge of theft against hotel servant by guest in hotel.

In an action of damages for slander by a housemaid in a hotel against a person residing in the hotel, the pursuer averred that, while she was cleaning the defender's room, he came in and accused her of having stolen during his absence a quantity of whisky and claret from bottles belonging to him in his bedroom, and that thereafter he had repeated the accusation to her mistress, in the presence of the pursuer and of another servant. **Held** that the pursuer's statement did not disclose a case of privilege, and that it was therefore unnecessary for her to aver facts and circumstances from which malice was to be inferred.

Reid v Moore, 1893, 20 R. 712; 30 S.L.R. 628.

(358)

Charge of dishonesty by secretary against foreman of co-operative society.

The secretary of a co-operative society, at a meeting thereof at which only members were present, made certain statements charging the foreman butcher of the society with acting dishonestly in the course of his duties. **Held** that the occasion was privileged.

Williamson v M'Cann, 1908, 16 S.L.T. 221.

(359)

Criticism by customer of tradesman's employee.

A skirt cutter brought an action of damages for slander, in which she averred that the defender, while having a skirt fitted at a ladies' tailor's shop where the pursuer was employed, stated in the presence of the manager of the shop that the pursuer was grossly unfit for her duties, and that her services should be dispensed with. **Held** that the words used were not actionable in the circumstances.

Vallance v Ford, (O.H.) 1903, 10 S.L.T. 555.

(360)

Malice — Sufficiency of averments — Complaint by ratepayer to local authority.

Couper v Lord Balfour of Burleigh, 1913 S.C. 492; 50 S.L.R. 320; 1913, 1 S.L.T. 122; 1914 S.C. 139; 51 S.L.R. 126; 1913, 2 S.L.T. 417, Nos. 263 and 265, supra.

▼ 4

(361)

Sufficiency of averments — Report by inspector to chief constable regarding conduct of police officer.

M'Murphy v Campbell, 1887, 14 R. 725; 24 S.L.R. 514, No. 331, supra.

(362)

Report by railway inspector to his superiors as to conduct of clerk — Proof.

A railway inspector lodged a report with the traffic superintendent stating that he had detected, in a goods shed, a railway clerk using a gimlet in the side of a cask, and a railway porter sitting on the cask with a water can in his hands, that he had said to them that they were in a very awkward position, and that the clerk said they were, while the porter followed him and asked if he intended to report the matter. The clerk and the porter raised an action of damages for slander against the inspector, and obtained an issue which contained malice. At the trial the pursuers deposed that the whole report was an invention, but they offered no explanation of the defender's motive in making the charge against them. The jury having returned a verdict for the pursuers, the Court **held** that, if the jury believed the evidence for the pursuers, the false report by the defender was sufficient evidence of malice to warrant the verdict.

Martin v Cruickshanks, 1896, 23 R. 874; 33 S.L.R. 683; 4 S.L.T. 62.

(363)

Charge of theft by employer of contractor against contractor's servants — Malice — Sufficiency of averment.

In an action of damages for slander the pursuer averred that he was a joiner in the employment of C M & Co., shipwrights; that on a certain day he and three other workmen were sent by the firm to execute a piece of work on board a vessel lying in the docks at Glasgow belonging to the defenders; that some days after the said workmen had left the vessel the defenders sent an account to C M & Co. — "To six bottles of whisky, at 3s. 6d. per bottle, abstracted by your men while putting up, &c., on board" the vessel, and subsequently wrote this letter to C M & Co. — "In reply to yours of yesterday's date, we know that when your men went down the hold to put up the powder bulkhead the whisky cases were intact, but after they left, we found, on examination, that a case had been tampered with and six bottles of whisky abstracted. We could come to no other conclusion but that your men had taken it." The pursuer averred that the account and letter maliciously, and without probable cause, represented the pursuer as being dishonest, and as having stolen six bottles of whisky. There was no other averment of malice. **Held** that the pursuer's averments showed that the defenders were privileged in making the statements complained of, and that as the pursuer had failed to set forth facts from which malice

could be inferred, the action was not relevant.

M'Fadyen v Spencer & Co., 1892, 19 R. 350; 29 S.L.R. 295.

(364)

Giving information to proper authority—Duty or right—Master of ship—Entry in log—Merchant Shipping Act, 1854, secs. 243, 244, and 280-286.

Held that, where a pursuer seeks to recover damages for a statement, imputing misconduct to him, which has been made by the defender, in discharge of his duty, to the proper authority, he must put in issue, not only that the statement was made maliciously, but also that it was made without probable cause. **Opinion** (per Lord Trayner) that the same rule applies where the statement is made in exercise of a right.

The chief officer of a ship raised an action against the master, concluding for damages in respect of an entry in the log, made by the master, that the pursuer had "wilfully and intentionally disobeyed" his orders in allowing a particular seaman to steer. **Held** (1) that the pursuer must put want of probable cause in issue, as well as malice; and (2) that his averments disclosed a case in which the master had probable cause for his conduct.

Hill v Thomson, 1892, 19 R. 377; 29 S.L.R. 317.

(365)

Poor law authority's ill-usage of pauper children.

In an action of damages for slander, the pursuer alleged that the defender, the minister of the parish in which the pursuer resided, had, by letters written by him to the inspector of poor of another parish and to the Board of Supervision, represented the pursuer as grossly unfit to have the charge of pauper children boarded with him by the parochial board of that other parish. **Held** that the pursuer was bound to put in issue want of probable cause as well as malice.

Croucher v Inglis, 1889, 16 R. 774; 26 S.L.R. 587.

(366)

Presbytery—Parish minister alleging misconduct by co-presbyter.

Held that malice and want of probable cause must be put in issue in an action of damages based on statements alleged to have been made by a minister at a meeting of the presbytery to which he belonged regarding the conduct of another minister in the same presbytery.

A v B, (O.H.) 1895, 22 R. 984; 32 S.L.R. 514; 2 S.L.T. 500.

(c) To Person Interested to Receive Information.

(367)

Privileged occasion—Church—Communication by member of congregation to elder as to conduct of session clerk—Letter to

minister as to conduct of session clerk asking for inquiry.

A member of a congregation stated to one of the elders, openly in his shop, and in the presence of another person, that another member of the congregation, who was session clerk, had been drunk and incapable on a certain night. **Held** that the statement was not privileged.

In an action of damages for slander, **held** by the presiding judge at the trial (Lord Ormisdale) that a letter written by a member of a congregation to the minister, informing him that another member, who was also session clerk, had been charged with drunkenness, sent with a view to inquiry, was privileged. **Observations** on the nature and extent of the privilege claimed.

Rankine v Roberts, 1873, 1 R. 225; 11 S.L.R. 89.

(368)

Malice—Issue—Duty of master to guarantors of servant's honesty.

The employers of a commercial traveller were insured with an insurance company under a policy taken out by him against his possible defalcations. In an action of damages for slander the traveller averred that the employers had made statements to the insurance company that the pursuer had been guilty of embezzlement, and that they made those statements in the knowledge that the policy had been avoided. The defenders denied that the policy had been avoided. **Held** that the occasion was privileged and that malice must be inserted in the issue.

Dundas v Livingstone & Co., 1900, 3 F. 37; 38 S.L.R. 21.

(369)

Dismissal of servant on account of drunkenness—Letter to registry through which servant engaged—Malice—Sufficiency of averment.

A domestic servant in an action of damages for slander against her former mistress averred that the defender, immediately after dismissing the pursuer for alleged drunkenness, wrote to the registry office through which the defender had engaged the pursuer a letter in which she stated that she had found the defender "a most unsatisfactory servant, and she is leaving to-day. Yesterday morning she was quite incapable, and unfit to take orders," and the letter further stated that the writer declined to give any one the servant's character "without mentioning her failing." The pursuer further averred that the statements regarding the pursuer were not made in answer to any inquiry, but were gratuitous and unsolicited, and were made by the defender maliciously, and without probable cause, and with the intention of injuring the pursuer in her character and prospects. **Held** (1) that the letter founded on was privileged; and (2) that the averments of malice were irrelevant for want of specification.

Farquhar v Neish, 1890, 17 R. 716; 27 S.L.R. 549.

(370)

Proof — Report against servant to employers' association — Register of defaulters.

An association of owners of steam fishing vessels resolved that a "register of defaulting crews" should be kept, and that, if one of the crew of a vessel belonging to a member should, when engaged to go to sea, refuse to do so, or should come on board drunk, the member should report his name to the secretary for insertion in the register. A member of the association reported an engineer to the secretary as having been drunk, and having refused to proceed to sea. The engineer's name and alleged offences were accordingly inserted in the register. The engineer brought an action of damages for slander against the member who had reported him. **Held** that in making the report the defender was privileged, and that, as it was not proved that he had acted maliciously, he was not liable in damages for slander.

Keith v Lauder, 1905, 8 F. 356; 43 S.L.R. 230; 13 S.L.T. 650.

(371)

Law agent who had given personal guarantee to cautioners for executrix writing to cautioners — Malice — Sufficiency of averments.

A law agent who was in charge of the winding up of an executrix estate, and had given the cautioners for the executrix his personal guarantee that the estate would be distributed according to law, wrote to the cautioners that his guarantee would become inept in consequence of the actings of the son of the executrix, and advising them to withdraw their bond of caution. In an action of damages, the son innuendoed the letter as slanderous, and averred that the defender wrote the letter maliciously, with the object of inducing the cautioners to withdraw their bond, and so obstructing the administration of the estate and preventing or delaying the funds being taken out of his hand. **Held** (1) that the occasion was privileged; and (2) that, assuming the necessity for an averment of facts and circumstances inferring malice, such were sufficiently averred.

Stewart v Hannah, 1905, 8 F. 107; 43 S.L.R. 74; 13 S.L.T. 499.

(372)

Minister and assistant minister — Letter from minister to elders.

Opinion that a letter addressed to the elders of a church by the minister regarding the conduct of his assistant was privileged.

Barclay v Manuel, (O.H.) 1902, 10 S.L.T. 450.

(373)

Trade slander — Company for providing subscribers with confidential information as to financial status of traders.

In an action of damages for slander, the pursuers complained of a letter as injurious to their credit. It was admitted that the defenders were a company formed for the purpose, inter alia, of preventing their subscribers from making bad debts, by furnishing them with information as to the financial

status of persons with whom they proposed to trade; that the letter complained of was written in response to a request by a member for information as to the amount of credit which it would be safe for him to give the pursuers; and that the information was given on the condition that it was confidential, for the use of the subscriber only, and not to be divulged by him to any third party. **Held** that the defenders were privileged in writing as they did, and that malice must be put in the issue.

Bayne & Thomson v Stubbs, Limited, 1901, 3 F. 408; 38 S.L.R. 308; 8 S.L.T. 412.

(374)

Trade association — Statement affecting credit — Black list.

A local association of traders, at their own expense, and for the protection of their trading interests, caused a list of names and addresses of certain persons in the district to be circulated annually among their members (but to no one who was not a member). The list bore no title, and made no comment on the persons whose names were included; but it was admittedly compiled from the "black lists." An action of damages against the association and certain of its members, at the instance of a person whose name appeared in the list, was dismissed as irrelevant, in respect that the defenders were privileged in issuing the list, and that facts inferring malice were not averred.

Barr v Musselburgh Merchants' Association, 1912 S.C. 174; 49 S.L.R. 102; 1911, 2 S.L.T. 402.

(375)

Privileged occasion — Moral duty to make communication — Poaching — Communication to shooting tenant in response to inquiry.

A, the tenant of the shootings on a certain estate, complained to an innkeeper in the neighbourhood that poaching had been taking place on the estate, and the innkeeper promised to assist A in finding out who the poachers were. Thereafter the innkeeper was told by a gamekeeper that B had been poaching on the estate. The innkeeper communicated this information to A. In an action of damages for slander brought by B against the innkeeper, **held** that in making this communication to A the defender was privileged.

Nelson v Irving, 1897, 24 R. 1054; 34 S.L.R. 786; 5 S.L.T. 78.

(376)

Statement to relative about matter of family interest — Statement to mother about son's companions.

The defender in an action of slander said to his sister-in-law that he had had it from a friend that the pursuer would not be permitted to go on any racecourse in the country, and he made the statement because he thought the pursuer was not a good companion for his nephew. **Held** that the statement was privileged.

Moffat v Coats, 1906, 44 S.L.R. 20; 14 S.L.T. 392.

(377)
Malice—Sufficiency of averments—Discrepancy between statements at different times as to servant's character.

In an action of damages for slander, the pursuer averred that he had been for four years in the service of the defender as a barman, that on leaving his service he received a certificate that the defender had always found him honest, sober, and trustworthy; that a year later, in answer to an inquiry, the defender wrote that the pursuer was "no good," meaning thereby that the pursuer was not honest and sober; that that statement was known to the defender to be false, and was made maliciously. **Held** that malice might be inferred from the unexplained contradiction between the character of 1899 and the character of 1900, and an issue allowed.

Macdonald v M'Coll, 1901, 3 F. 1082; 38 S.L.R. 781; 9 S.L.T. 146.

(378)
Want of probable cause—Kirk session—Objections to appointment of elder.

In an action of damages for slander on account of statements made by members of a parish church to the kirk session, with a view to preventing the pursuer from being ordained as an elder, **held** (by Lord Stormonth-Darling, Ordinary, and acquiesced in) that want of probable cause must be put in issue as well as malice.

Jack v Fleming, 1891, 19 R. 1; 29 S.L.R. 5.

(d) To Person Slandered.

(379)
Doctor and chemist—Malice—Extravagant statements—Recklessness.

A doctor, in making a complaint to a chemist that he has not dispensed a medicine in accordance with the doctor's prescription, is in a privileged position, and anything said or written by the doctor to the chemist, pertinent to the occasion, will be protected unless malice is proved. Terms of a letter written by a doctor to a chemist, complaining of the way in which the chemist had dispensed one of the doctor's prescriptions, which, in the circumstances proved, were **held** to be so extravagant and to indicate such recklessness on the part of the doctor as to infer malice.

Gall v Slessor, 1907 S.C. 708; 44 S.L.R. 547; 14 S.L.T. 859.

(380)
Sale of goods—Charge of theft.
 The purchaser of a coat having failed to pay for it at the contract time, the sellers wrote him a letter demanding payment, and stating that his retention of the coat was in the circumstances theft. **Held** that the occasion was not *prima facie* privileged. **Opinion** that, if the occasion were privileged, and malice had accordingly to go into the issue, the case was not one where special facts and circumstances inferring malice would require to be averred.

Handasyde v J. Hepworth & Son, (O.H.) 1907, 15 S.L.T. 180.

(381)
Collector of insurance premiums.
 An insured person discontinued his insurance policy. On being asked his reasons, he wrote to the collector accusing him of familiarities with his wife. In an action of damages for slander, issue allowed, the question of privilege being reserved.

M'Cubbing v Simpson, (O.H.) 1894, 2 S.L.T. 262.

(382)
Railway—Ticket collector.
 A ticket collector who charges a passenger with travelling twice with the same ticket is privileged.

Cumming v Great North of Scotland Railway Co., (O.H.) 1916, 1 S.L.T. 181.

(383)
Manager of theatre—Statement that actor obtained engagement under false pretences as to capacity.

A theatre manager engaged an actor to perform at three towns. After the performance had been completed at two of the towns, he cancelled the engagement for the third, stating that the actor had failed to complete his part of the transaction by not performing in first-class style, and, after some correspondence, in which the actor insisted on implement of the contract, wrote to him in these terms—"You made your engagement under false pretences. You advertise what you are not capable of performing." The actor brought an action of damages for slander against the manager, averring that the defender had maliciously and without probable cause written the letter complained of. **Held** that the letter was privileged, and that it was therefore necessary for the pursuer to aver and to prove malice, and issue allowed.

Stuart v Moss, 1885, 13 R. 299; 23 S.L.R. 231.

(384)
Theatre—Bye-laws made by statutory authority—Duty not to permit women of ill-fame to enter theatre.

In an action by a married woman for having been called a prostitute and ordered to leave a theatre by the theatre manager, the pursuer referred for its terms to a bye-law, made under statutory authority, and founded on by the defenders, which was applicable to the theatre, and which provided that the licensed manager should not permit men or women of bad fame to enter the theatre. **Held** that the occasion was privileged and that malice must be inserted in the issue.

Finburgh v Moss' Empires, 1908 S.C. 928; 45 S.L.R. 792; 16 S.L.T. 116.

(385)
Shop manager charging customer with theft.

A lady brought an action of damages for slander against a shopkeeper, in which she averred that one of his departmental managers had challenged her in the shop with the theft of a purse. The pursuer did not

aver actual malevolence on the part of the manager. The Lord Ordinary disallowed issues and dismissed the action, **holding** that the occasion was privileged and that malice was not relevantly averred.

Henderson v Patrick Thomson, Limited, (O.H.) 1911, 1 S.L.T. 284.

(386)

Sufficiency of averments of malice—Recklessness—Master's liability for servant's slander.

In an action of damages for slander, brought against a limited company owning a music hall, the pursuer averred that, while he was present at a performance in the hall, he was falsely accused by an attendant of indecent conduct towards a member of the audience, and that he was taken to a private room, where the slander was repeated by the attendant and by the manager. He averred that these slanderous statements "were made and persisted in most recklessly, pertinaciously, and maliciously." The occasion was admittedly privileged. **Held** there was no sufficient averment of facts inferring malice, and the action was irrelevant.

Gorman v Moss' Empires, 1913 S.C. 1; 50 S.L.R. 1; 1912, 2 S.L.T. 271.

(387)

Accusation of dishonesty—Manager of business and dismissed servant—Malice—Sufficiency of averments of malice.

A cashier, who had been dismissed from his employment, brought an action of damages for slander against the manager of the business. The pursuer averred that, having discovered shortages in the cash, he reported these to his employer; that the same afternoon, in the presence of his employer, the defender charged him with having taken the money, and the same evening dismissed him from the employment. Two days later the defender called on him at his house and, in the presence of his wife, said to him, "I have come to ask for explanations; you must have taken the money." He further averred that the defender, who had formerly been very friendly, had for some months entirely changed in his demeanour; that he had become jealous of the pursuer and desired to undermine his influence with his employer and to find an excuse for getting him dismissed; that he made these accusations, which inquiry would have shown to be baseless, without making any investigation and with the object of gratifying the animus he had conceived against the pursuer. **Held** that, on the pursuer's averments, the occasion when the slander was uttered in the pursuer's house was not privileged; and issue without malice allowed. **Held** further that, if it should appear at the trial that the occasion was privileged and consequently that malice must be established, the pursuer's record contained relevant averments of malice.

Suzor v Buckingham, 1914 S.C. 299; 51 S.L.R. 309; 1914, 1 S.L.T. 145.

(388)

Want of probable cause—Minister communicating to candidate for eldership a report as to candidate's character.

In an action of damages for slander, the pursuer, a candidate for eldership, averred that the defender, the parish minister, had written a letter to him in which he informed him that a third party had made a serious charge against him, and that the defender could not ordain the pursuer as elder with such a charge against his character. **Opinion** (per Lord President Strathclyde and Lord Skerrington) that the pursuer was bound to put want of probable cause in issue as well as malice.

Murray v Wyllie, 1916 S.C. 356; 53 S.L.R. 263; 1916, 1 S.L.T. 87.

(e) By Master to Servants.

(389)

Criticism by master of servant's skill.

Observed (per Lord Stormonth-Darling, Ordinary)—"When a master confines himself to merely expressing an opinion about the incompetency or unskilfulness of a servant, it seems to me it would be dangerous to the proper carrying on of the work of society that he should be liable to an action of damages for slander."

Munro v Mudie, (O.H.) 1901, 9 S.L.T. 91.

(390)

Privileged occasion—Charge of theft—Inquiry about missing property made in presence of persons not concerned in the matter.

An inquiry as to missing property which was held to support an innuendo of theft was held not to be privileged, in respect that it was made before fellow-servants of the accused person, who were not concerned with the matter.

Adams v Templeton & Co., (O.H.) 1913, 2 S.L.T. 241.

(391)

Malice—Issue—Warning by mistress to female servants as to character of person with whom they associated.

In an action of damages for slander against the wife of the rector of an institution, the pursuer averred that the pursuer had been at a ball with two of the female servants in the institution; that thereafter the defender stated in the presence of Nellie Angus, Margaret Johnston, Annie M'Phail, and Annie Dunbar, all domestic servants in the institution, that the pursuer was "a noted blackguard," "a low scamp," and that he went after every good-looking girl for the purpose of seducing them. The pursuer in answer to an averment by the defenders stated that he took Maggie Johnston and Mary M'Phail to the ball, and returned with Maggie Johnston and Nellie Angus about five o'clock next morning, and admitted that the pursuer and Nellie Angus spent a short time together in the grounds of the institution before they separated. The pursuer ad-

mitted that in 1886 he had unsuccessfully defended an action for the alimony of an illegitimate child. **Held** that the pursuer's averments did not necessarily disclose a case of privilege, and that malice and want of probable cause should not be put in the issue.

Milne v Smith, 1892, 20 R. 95; 30 S.L.R. 105.

(392)

—Dismissal of servant on account of theft—Correspondence between master and servant's law agent with reference to claim for wages—Malice—Sufficiency of averment.

A domestic servant was convicted of stealing certain articles from her master's premises, and dismissed from his service. Her law agent having on her instructions written demanding the balance of wages due to her, her master replied that the wages should be duly paid, but that since her departure many more things had been missed. Her agent again wrote demanding an explanation of these insinuations, and her former master answered that "he had no doubt she had also taken the things now amissing." In an action of damages for slander by the servant against her master, the pursuer averred that the statements were malicious. The defender pleaded privilege and contended that special averments of malice were necessary to entitle the pursuer to an issue. The Court allowed an issue whether "the defender falsely, maliciously, and calumniously made" the last statement quoted, meaning thereby that the pursuer had stolen the things referred to.

Laidlaw v Gunn, 1890, 17 R. 394; 27 S.L.R. 317.

(393)

—Charge of immorality by employer of domestic servant.

In an action of damages for slander brought by a domestic servant against her master, the pursuer averred that one evening she and a fellow-servant took two men who had come to visit them into their bedroom; that the defender having discovered this ordered the visitors to leave the house; that about three o'clock on the following morning he came into the bedroom where the pursuer was alone and in bed, charged her with immoral conduct the night before, and with being the mother of an illegitimate child, and then expressed a wish to have connection with her. The defender pleaded that as the pursuer's master he was privileged in charging her with misconduct. **Held** that although a case of privilege might be disclosed at the trial no such case appeared on the pursuer's averment, and that it was not necessary for the pursuer to put malice in issue.

Observed—The general rule is, that an accusation by a master to his servant of misconduct then and there brought to the master's knowledge is privileged.

Cunningham v Petherbridge, 1894, 32 S.L.R. 1; 2 S.L.T. 229.

(394)

—Dismissal of servant—Accusation of immorality made by master against servant—Duty of master to inform other members of staff.

The manager of an engineering firm, having observed that two clerks in the drawing office had spent about ten minutes together in a water-closet in the works with the door closed, summarily dismissed them, refusing to hear explanations and using the words—"When two men are discovered under those circumstances, there is only one inference to be made from their conduct." On the following day the manager addressed the drawing office staff and told them—"Two of your number were dismissed yesterday at a moment's notice; they left without a shred of character; they are not men, they are beasts." In actions of damages for slander by both men against the manager, in which it was admitted that the first occasion was privileged, **held** that the second occasion was also privileged, in respect of the interest and duty which the defender had to inform the staff as to the circumstances of the dismissal.

A B v X Y, 1917 S.C. 15; 54 S.L.R. 37; 1916, 2 S.L.T. 210.

(395)

—Dismissal of servant—Accusation of indecency—Informing other members of staff.

A works manager was alleged to have said before the workpeople employed in the paint shop of the works—"Look here, all of you, decency must be maintained. If men and women are to work together in this employment, I will have no indecency here. What I saw to-day was enough. A, B and C will leave this employment at five o'clock to-night." A and B were men, C was a woman. In separate actions of damages for slander brought by A, B and C against the works manager, **held** that the case was one of privilege and that malice must go into the issue, but that specific averments of malice were not required and that want of probable cause should not go into the issue.

Newall v Bennett, (O.H.) 1896, 3 S.L.T. 268.

(396)

—Dismissal of nurse by head nurse—No admission that defender had power to dismiss—Form of issue—Malice.

The head nurse of a hospital dismissed another nurse by a letter which the latter alleged to be defamatory. In an action of damages for slander by the dismissed nurse against the head nurse, **held** that malice was not required in the pursuer's issue, as no admission could be extracted from the condescendence that the defender was lady superintendent of the hospital, and that as such she had oversight of the nurses and had power to dismiss them.

Hamilton v Wright, (O.H.) 1895, 3 S.L.T. 10.

(397)

—Dismissal of servant—Circular sent by employer to other servants—Charge of in-

attention and neglect on part of dismissed servant—Malice—Issue.

Bryant v Edgar, 1909 S.C. 1080; 46 S.L.R. 802; 1909, 1 S.L.T. 527, No. 165, supra.

(398)

—Malice — Sufficiency of averment — Animus and knowledge that charge false.

A cashier, who had been dismissed from his employment, brought an action of damages for slander against his employer, for having, on two occasions (which were admittedly privileged), accused him of misappropriating money, the proposed issue being whether the defender had made these accusations "falsely, calumniously, and maliciously." The pursuer averred that the defender, with whom he had previously been on friendly terms, had conceived an animus against him, and had, by a series of petty incidents which he detailed, endeavoured to annoy him and to induce him voluntarily to leave the defender's service; and that having failed in this purpose the defender had taken steps to dismiss him by making the false accusations complained of. He further averred that these accusations had been made and repeated by the defender in the knowledge that they were false, without inquiry and without listening to the explanation of his innocence which the pursuer had offered, and would have been able, to give. **Held** that the pursuer had averred facts and circumstances relevant to instruct malice on the part of the defender. The general rule laid down by Lord President Kinross in *Macdonald v M'Coll*, 3 F. 1082, and followed in subsequent decisions, as to the necessity in cases of privilege of averring facts and circumstances from which malice can be inferred, doubted (per Lord Skerrington); and **opinion** that in certain cases of privilege a general averment of malice is sufficient.

Suzor v M'Lachlan, 1914 S.C. 306; 51 S.L.R. 313; 1914, 1 S.L.T. 149.

(399)

—Sufficiency of averments—Allegation of dishonesty.

In an action of damages for slander by a former employee against her employer, the pursuer averred that the defender, in presence of two employees, had maliciously accused her of defrauding him. She further averred that the defender had made no inquiry into the truth of the accusation, though inquiry would have shown that the charge was groundless; that he had conceived an ill-will towards the pursuer, and, though formerly friendly, had ceased to speak to her because of a quarrel between her and the defender's manager, and because the pursuer's father had given up his situation in the defender's employment. **Held** that there was a relevant averment of malice.

Dinnie v Hengler, 1910 S.C. 4; 47 S.L.R. 1; 1909, 2 S.L.T. 237.

(400)

—Sufficiency of averments—Allegation of drunkenness.

A cook was dismissed by her employer on

the ground of drunkenness. Her agent wrote to the employer demanding a month's board wages. The employer replied to the agent stating that he had dismissed her for drunkenness. In an action of damages for slander by the cook against her employer, the defender was assailed, on the ground that the pursuer must aver facts and circumstances from which malice might be inferred, and that the pursuer's averments were insufficient.

Sheriff v Denholm, 1897, 5 S.L.T. 234, 346.

(401)

Averments which, in an action of damages for slander arising out of a charge of being drunk, made by a master against a servant, were **held** not to amount to a relevant averment of malice.

Hanton v Hatje, (O.H.) 1907, 15 S.L.T. 531.

(f) At Private Meetings.

(402)

Secretary of trade union—Duty to criticise returns of branches.

The secretary of a trade union, whose duty it was to criticise the returns from the branches, stated at a general meeting of the union, and while in course of submitting the reports of the branches, that the committee of a branch had paid a certain sum to themselves while distributing strike pay. **Held** that the occasion was privileged. Averments which were **held** insufficient to infer malice.

Quigley v Brown, 1913, 1 S.L.T. 61; 1913, 2 S.L.T. 391.

(403)

Creditors on insolvent estate—Imputation against trustee on debtor's estate.

At a meeting of creditors an accountant was nominated trustee on the debtor's estate. One of the creditors made statements to the effect that the accountant was unfit for the post. **Held** that the occasion was privileged, but that a general averment of malice was sufficient.

Oliver v Barnet, (O.H.) 1895, 3 S.L.T. 163.

(404)

Sporting association—Complaint by referee of football match to committee of football union as to offensive behaviour of player—Malice—Sufficiency of averments.

The referee at a football match complained by letter to the committee of the football union that one of the players had during the match made offensive remarks about him. At a meeting of the committee held to investigate the matter, the referee gave evidence in support of his complaint. **Held** that the occasion was privileged, and an action of damages for slander at the instance of the player against the referee dismissed as irrelevant in the absence of a specific averment of facts and circumstances inferring malice.

Murdison v Scottish Football Union, 1896, 23 R. 449; 33 S.L.R. 337; 3 S.L.T. 273.

(g) At Public Meetings.

(405)

Discussion of questions before meeting—Charges against individuals.

At a meeting of the statutory court of contributors to the Royal Infirmary of Edinburgh a question arose as to the propriety of electing as managers persons favourable to the admission of female medical students to the clinical lectures in the Infirmary. A member of the court, in speaking of the importance due to the opposition of the male medical students, referred to a petition presented to the managers signed by a number of them, and to a students' riot at Surgeons' Hall, where female students had been attending medical classes along with male students, and said—"This I do know, that the riot was not wholly or mainly due to men from Surgeons' Hall. I know that Dr. C's class assistant" (in the University) "was one of the leaders of the riot, and that the foul language he used could only be explained on the supposition I heard asserted that he was intoxicated." In an action of damages, brought by the class assistant referred to, against the speaker, **held** that in the circumstances the defender was not privileged in her observations regarding the pursuer.

Craig v Jex-Blake, 1871, 9 M. 973; 43 J. 524; 8 S.L.R. 616.

(406)

Responsibility for admission of public—Reply to public attack.

A district nurse brought an action of damages for slander against the members of committee of a district nursing association in respect of a report which referred to the pursuer and was read on behalf of the defenders at a meeting of the association attended by the public, and was published in a newspaper. The Lord Ordinary allowed issues without the insertion of malice or want of probable cause, leaving it to be determined by the judge who presided at the trial whether the defenders were responsible for the presence of the public at the meeting, and whether the defenders were vindicating their conduct from public attack in consequence of the pursuer herself having, in the first instance, carried the controversy into the public prints.

Jackson v Kemp, (O.H.) 1900, 7 S.L.T. 391.

(h) In Other Cases.

(407)

Bank agent—Charge of forgery against customer—Statement made in presence of bank clerks—Sufficiency of averments of malice.

In an action of damages for slander, the pursuer averred that the defender, who was a bank agent, had in the public office of the bank, and in the presence and hearing of the bank clerks, who were named, maliciously, and without probable cause, used words which implied that the pursuer had forged

the signature of the acceptor of a bill; that the defender had then consulted a friend, who stated that, in his opinion, the signature was genuine; but that, notwithstanding that opinion, he had repeated the charge of forgery, and that later in the same day, when a clerk whom he had sent with a letter to the pursuer returned and said that he could not find him, he had said of him, "he may have skedaddled," implying that he had probably fled in order to escape a criminal prosecution; and that on both these latter occasions the slander was also uttered in the public office, and in the presence and hearing of the bank clerks and members of the public. The pursuer further averred that, if the defender had any reason to suspect the signatures, he might have satisfied himself by applying to the acceptor, whose office was near at hand. **Held** (1) that the pursuer's averments did not disclose a case of privilege; and (2) that they contained a sufficient averment of malice to entitle him, if a case of privilege were made out at the trial, to meet that by proving malice.

Ingram v Russell, 1893, 20 R. 771; 30 S.L.R. 699; 1 S.L.T. 70.

(408)

Doctor — Charge of improper treatment against midwife.

A midwife raised an action of damages for slander against a doctor, averring that she had been called to attend a woman (Mrs. Moore) in labour; that she had given her a certain drug which was the proper treatment; that the defender, having been called in to see the woman, stated to Mrs. Moore's husband that the pursuer had poisoned his wife. The Court refused to insert malice and want of probable cause in the issue, on the ground that the pursuer's statements did not necessarily disclose a case of privilege.

Reid v Coyle, 1892, 19 R. 775; 29 S.L.R. 638.

(409)

Tradesman engaged in construction of building — Complaint against architect of building.

An architect of a building in course of erection condemned certain joiner work. The law agent of the joiner, acting on the instructions of his client, wrote letters to the architect and to the employers accusing the architect of acting unfairly. **Held** that the joiner was not in a position of privilege.

Crawford v Adams; Crawford v Dunlop, 1900, 2 F. 987; 37 S.L.R. 767; 8 S.L.T. 62.

(410)

False birth notice—Statement not ex facie slanderous—Ignorance of slander.

A newspaper among the notices of births stated that A B had given birth to a child at a certain date. The statement was defamatory because the date stated was within two months of A B's marriage. **Observed** (per Lord Moncreiff) that the statement was not privileged.

Morrison v Ritchie & Co., 1902, 4 F. 645; 39 S.L.R. 432; 9 S.L.T. 476.

(411)

Negligence—Advertisement—Necessity for averring negligence.

M'Lean v Bernstein, (O.H.) 1900, 8 S.L.T. 42, No. 14, *supra*.

(412)

Sporting association—Complaint by referee of football match to committee of football union as to offensive behaviour of player—Publication of resolution of committee.

The referee at a football match complained to the committee of the football union that one of the players had during the match made offensive remarks about him. The committee, after inquiry, passed and communicated to the press a resolution that the player had used offensive language to the referee, and that he be severely censured, and be ordered to apologise to the referee. In an action of damages for slander at the instance of the player against the individual members of the committee, **held** that a case of privilege was not disclosed on the pursuer's averments, and that the question of privilege must be left to be dealt with at the trial.

Murdison v Scottish Football Union, 1896, 23 R. 449; 33 S.L.R. 337; 3 S.L.T. 273.

(413)

Law agent—Law agent writing slanderous letter on instructions of client—Agent identifying himself with slanderous statement.

A law agent wrote a slanderous letter on the instructions of his client. The person slandered was **held** entitled to sue the agent in respect that he had identified himself with the slanderous statement. **Question**, whether the agent was privileged.

Crawford v Adams; Crawford v Dunlop, 1900, 2 F. 987; 37 S.L.R. 767; 8 S.L.T. 62.

(414)

Slanderous statement made without instructions of client.

In an action of damages for slander, the pursuer averred that he had let a cutting machine on hire to W, and that on W becoming insolvent and granting a trust deed, the pursuer removed the machine from his premises; that the defender, the law agent for the trustee, wrote to the pursuer a letter in which he demanded delivery of the machine, and which the pursuer inuendored as charging him with theft of the machine; and that the letter was written and the charge of theft made maliciously and without instructions from the defender's client. **Held** that the word maliciously ought not to go into the issue. **Opinions** (per Lord President Inglis and Lord Adam) that if the defender made the charge of theft without instructions from his client he was not privileged. **Opinion** (per Lord Kinneir) that if the defender had instructions to write a letter demanding delivery of the machine, the mere variation in its terms from his instructions would not deprive him of his privilege.

Wilson v Purvis, 1890, 18 R. 72; 28 S.L.R. 76.

(415)

Slanderous statement made as agent and in reference to client's business.

A partnership was dissolved by the death of one of the partners, and a reference took place to ascertain the amount which the representatives of the deceased could claim from the surviving partner. There was a formal investigation into the affairs of the surviving partner, the result of which the law agent of the deceased's representatives had to consider, in order to satisfy himself as to the survivor's financial position. The law agent on six different occasions made statements to the effect that the surviving partner was in embarrassed circumstances. The statements were made with reference to the inquiries into the surviving partner's financial position, and there was nothing to suggest that in making them the law agent was acting otherwise than as agent. In an action by the surviving partner against the law agent, **held** that the defender was privileged, that it was not necessary to state facts and circumstances showing malice, and that want of probable cause need not be inserted in the issue.

Watson v Ross, (O.H.) 1897, 5 S.L.T. 182.

(416)

Letter written by law agent on behalf of client—Letter written to law agent about claim put forward against client—"Attempt at extortion."

Edmondson v Cartner, (O.H.) 1905, 13 S.L.T. 78, No. 137, *supra*.

(417)

Slander of title—Statement by law agent of landlord at sale of tenant's furniture—Malice.

The law agent of the proprietor of a house attended a sale of the tenant's furniture, and stated to the auctioneer, in the hearing of the persons present at the sale, that he had come to stop the sale, that he had got or was to apply for a sheriff's warrant to stop the sale, and that purchasers would not be allowed to remove articles purchased. The auctioneer stated that the current year's rent had been paid, and produced the receipts therefor, and called on the law agent to produce a warrant for stopping the sale, which the agent failed to do. In consequence various persons were deterred from bidding, and the sale realised an amount much below what it would have realised but for the statements made by the law agent. **Held** that an action of damages against the law agent, in which the above facts were averred, was irrelevant, in respect that the statements complained of were of the nature of slander of title made by a person who had a natural interest to make them, and did not constitute an actionable wrong in the absence of an averment of malice.

Yeo v Wallace, (O.H.) 1868, 5 S.L.R. 253.

(4) REPORTS OF JUDICIAL PROCEEDINGS.

(418)

Privilege of newspaper—Fair report.

Per Lord Kyllachy—"I do not . . . consider that any privilege whatever attaches to a newspaper report as such. If a newspaper gives circulation to a slander, it is simply in the position of any other person circulating a slander, and the general rule is that a person circulating a slander is answerable equally with the author of the slander. . . . On the ground of public policy, a certain exception has come to be recognised, namely, that a person reporting truly—that is, fairly and accurately—the proceedings in public Courts of justice is not to be answerable for the circulation thereby of defamatory matter—at all events, in the absence of proof of express malice. On that ground . . . alone, does any privilege attach to the reports of proceedings in Courts of justice, and it is a privilege entirely conditional on the truth—that is, the fairness and accuracy—of the report, and it is a privilege, moreover, which is not at all peculiar to a newspaper, but extends to all other persons who desire for any legitimate reason to put the outside public in the same position as the portions of the public who happened to be within the walls of the Court."

Circumstances in which the Court refused to set aside as contrary to evidence the verdict of a jury finding that a newspaper report of Court proceedings was not fair and accurate.

Wright & Greig v Outram & Co., 1890, 17 R. 596; 27 S.L.R. 482.

(419)

Fair report—Counter issue.

In an action of damages against the proprietors of a newspaper for slander alleged to be contained in a report in the newspaper of proceedings in a Court of justice, the pursuers averred that certain statements reported to have been made in Court were not made, and that these statements were false and calumnious. The defenders contended that the pursuers were bound to put malice in the issue, and proposed as a counter issue whether the report was a fair and accurate report of the proceedings. **Held** (1) that a case of privilege did not arise unless the report was fair and accurate, and therefore that malice should not be inserted in the issue; and (2) that the counter issue was unnecessary.

Wright & Greig v Outram & Co., 1889, 16 R. 1004; 26 S.L.R. 707.

(420)

Fair report—Onus of proof.

It is *prima facie* libellous for a newspaper to say of any one that in a process of divorce he is accused of having committed adultery with a married woman, even although the fact of his being so accused is admitted.

In an action based upon a defamatory statement made in a newspaper, where the

defence is that the statement complained of was a fair and accurate report of proceedings in a public Court of justice, it is not incumbent upon the pursuer to negative this defence in his averments. If the statement is *prima facie* defamatory, the pursuer is entitled to an issue. It is for the defender to establish such a defence, and it is a question for the jury whether he has done so. **Question**, whether a statement of defamatory allegations made in an action, which is published after the decision of the case, without any intimation of the result, can be a fair and accurate report of proceedings in a public Court of justice.

Pope v Outram & Co., 1909 S.C. 230; 46 S.L.R. 61; 16 S.L.T. 457.

(421)

Privileged occasion—Publication of closed record before trial of cause.

Opinions that the publication in a newspaper of a closed record containing defamatory statements, which has not been referred to publicly in discussion in open Court, is not privileged.

Macleod v Justices of Peace of Lewis, 1892, 20 R. 218; 30 S.L.R. 186.

(422)

Publication of summons before record closed.

A summons which has been called in Court, but upon which no other step of procedure has followed, is not a public document, and any person who publishes defamatory statements contained in it is liable to an action of damages.

Observations on the principle of the publicity of judicial proceedings.

Richardson v Wilson, 1879, 7 R. 237; 17 S.L.R. 122.

(423)

Publication of decrees in absence—Fair and accurate report—Black list—Erroneous entry.

In an action of damages of slander the pursuers obtained an issue whether the publication of their name as defenders in a list of decrees in absence in "Stubbs' Weekly Gazette" falsely represented that they were unable to pay their debts. The decree in question was not in absence but of consent. The jury found for the pursuers, and the defenders moved for a new trial on the ground that the statement was a substantially correct report of what took place in a Court of justice. The Court refused the motion, **holding** that the jury were entitled to take the view that the publication was a representation that the pursuers were unable to pay their debts, and that the same inference would not have arisen if it had been stated that the decree was of consent.

Hunter & Co. v Stubbs, Limited, 1903, 5 F. 920; 40 S.L.R. 681; 11 S.L.T. 142.

(424)

The defenders in an action of damages for slander carried on a business which they described as a means of enabling traders

to avoid making bad debts, and were proprietors of a newspaper which had a special portion devoted to the publication of the names and addresses of persons by and against whom decrees in absence were taken. **Observed** (per Lord Kinnear)—“People who follow such a business . . . impose upon themselves a duty of care and circumspection, . . . and it will be no answer to any well grounded complaint of injury through misrepresentation of fact that they have misunderstood the import of entries in the Sheriff Court books, or that the entries themselves were misleading. They undertake to say what passed in Court apparently by a study of what is recorded in the Sheriff Court books, and they take the risk of their own interpretation of the entries which they may not perfectly understand.”

Russell v Stubbs, Limited, 1913 S.C. (H.L.) 14; [1913] A.C. 386; 50 S.L.R. 676; 1913, 1 S.L.T. 428.

(425)

—**Publication of decree in foro as a decree in absence.**

Crabbe & Robertson v Stubbs, Limited, 1895, 22 R. 860; 32 S.L.R. 650; 3 S.L.T. 73, No. 148, supra.

(426)

—**Decree recalled in respect of invalid citation.**

A debt collector was employed by a creditor to collect a debt. Having failed to do so, he employed a law agent, who used arrestments on the dependence of an action subsequently raised in the creditor's name against him in the Sheriff Court. The debtor was then outwith the jurisdiction of the sheriff, and was not duly cited. Decree in absence was obtained, and arrestments in execution were used against him. The debt collector then published in a “commercial compendium,” for which it was alleged he was responsible, a bare statement that the decree had been obtained against the debtor for the amount of the debt in question. The decree in absence was subsequently recalled on the ground of improper citation. In an action for damages at the instance of the debtor against the debt collector, **held** on the averments (1) that the defender was merely an intermediary between the client and the law agent, and was not responsible for the errors of the latter; and (2) that the defender, not being responsible for the obtaining of the decree, was not liable in damages for publishing the fact that it had been granted. Action dismissed as irrelevant.

Taylor v Rutherford, 1888, 15 R. 608; 25 S.L.R. 430.

(427)

—**Immaterial omission.**

M'Lintock v Stubbs, Limited, 1902, 5 F. 1; 40 S.L.R. 10; 10 S.L.T. 267, No. 152, supra.

(428)

Publication of decrees—Railway company posting up bills setting forth convictions for offences against company.

A railway company is not liable in damages for slander by posting up in its stations bills announcing the names and addresses of persons who have been convicted of the offence of travelling without having previously paid the fare, and with intent to avoid payment thereof, or of other offences against the company's acts and bye-laws, together with the date and nature of the offence and the sentence imposed.

Buchan v North British Railway Co., 1894, 21 R. 379; 31 S.L.R. 273; 1 S.L.T. 450.

(429)

Malice—Publication of fair report—Interdict.

The Court will not interfere by way of interdict to prevent the publication of a report of proceedings in an open Court of Justice, British or foreign, including letters produced in evidence and read, when it is not alleged that the report is unfair. **Question**, whether averments of malice in such publication will found an action of damages at the instance of a person referred to in such letters.

Riddell, &c. v Clydesdale Horse Society, 1885, 12 R. 976; 22 S.L.R. 657.

(430)

Privileged occasion—Report of judicial proceedings—Absence of judge—Statements not pertinent to the proceedings.

The statutory examination of a bankrupt was taken in the sheriff-clerk's room, and in part outwith the presence of the sheriff. The trustee used slanderous words with reference to the law agent of the bankrupt. A newspaper published a report of the bankruptcy proceedings, including the statements made by the trustee. In an action by the law agent against the proprietors of the newspaper, the accuracy of the report was admitted by the pursuer, but its fairness was challenged. **Held** (1) that the words must be deemed to have been uttered in the course of judicial proceedings; but (2) that they had no relation to the judicial proceedings, and that the proprietors of the newspaper were not privileged. **Observations** on the privilege of newspapers.

Thomson v Munro & Jamieson, (O.H.) 1900, 8 S.L.T. 327.

(5) COMMENT ON PUBLIC MATTERS.

(a) Comment by Newspapers.

[See also (4), supra.]

(431)

Refusal to disclose name of correspondent.

The publisher of a newspaper, who has refused to disclose the name of the writer of an anonymous letter to the editor published in his newspaper, cannot plead privilege in

answer to an action of damages for slanderous statements in the letter.

Brims v Reid & Sons, 1885, 12 R. 1016; 22 S.L.R. 670.

M'Kerchar v Cameron, 1892, 19 R. 383; 29 S.L.R. 320.

(432)

Averment that letter received in ordinary course of business.

In an action against the proprietors of a newspaper for damages for a slander contained in an anonymous letter appearing in the paper, the defenders averred that the letter was received in the ordinary course of business and in good faith. **Observed** (per Lord Moncreiff) that the defenders were not entitled to prove this averment, as they refused to disclose the name of the writer.

Morrison v Smith & Co., 1897, 24 R. 471; 34 S.L.R. 370; 4 S.L.T. 261.

(433)

Diligence to recover documents relating to authorship of letter.

Cunningham v Duncan & Jamieson, 1889, 16 R. 383; 26 S.L.R. 316, No. 42, supra.

Ogston & Tennant v The "Daily Record," Glasgow, 1909 S.C. 1000; 46 S.L.R. 703; 1909, 1 S.L.T. 551, No. 43, supra.

(434)

Criticism of public official.

Observed (per Viscount Haldane)—“In dealing with a newspaper article written about a public functionary, considerable latitude is allowed by the law. Any gentleman who takes the position of architect under the school board of Dundee is filling a capacity as a public official, and he must expect criticism, such criticism as the law might not recognise as justified in the case of a merely private person, but readily admits when it is in the public interest that criticism should be brought to bear upon the conduct of public officials. When a person is in a public capacity, he may be criticised by the newspapers in the public interest; and that rebuts the presumption of malice in law which the Court might otherwise make and leaves malice in fact to be proved, and malice in fact to be found either in the special language of the article or in circumstances proved which point to some motive of enmity to the particular individual.”

Langlands v John Leng & Co., 1916 S.C. (H.L.) 102; 53 S.L.R. 212; 1916, 1 S.L.T. 168.

(b) Statements Regarding Candidates at Elections.

(435)

Privileged occasion—Statement by person not an elector.

Where a parish was divided into two electoral divisions for county council purposes, and a voter in one division was sued by a candidate for the other for damages for falsely and calumniously stating that it would be useless to elect the pursuer as he

would soon be bankrupt, **held** that the defender was not privileged, and that malice need not be put in the issue.

Anderson v Hunter, 1891, 18 R. 467; 28 S.L.R. 324.

(436)

Statement by elector.

In an action of damages for slander the pursuer averred that in the course of a municipal election, in which he had been a candidate, the defender, who was an elector, had, in order to influence electors to vote against him, falsely and calumniously stated that the pursuer had been bankrupt, and that he had made a very bad failure, meaning thereby that it was a dishonest and disreputable failure, and that his creditors had received only 1s. 6d. per £, and that the pursuer was, in consequence, an unsuitable person to represent the electors. **Held** that the pursuer's statement showed that the defender was privileged, and that as malice was not averred, the action fell to be dismissed.

Bruce v Leisk, 1892, 19 R. 482; 29 S.L.R. 412.

(437)

Election to eldership—Canvassing for signatures to petition against candidate.

In an action of damages for slander the pursuer averred that on the occasion of his election to the eldership in a parish church, the defenders had deliberately and maliciously resolved to use means to prevent his ordination; that they had prepared and published a petition to the minister to be signed by members of the congregation representing that the pursuer's appointment as an elder would be injurious to the church; and that they proceeded to canvass certain members of the church for signatures to the petition. **Held** (by Lord Stormonth-Darling, Ordinary, and acquiesced in) that the pursuer was not bound to put malice and want of probable cause in issue, as the defenders were not privileged in canvassing for signatures to the petition.

Jack v Fleming, 1891, 19 R. 1; 29 S.L.R. 5.

(438)

Election to eldership—Minister communicating to candidate report as to his character.

In an action of damages for slander, the pursuer, a candidate for eldership, averred that the defender, the parish minister, had written a letter to him in which he informed him that a third party had made a serious charge against him, and that the defender could not ordain the pursuer as elder with such a charge against him. Circumstances in which **held** that the occasion was privileged and that the pursuers had failed to aver facts and circumstances inferring malice. **Opinions** (per Lord President Strathclyde and Lord Skerrington) that the pursuer was bound to put probable cause in issue as well as malice.

Murray v Wyllie, 1916 S.C. 356; 53 S.L.R. 263; 1916, 1 S.L.T. 87.

(439)

Want of probable cause—Slander of town councillor standing for re-election.

Held that in an action of damages for slander in respect of defamatory language used about a town councillor who was a candidate for re-election at a public meeting held in reference to the election of town councillors, the averment of want of probable cause was not required.

Christie v Craik, (O.H.) 1899, 7 S.L.T. 67; affirmed on other points, 1900, 2 F. 380; 37 S.L.R. 285; 7 S.L.T. 321.

(c) Replies to Public Attacks.

(440)

Privileged occasion.

Communications to a newspaper made in fair self-defence are privileged, and no action will lie against a man who has been publicly attacked by the pursuer of the action for relevant statements made as publicly in answer to the attack.

A stable-keeper was, on the information of officers of a society for the prevention of cruelty to animals, tried on a charge of cruelty, the result being that the charge was found not proven. He then entered into a correspondence with the secretary of the society, demanding payment of the expenses of the prosecution, complaining that he had suffered cruel injustice, that the society and its officers had an interest in bringing as many prosecutions as possible, that he had been "rushed" into Court without any inquiries having been made, and that the prosecution had "ignominiously failed." His demand for expenses having been refused, he sent the correspondence to a newspaper, and it was published. Thereafter the secretary of the society wrote to the same newspaper, detailing the information on which the prosecution had proceeded, referring to a warning which the society had addressed to the stableman in another case, and pointing out

that the judgment was one of "not proven," which was "in the circumstances a very different verdict from 'not guilty.'" The stableman having raised an action of damages for slander, **held** that the statements complained of did not go beyond what the defenders were entitled to say in answer to the charges made against them, and that there was no relevant ground of action.

Opinion (per Lord Shand) that the occasion was privileged.

Observations (per Lord Shand) on the necessity for averments of malice and an issue of malice in cases of this description.

Gray v Society for Prevention of Cruelty to Animals, 1890, 17 R. 1185; 27 S.L.R. 906.

(441)

———M wrote a letter to a newspaper in which he stated that he had detected W, who had contracted to supply groceries to a school of which M had been superintendent, in trying to send a different, and, he believed, a cheaper brand of coffee than that contracted for. W replied by a letter to a newspaper, which M in an action of damages for slander by him against W innuendoeed as representing that he "had no regard for truth and was a liar." **Held** that the letter as innuendoeed was more than a reply to the pursuer's charge, and that the pursuer was entitled to an issue whether the statement in the defender's letter represented that the pursuer had no regard for truth and was a liar.

Milne v Walker, 1893, 21 R. 155; 31 S.L.R. 149; 1 S.L.T. 332.

(442)

Question left to judge at trial.

Jackson v Kemp, (O.H.) 1900, 7 S.L.T. 391, No. 406, *supra*.

VIII. DAMAGES.

[See DAMAGES.]

SLANDER OF JUDGES. See JUSTICIARY.

SLAUGHTER-HOUSE. See PUBLIC HEALTH.

SMALL DEBT. See LIMITATION OF ACTIONS; SHERIFF.

SMALL HOLDINGS.

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STATUTES.

Act 1886—The Crofters Holdings (Scotland) Act, 1886 (49 & 50 Vict. c. 29).

Act 1887—The Crofters Holdings (Scotland) Act, 1887 (50 & 51 Vict. c. 24).

Act 1911—The Small Landholders (Scotland) Act, 1911 (1 & 2 Geo. V. c. 49).

Act 1919—The Land Settlement (Scotland) Act, 1919 (9 & 10 Geo. V. c. 97).

I. UNDER THE CROFTERS HOLDINGS ACTS, 1886 and 1887.

1. JURISDICTION AND PROCEDURE.

(1) JURISDICTION.

Jurisdiction of courts with regard to arrears of rent.

Held, on a construction of the Act 1886, particularly sec. 6, sub-sec. (5), thereof, that the jurisdiction of the ordinary courts of law to grant decree for payments of arrears of rent is not suspended by the presentation of an application to the Commissioners under

the act to fix a fair rent and to deal with arrears.

Question (per Lord Rutherford Clark), whether the landlord is entitled to do instant diligence on such a decree for recovery of the full sum named therein, and whether his remedy, pending the determination of the Commissioners, is limited to diligence in security.

Fraser v Macdonald, 1886, 14 R. 181; 24 S.L.R. 156.

(2)

Held (per Lord Wellwood, Ordinary), upon a construction of the Acts 1886 and 1887, that a decree for payment of arrears of rent may be pronounced against a crofter notwithstanding the dependence of an application to the Commissioners to have a fair rent fixed.

Stuart & Stuart v Macleod, 1891, 19 R. 223; 29 S.L.R. 199.

(3)

Declarator that applicant was a crofter in sense of Act—Competency.

An application to the Crofters' Commission contained a prayer for a bare declarator that the applicant was a crofter

in a certain holding within the meaning of the Crofters Holdings Act, 1886. **Held** that the application was incompetent, in respect that the Act did not empower the Commission to issue such declarators.

Balfour v Hutchison, (O.H.) 1899, 7 S.L.T. 82.

(4)

Declarator as to crofter's right of pasturage.

Held that the jurisdiction of the Court of Session to entertain an action by a proprietor for declarator and interdict against crofters whose holdings adjoined his lands, and who asserted that at the date of the Act 1886 they had rights of pasturage over his property, was not ousted by an application made by the crofters prior to the raising of the action, and still pending, to have fair rents fixed for their holdings under the Act.

Duke of Sutherland v Reed, 1890, 18 R. 252; 28 S.L.R. 217.

(5)

Question, whether tenant is crofter in sense of Act.

Observed (per Lord M'Laren)—“Unless the proprietor and the tenant are agreed that the tenant is a crofter in the sense of the Act, and is entitled to its benefits, it is only through the ordinary courts of the country that the dispute can be finally determined.”

Stuart & Stuart v Macleod, 1891, 19 R. 223; 29 S.L.R. 199.

(6)

Value of cause—Special case—Competency.

Special case as to the amount of rent payable by certain crofters dismissed on the ground that the value of the cause was under £25, sec. 63 of the Court of Session Act, 1868 not extending the jurisdiction of the Court of Session so as to enable it to decide in a special case questions not otherwise competent to it.

Bruce, 1889, 17 R. 276; 27 S.L.R. 223.

(7)

Finality of sheriff's judgment under Act 1886, sec. 16.

Question, whether the decision of a sheriff, finding that a person to whom a holding had been bequeathed was not one of the relatives to whom the deceased might legally bequeath his holding, was a final decision in the sense of the Act 1886.

Mackenzie v Cameron, 1894, 21 R. 427; 31 S.L.R. 347; 1 S.L.T. 480.

(8)

Finality of determination of Crofters' Commission—Order fixing fair rent, but not determining whether applicant a crofter—Act 1886, secs. 21 and 25.

A person, who held as sub-tenant part of a farm, presented an application to the Crofters' Commission to have the fair rent of his holding fixed under the Crofters Holding Act, 1886. No question was raised before the Commission as to whether the

applicant, being a sub-tenant, was a crofter within the meaning of the Act. The Commission pronounced an order fixing a fair rent, but did not in terms find that the applicant was a crofter in the sense of the Act. In an action by the landlord for reduction of the order fixing a fair rent, on the ground that the applicant, as a sub-tenant, was not a crofter in the sense of the Act, **held** that as the Commission had not considered the question whether the applicant was a crofter in the sense of the Act, their order was not final on that question, and that the landlord was entitled to have the decision of the Court on the question.

Question, whether if the Commission had determined that the applicant was a crofter in the sense of the Act, their determination would have been final.

Dalglish v Livingston, 1895, 22 R. 646; 32 S.L.R. 347; 2 S.L.T. 564.

(9)

Determination by Crofters' Commission that applicant a crofter—Reduction—Act 1886, secs. 20, 21, and 25.

In an application under sec. 20 of the Crofters Holdings (Scotland) Act, 1886, the Commissioners found and declared that the applicant was a crofter and fixed a fair rent. Thereafter the landlord raised an action against the applicant concluding (1) for reduction of the order, and (2) in the event of reduction, for removal of the applicant from his holding on the ground that he was not a crofter. The defender pleaded, *inter alia*, that the action was excluded by sec. 25—the finality clause of the statute. **Held** (1) that the Commissioners were entitled, for the purpose of determining whether they had jurisdiction to entertain the application, to decide whether the applicant was a crofter; (2) that their decision in so far as it determined the matter committed to them by the Act, *viz.*, the fixing of a fair rent, was not open to reduction; but (3) that their decision was not final on the question whether the applicant was a crofter, and so entitled to fixity of tenure, that being a question for the Court.

Sitwell v Macleod, 1899, 1 F. 950; 36 S.L.R. 762; 7 S.L.T. 62.

(10)

“Cottar”—Compensation for improvements.

Held that it is incompetent for a “cottar” to claim compensation for improvements, under the Act 1886, in the Court of Session.

M'Dougall v M'Alister, 1890, 17 R. 555; 27 S.L.R. 445.

(2) PROCEDURE.

(11)

Decree conform—Sheriff—No appeal.

Duke of Argyll v Cameron, 1888, 16 R. 139; 26 S.L.R. 96. SHERIFF, No. 16.

(12)

Suspension—Decree of removing—Caution—Juratory caution.

Livingstone v Beattie, 1890, 17 R. 702; 27 S.L.R. 562. EXPENSES, No. 961.

(13)

Interdict—Landlord refusing to accept legatee of deceased crofter—Act 1886, sec. 16.

Colquhoun v Mackenzie, 1894, 22 R. 23; 32 S.L.R. 33; 2 S.L.T. 276, No. 25, *infra*.

(14)

Interdict between crofters on same estate as to taking seaware—Landlord not called.

In 1903 crofters, who were in the occupation of their crofts at the passing of the Crofters Holdings (Scotland) Act, 1886, and whose rents were fixed by the Commissioners under the Act in 1889, brought an action against certain neighbouring crofters who held of the same landlord, for interdict against the defenders infringing rights which the pursuers averred that they possessed, as pertinents of their crofts, of taking seaware from the seashore (belonging to the common landlord) in the neighbourhood of the crofts. The defenders' crofts were not in existence at the passing of the Crofters Holdings Act, 1886, but were formed out of two farms under the powers of the Congested Districts (Scotland) Act, 1897. The pursuers averred that they were entitled to take seaware to the extent to which they had been in use to take it at the date when their rents were fixed; and that the defenders were not entitled to take it to any greater extent than the two tenant farmers had been in use to take it at that date. They averred that the defenders were now taking more than the farmers had been in use to take. The pursuers did not produce any written contract, estate regulation, or finding of the Crofters Commission defining the extent of seaware to which they were entitled. The defenders stated that they had the authority of the landlord for taking seaware as they had taken it, and pleaded "All parties not called," in respect that the landlord had not been called as a defender. The Court sustained the plea and dismissed the action.

Mackinnon v Macdonald, 1905, 7 F. 589; 42 S.L.R. 445; 12 S.L.T. 823.

(15)

Ejection and removing—Trustee in cession—Title to sue—Act 1886, sec. 1.

Mackenzie v Munro, 1894, 22 R. 45; 32 S.L.R. 43; 2 S.L.T. 290, No. 41, *infra*.

(16)

Order fixing fair rent for sub-tenant—No intimation to landlord—Landlord's title to reduce order.

Dalgleish v Livingston, 1895, 22 R. 646; 32 S.L.R. 347; 2 S.L.T. 564, No. 8, *supra*.

2. RIGHTS AND LIABILITIES OF LANDLORD AND CROFTER.

(1) "CROFTER" IN SENSE OF ACTS.

(17)

Sub-tenant.

Opinion (per Lord Kincairney) that a sub-tenant cannot be a crofter in the sense of the Act 1886.

M'Dougall v M'Alister, 1890, 17 R. 555; 27 S.L.R. 445.

(18)

Held that a sub-tenant was not a crofter within the meaning of the Act.

Livingstone v Beattie, 1891, 18 R. 735; 28 S.L.R. 518.

Dalgleish v Livingston, 1895, 22 R. 646; 32 S.L.R. 347; 2 S.L.T. 564.

(19)

Condition as to residence—Act 1886, sec. 34.

Held that a person who, between 1885 and 1888, lived at a distance from his holding, visiting it only occasionally for a week or a fortnight at a time to do necessary farm work, the house being at other times during this period unoccupied—was not a crofter within the meaning of the Act, in respect that he had not complied with the condition as to residence.

Livingstone v Beattie, 1891, 18 R. 735; 28 S.L.R. 518.

(20)

Heir of crofter dying after passing of Act—Removing—Act 1886, secs. 1, 19, and 34.

A person, who, at the passing of the Act, was a crofter complying with the conditions of sec. 34 of the Act, 1886, died before the parish in which his croft was situated had been declared a crofting parish in terms of sec. 19 of the Act. In an action of removing by his landlord against his heir who was in possession and occupation of the croft, **held** that the defender was a crofter in the sense of the Act, and entitled to resist removing, subject to the conditions of sec. 1 of the Act.

M'Nab v Campbell, 1888, 15 R. 472; 25 S.L.R. 352.

(21)

Bequest of holding—Act 1886, sec. 16.

Held that the power conferred on a crofter under sec. 16 of the Act 1886, of bequeathing his holding, was validly exercised in favour of a niece, although there were in existence sons and daughters of the crofter.

M'Lean v M'Lean, 1891, 18 R. 885; 28 S.L.R. 698.

(22)

Held that, under the 16th section of the Act 1886, a crofter is not entitled to bequeath his right to his croft to the son of his mother's sister.

Mackenzie v Cameron, 1894, 21 R. 427; 31 S.L.R. 347; 1 S.L.T. 480.

(23)
Succession to croft—Abandonment—Mora
—Act 1886, secs. 3 and 34.

Circumstances in which the heir of a crofter who had not possessed or paid rent for the croft for seventeen years was held barred by acquiescence and delay from claiming the croft.

Observed (by Lord President Dunedin) that the heir of a crofter who does not come forward and take up the croft debito tempore must be held to have abandoned it, and if two years' rent remains unpaid the right of the heir is forfeited under sec. 3 of the Crofters Holdings (Scotland) Act, 1886.

Opinion (per Lord M'Laren) that the heir must establish his claim within a reasonable time, and that such reasonable time could not exceed a year.

MacIver v MacIver, 1909 S.C. 639; 46 S.L.R. 552; 1909, 1 S.L.T. 258.

(24)
Renunciation by eldest heir portioner
—Act 1886, secs. 19 and 34.

A crofter died leaving five daughters, who at common law were his heirs portioners, the eldest of whom had children. The three eldest daughters renounced the succession to the croft by letter of renunciation addressed to the landlord, but the fourth claimed to succeed as her father's heir. **Held** that whether or not the renunciation by the eldest daughter had the effect of benefiting the landlord or the deceased's next heir the claimant could not succeed, as the next heir was the eldest son of the eldest daughter.

Balfour v Hutchison, (O.H.) 1899, 7 S.L.T. 82.

(25)
Legatee of crofter—Refusal of landlord to accept legatee—Interdict—Act 1886, sec. 16.

A crofter bequeathed his right to his holding to M, his mother's sister's son, who entered into occupation of the croft. The landlord having refused to accept him as legatee, M presented a petition to the sheriff for declarator that he was crofter in the holding. The Court having decided that M was not a legatee in the sense of the Crofters Holdings Act, 1886, the landlord applied for interdict against M continuing in possession. M pleaded that interdict was incompetent, as he had been up to the time of the decision in lawful possession of the croft under sec. 16, sub-sec. (f) of the Act. **Held** that as he had never been entitled to the character of legatee he had never been in possession of the holding, and that interdict was competent.

Colquhoun v Mackenzie, 1894, 22 R. 23; 32 S.L.R. 33; 2 S.L.T. 276.

(2) THE HOLDING.

(26)
Nature of crofter's right in holding—Property—March fence—Act 1861, c. 41.

Held that a crofter within the meaning of the Act 1886 is the tenant, not the pro-

prietor, of his holding, and that, therefore, he has no title to insist, under the Act 1861, c. 41, upon the proprietor of lands adjoining his croft paying half the cost of the march fence.

MacDonald v Dalgleish, 1894, 21 R. 900; 31 S.L.R. 751; 2 S.L.T. 67.

(27)
Whether an inn a "holding"—Bankruptcy—Sequestration—Contingent debt.

On expiry of a charge by a landlord on an extract decree for payment of arrears of the rent of an inn the landlord's assignee presented a petition for sequestration of the tenant's estate under the Bankruptcy Act, 1856. The debtor objected, on the ground that the debt was contingent until the Crofters' Commission issued its determination on an application by him to fix a fair rent for the holding. **Held** that as the debt was constituted by a decree for payment of arrears of rent of an inn, it could not be held to be for the rent of a "holding" within the meaning of the Act; that the debt was not therefore contingent; and that sequestration must be awarded.

Stuart & Stuart v Macleod, 1891, 19 R. 223; 29 S.L.R. 199.

(28)
Holding including right of ferry.

Circumstances in which held that a small holding included a right of ferry and was accordingly not a holding within the meaning of the Crofters Holdings Act, 1886.

Marquess of Breadalbane v Orr, (O.H.) 1896, 4 S.L.T. 75.

(29)
Right of crofter to take seaware—Right in question with singular successors—Act 1886, sec. 12.

In 1894 the proprietor of lands within a crofting parish sold part of these lands, and thereafter the purchaser brought an action against crofters on the remaining portion of the seller's lands praying to have the defenders interdicted from gathering seaware on the seashore ex adverso of the lands sold. In defence the crofters averred that from time immemorial they and their predecessors in the crofts had been in use and had right to gather seaware from the seashore in question, and that in 1887 their rents were fixed by the Crofters' Commission on the footing that they had that right. **Held** that the defenders were entitled to proof of their averments as to their right to gather seaware.

Macdonald v Macdougall, 1896, 23 R. 941; 33 S.L.R. 705; 4 S.L.T. 73.

(30)
Legal right or pertinential privilege.

Question (per Lord Kyllachy), whether pertinential privileges of taking seaware held by crofting tenants at the passing of the Crofters Holdings Act were then or are now of the nature of legal rights or were not then and are not now rather privileges held

necessarily at the landlord's pleasure, and subject always to estate regulations.

Mackinnon v Macdonald, 1905, 7 F. 589; 42 S.L.R. 445; 12 S.L.T. 823.

(31)

Right to cut peats.

The yearly tenant of a croft, with the right to cut peats in the moss of A, in 1867 obtained permission from the landlord to cut peats from the moss of B, said permission to continue during the pleasure of the landlord. The crofter thereafter got his peats from B and not from A. In 1887 the landlord withdrew the permission to cut peats in B. The crofter having continued to take peats from B, the landlord applied for interdict against him. The defender maintained that the right to cut peats from B formed part of his holding in the sense of the Act 1886, and that the application for interdict was therefore incompetent. **Held** that the landlord was entitled to withdraw the permission to cut peats conditionally given, and that interdict fell to be granted.

Parr v Maclean, 1889, 16 R. 810; 26 S.L.R. 586.

(32)

Right of tenant of farm to crops sown pending proceedings for enlargement of holdings.

In April, 1889, by order of the Crofters' Commissioners, certain lands—part of a farm held under a lease dated subsequently to the passing of the Act 1886—were assigned to certain crofters for the enlargement of their holdings. The landlord and tenant of the farm thereafter brought a suspension and interdict to have the crofters interdicted from entering upon the assigned lands, on the ground that they had no title, not having obtained decree conform to the order from the sheriff in terms of the Act, and obtained interim interdict. After certain procedure decree conform was pronounced on 3rd March, 1890, and the interim interdict was recalled. A second note of suspension and interdict against entering the lands was thereafter brought by the landlord and tenant on the ground that the order and all that had followed upon it was ultra vires of the Commissioners, the farm being held under the above lease. In July, 1890, the reasons of suspension were repelled. Meantime the tenant had sowed the assigned lands with the necessary seeds for crop 1890. In August, 1890, the crofters obtained a decree of ejection against the tenant, and claimed right to the crop sown. In a suspension by the tenant the Court **held** that in the circumstances the tenant had a right to sow the crop, and that the crop so sown by him belonged exclusively to him.

Question, whether the crofters might have a right to the profits of the crop.

Swanson v Grieve, 1891, 18 R. 371; 28 S.L.R. 258.

(33)

Enlargement of holdings—Application of Act to lands under lease.

Held upon a construction of the Act 1886 (1) that it was not ultra vires of the

Crofters' Commission to grant an application by crofters for a let of land for the enlargement of their holdings, although the land applied for was part of a farm let under a lease, the lease being dated subsequent to the Act, and the rent of the farm being above £100; and (2) that the effect of the order granting the application was not suspended till the termination of the lease.

Traill's Trustees v Grieve, 1890, 17 R. 1115; 27 S.L.R. 884.

(34)

Subdivision of holding—Act 1886, sec. 1, sub-sec. (4), and secs. 3 and 33.

Where a crofter had several years before the passing of the Act 1886 entered into an arrangement with a farm servant engaged yearly from Whitsunday to Whitsunday, to allow him to occupy a house and part of the arable ground on the croft, as part remuneration for his services, and had continued this arrangement after Whitsunday, 1887, **held** that, as the subdivision of the croft had taken place prior to the passing of the Act, the crofter had not by the mere continuance of the arrangement after that date subdivided his holding and so committed a breach of the statutory condition contained in sec. 1, sub-sec. (4), of the Act.

Lord Abinger v Cameron, 1888, 15 R. 598; 25 S.L.R. 396.

(35)

Right of crofter to build on croft for fish-curing—Act 1886, secs. 1, 8, 32, and 34.

Held that a crofter whose holding adjoined the seashore was not entitled under the Crofters Holdings (Scotland) Act, 1886, to erect or use buildings on his croft for the purpose of fish-curing.

Gilmour v Peterson, 1901, 3 F. 569; 38 S.L.R. 384; 8 S.L.T. 476.

(36)

Obligation to erect buildings—Whether buildings erected were in conformity with obligation.

The tenant of a small croft of ten acres, under a nineteen years' lease, bound himself in the lease to erect a house on the croft, for which he was to receive payment at the end of his lease "if built of stone and lime and slated." He built a house on the croft which was not of stone and lime, but was of stone and clay, and instead of being slated was partly tiled and partly thatched. **Held** that he was not entitled to receive payment for the house at the end of the lease.

Skinner v Lord Saltoun, 1886, 13 R. 823; 23 S.L.R. 595.

(3) MISCELLANEOUS.

(37)

Valuation Acts—Fair rent—Crofter proprietor—Act 1886, sec. 6.

A crofter, the rent of whose farm had

been fixed at a fair rent by the Crofters' Commission, purchased his holding. The assessor, assuming that the fair rent represented only the landlord's interest in the croft, added thereto, in fixing the valuation, a sum representing the annual value of permanent improvements on the holding. **Held** that the valuation was right.

Mackay v Assessor for Sutherlandshire, 1897, 24 R. 737; 34 S.L.R. 621; 4 S.L.T. 296.

(38)

Public burdens—Poor rate—Valuation roll.

In an action for payment of an assessment of poor rates laid upon the defender (1) as proprietor and (2) as occupier, in respect of tenants paying under £4 of rent, the defender maintained that the remedies for enforcing payment from her of these rates ought also to be suspended, because under an application made to the Crofters' Commission for reduction of rent her right of recovery had been suspended. **Held** that the defence was irrelevant.

Macfarlane v Matheson, 1888, 16 R. 230; 26 S.L.R. 155.

(39)

Compensation for improvements — Improvements executed under "any specific agreement in writing"—Imperfect agreement perfected by rei interventus—Act 1886, sec. 8.

Under the Crofters Holdings (Scotland) Act, 1886, sec. 8 (c) a crofter renouncing his tenancy cannot obtain compensation for permanent improvements executed by him in fulfilment of "any specific agreement in writing." **Held** that the expression "specific agreement in writing" was not limited to probative agreements, but included an imperfect agreement made perfect by rei interventus.

Wares v Duff-Dunbar's Trustees, 1920 S.C. 5; 57 S.L.R. 1; 1919, 2 S.L.T. 203.

(40)

Bankruptcy—Forfeiture of tenancy precluding renunciation—Compensation for improvements—Act 1886, secs. 1, 3, 7, and 8—Bankruptcy (Scotland) Act, 1856, sec. 81.

Where the estates of a crofter had been sequestered, but his landlord had taken no steps to remove him, **held** that the crofter having been made notour bankrupt, his tenancy was forfeited under sec. 3 of the Crofters Act, and consequently that he could not be called upon by the trustee to renounce a tenancy which no longer existed.

Mackenzie's Trustee v Mackenzie, 1905, 7 F. 505; 42 S.L.R. 376; 12 S.L.T. 728.

(41)

Ejection and removing—Trustee in cession—Title to sue—Act 1886, sec. 1.

The trustee in a process of cession against a crofter presented a petition for the summary removing and ejection of the crofter from his holding. The defender refused to grant a disposition omnium bonorum, and

the pursuer had taken no means to compel him to grant it, or to convert the cession into a sequestration. **Held** (by Lord Kincairney, Ordinary) that as the defender, under the provisions of the Crofters Holdings Act, 1886, had no power to assign his tenancy, his right to the croft could not pass to the pursuer, even had a disposition omnium bonorum been granted.

Opinions (per Lord Trayner and Lord Kincairney, Ordinary), that at the time the petition was presented the pursuer had no title to sue.

Mackenzie v Munro, 1894, 22 R. 45; 32 S.L.R. 43; 2 S.L.T. 290.

(42)

Resumption by landlord—Statutory notice to treat by railway company—Act 1886, sec. 2.

The Crofters' Commissioners authorised the resumption of a croft by the landlord, on whom a railway company had served a notice to treat with a view to acquiring inter alia the croft for the purposes of a railway. **Held** that this was resumption for a reasonable purpose within the meaning of sec. 2 of the Crofters Act, 1886.

Macmillan v Cameron, (O.H.) 1897, 5 S.L.T. 120.

II. UNDER THE SMALL LAND-HOLDERS (SCOTLAND) ACT, 1911.

1. LAND COURT—JURISDICTION AND PROCEDURE.

(43)

Powers of Land Court—Sist of proceedings ripe for judgment—Competency—Review by Court of Session—Act 1911, sec. 25 (2).

In July, 1914, an application for the formation of small holdings on certain farms was presented to the Land Court by the Board of Agriculture. Answers were lodged by the proprietor, proof was led, the farms were inspected on behalf of the court, and counsel were heard on 11th January, 1916. On 21st March, 1916, judgment not yet having been pronounced, the Board of Agriculture presented a minute in which they stated that, owing to the altered circumstances arising out of the war, they did not wish to proceed further with the application meanwhile; and craved the court to sist proceedings in hoc statu. The proprietor having lodged answers craving the court to pronounce judgment, the Land Court heard parties, and thereafter sisted the proceedings as craved. **Held** (by a majority of seven judges) that the Land Court had not acted ultra vires in granting the sist, and accordingly that its decision could not be reviewed.

Matheson v Board of Agriculture, 1917 S.C. 145; 54 S.L.R. 120; 1916, 2 S.L.T. 341.

(44)

Appeal to Court of Session—Appeal against an order pronounced by one member of the Land Court—Competency—Act 1911, sec. 25.
A party aggrieved by an order pronounced

by a single member of the Land Court may appeal to the Court of Session without first submitting the order to review by a court consisting of three or more members of the Land Court.

Strachan v Hunter, 1916 S.C. 901; 53 S.L.R. 725; 1916, 2 S.L.T. 89.

(45)

Procedure—Amendment by the Court—Application by landholders amended so as to apply to statutory small tenants—Competency—Act 1911, secs. 3 (12) and 32 (4).

Tenants of a holding presented to the Land Court, in the character of landholders, an application for the fixing of a fair rent, and parties were heard on the application. Thereafter the Land Court, being of opinion that the greater part of the improvements were not provided by the tenants, amended the application at their own hand so as to make it apply to proceedings at the instance of statutory small tenants, and, without hearing parties further, proceeded to fix an equitable rent and the period of renewal of the tenancy. **Held** that the amendment was competent, but that the Land Court were bound to give the landlord an opportunity of being heard on any objections he might have to state under sec. 32 (4) of the Small Landholders Act, 1911.

Fullarton v Duke of Hamilton's Trustees, 1918 S.C. 292; 55 S.L.R. 371; 1918, 1 S.L.T. 294.

(46)

—Motion for rehearing pending requisition for special case—Act 1911—Rules of the Scottish Land Court, Nos. 90 and 102.

An application to the Scottish Land Court for an order declaring the applicant to be a landholder or a statutory small tenant was refused by the Land Court. The applicant required a special case to be stated for appeal to the Court of Session; and thereafter, while the case was being adjusted, he lodged an application for a rehearing. He refused to withdraw the requisition for a special case, and the Land Court refused the application for a rehearing, on the ground that it was incompetent pending the requisition for a special case. **Held** that the application for a rehearing was competent, and ought to have been dealt with by the Land Court on its merits.

M'Coll v Beresford's Trustees, 1920 S.C. 394; 57 S.L.R. 321; 1920, 1 S.L.T. 283.

(47)

Admissibility of evidence—Meaning of "landholder"—Evidence as to sub-letting to summer visitors—Act 1911, sec. 2.

In an application to the Land Court under the Small Landholders (Scotland) Act, 1911, by the occupier of a dwelling-house and garden and a quarter of an acre of agricultural land, for a finding that he was a "landholder" of the subjects within the meaning of the Act, the Land Court disallowed evidence regarding a practice of sub-letting the house to summer tenants and the revenue

derived therefrom, which the landlord proposed to lead for the purpose of showing that the applicant was not a "landholder."

Held that the evidence was competent and that it ought to have been admitted; and cause remitted to the Land Court to take the evidence and state the facts which they found proved by such evidence.

Sinclair v Campbell, 1919 S.C. 341; 56 S.L.R. 210; 1919, 1 S.L.T. 136.

2. CONSTITUTION OF NEW HOLDINGS.

(1) EFFECT OF ORDER BY LAND COURT.

(48)

Termination of tenancy—Notice to quit—Tacit relocation—Agricultural Holdings (Scotland) Act, 1908, sec. 18—Act 1911, sec. 7 (9) and (11).

A tenant occupied a farm on a lease which expired at Martinmas, 1913. On 9th November, 1912, the landlord duly gave him notice to quit at Martinmas, 1913, in terms of the Agricultural Holdings Act of 1908. In June, 1913, the tenant wrote a letter to the landlord stating that he was willing that, instead of the notice of termination taking effect at Martinmas, 1913, it should do so at Martinmas, 1914, "when my tenancy will accordingly cease and determine without further notice." This offer was accepted on behalf of the landlord. On 31st December, 1913, the Land Court pronounced an order empowering the Board of Agriculture to constitute small holdings on the farm up to Martinmas, 1915. This order was intimated to the tenant on 9th February, 1914. A few days later the tenant inquired of the landlord's factors whether they proposed to give him notice under the Agricultural Holdings Acts terminating his tenancy under the letter of June, 1913. The factors declined to give such notice, as it was uncertain that the Board would take possession at Martinmas, 1914. Ultimately the Board decided to take over the farm at Martinmas, 1914. **Held** (1) that the order of the Land Court did not debar the landlord from re-letting the farm, so long as the Board of Agriculture had not exercised their powers under the order; (2) that the tenant's letter of June, 1913, did not render it unnecessary for the landlord to give notice to quit at Martinmas, 1914, in terms of sec. 18 of the Agricultural Holdings Act, 1908; (3) that, no notice to quit at that term having been given, the tenancy was continued by tacit relocation until Martinmas, 1915, with the statutory rights of compensation.

Gleddinning v Board of Agriculture, 1918 S.C. (H.L.) 56; 55 S.L.R. 180; 1918, 1 S.L.T. 102.

(49)

Grazing rights of third party—Act 1911, sec. 24 (1) and (2).

M'Martin v Robertson, 1914 S.C. 783; 51 S.L.R. 677; 1914, 2 S.L.T. 37, No. 82, *infra*.

(2) COMPENSATION TO LANDLORD.

Act 1911, sec. 7 (11).

(50)

Compensation for depreciation in selling value of estate owing to presence of small holdings.

The Small Landholders (Scotland) Act, 1911, sec. 7 (11), provides that when small holdings are compulsorily constituted on an estate, compensation shall be paid by the Board of Agriculture for Scotland to the landlord "in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed." **Held** that, under this provision, the Land Court or an arbiter, as the case may be, is entitled to award compensation to a landlord for any reduction in the selling value of his estate directly due to the establishment thereon of small holdings, although the rental of the estate may not be diminished.

Scott Plummer v Board of Agriculture, 1916 S.C. (H.L.) 94; [1916] 1 A.C. 675; 53 S.L.R. 207; 1916, 1 S.L.T. 92.

(51)

Depreciation in value of estate—Depreciation "directly attributable to" constitution of holdings—Increase in rates due to new school.

The constitution of new holdings upon an estate made it necessary to erect a new school for the children of the small landholders. **Held** that depreciation in the value of the landlord's estate due to the consequent increase in the school rate could not be said to be "directly attributable to" the constitution of the new holdings within the meaning of the Small Landholders Act, 1911, sec. 7 (11), and, accordingly, that the landlord was not entitled to compensation therefor. **Opinion** that, as the depreciation occasioned by a rise in rates was not peculiar to the estate in question but affected all rateable lands in the parish, it was not depreciation of such a class as to entitle the landlord to compensation under the Small Landholders Act.

Orde v Board of Agriculture, (O.H.) 1918 S.C. 891; 56 S.L.R. 22; 1918, 2 S.L.T. 210.

(52)

Compensation for damage to letting value—Set-off—Capital payment for buildings taken.

Held that an arbiter, in determining the compensation due to a landlord in respect of the formation of a small holding on his farm, was entitled to set-off against a sum awarded in respect of the reduction in the letting value of the farm an amount representing the capitalised value of a 4 per cent. return on a sum allowed to the landlord for the buildings on the small holding taken over from him.

Macdonald v Board of Agriculture, (O.H.) 1915 S.C. 1127; 53 S.L.R. 4; 1915, 1 S.L.T. 429.

(3) COMPENSATION TO TENANTS.

Act 1911, sec. 7 (11).

(53)

Where whole farm taken—Annual profits—Deductions—Compensation for realisation of stock.

The Board of Agriculture acquired the right to take over compulsorily, for the formation of small holdings, the whole of a farm which was let to two tenants on a lease of which sixteen years had still to run, with breaks in four years and eleven years in favour of either party. **Held** (1) that, in estimating the compensation payable to the tenants, compensation in respect of loss of annual profits was payable only for the period which might reasonably be expected to elapse before the tenants could acquire another farm of similar class and quality, and not for the whole remaining years of the lease, subject to deduction for the contingency of the lease being terminated at one of the breaks; (2) that in estimating annual profits the arbiter was entitled to deduct from receipts a sum representing the value of the tenants' labour on the farm without making any corresponding award in their favour in respect of possible loss due to their being deprived of their situations on their farm; (3) that from annual profits he was entitled to deduct interest at the rate of 5 per cent. on the amount of the tenants' capital embarked in the farm; (4) that the tenants were not entitled to a sum for estimated loss on realisation of stock if the Board should finally determine to go on with the scheme.

MacIntyre v Board of Agriculture, (O.H.) 1916 S.C. 983; 53 S.L.R. 316; 1916, 2 S.L.T. 198.

(54)

Termination of tenancy—Notice to quit—Tacit relocation.

Glendinning v Board of Agriculture, 1918 S.C. (H.L.) 56; 55 S.L.R. 180; 1918, 1 S.L.T. 102, No. 48, supra.

(55)

Interdict by Board of Agriculture against tenant selling straw—Tenant afterwards found entitled to tenancy subsequent to date of interdict—Action of damages by tenant—Jurisdiction of Court of Session.

The Board of Agriculture acquired a farm for the purpose of forming small holdings, and dispossessed the tenant at Martinmas, 1914, interdicting him from disposing of the straw and chaff of the 1914 crop. The tenant, who was legally entitled to remain until Martinmas, 1915, was awarded compensation in an arbitration under the Small Landholders (Scotland) Act, 1911, sec. 7, and thereafter raised an action against the Board of Agriculture for declarator that the straw and chaff was his own property and for damages. **Held** that the Court had jurisdiction to entertain the action, and that the claim did

not fall to be determined by the Land Court or by an arbiter.

Glendinning v Board of Agriculture for Scotland, 1921, 1 S.L.T. 174.

(4) PROCEDURE IN ARBITRATION.

(56)

Alternative award—Competency of award—Action to enforce one alternative—Competency of action—Agreement between parties prorogating jurisdiction of Court—Act 1911, sec. 7 (11).

The Board of Agriculture having taken over a farm for small holdings as at Martinmas, 1914, the tenant of the farm claimed compensation, and an arbitration took place. A question having arisen whether the tenancy terminated at Martinmas, 1914, or at Martinmas, 1915, the parties lodged a joint minute stating that, if the arbiter was so advised, he should issue alternative findings, and that in the event of either party seeking to enforce his award no objection should be taken by the other party either to the form of the award, or to an action for enforcement, or the conclusions of such an action. In his award the arbiter found that the claimant's tenancy terminated at Martinmas, 1914, and assessed the compensation accordingly, but "alternatively, and in the event of it being hereafter held that the compensation payable to the claimant falls to be assessed on the footing that his tenancy of the said farm continues after Martinmas, 1914," he awarded additional compensation. The tenant brought an action against the Board of Agriculture in the Court of Session for declarator that his tenancy continued till Martinmas, 1915, and for payment of the additional sum awarded by the arbiter in the second alternative of his award. **Held** (1) that the arbiter's award was not a final decision that the tenancy terminated at Martinmas, 1914, but was an alternative award leaving the question open for the determination of the Court; (2) that, in the special circumstances (without finally deciding the competency of such proceedings), the House ought to entertain the action, in respect that, owing to the agreement between the parties, there had been no challenge of the competency; that the alternative award and the proceedings following thereon were not clearly invalid; and that similar proceedings had been entertained in *Scott Plummer v Board of Agriculture*, No. 50, *supra*.

Glendinning v Board of Agriculture, 1918 S.C. (H.L.) 56; 55 S.L.R. 180; 1918, 1 S.L.T. 102.

(57)

Review—Case stated for opinion of Lord Ordinary—Competency of reclaiming note—Act 1911, sec. 7 (11)—Agricultural Holdings (Scotland) Act, 1908, second schedule, par. 9.

A reclaiming note against an opinion of the Lord Ordinary, pronounced in a case stated by an arbiter acting in an arbitration for the assessment of compensation

under sec. 7 (11) of the Small Landholders (Scotland) Act, 1911, is incompetent.

Cathcart v Board of Agriculture, 1915 S.C. 166; 52 S.L.R. 108; 1914, 2 S.L.T. 379.

(58)

Special case—Expenses—Act 1911, sec. 7 (11)—Agricultural Holdings (Scotland) Act, 1908, second schedule.

Held that the expenses of a special case stated for the opinion of the Lord Ordinary under the Small Landholders (Scotland) Act, 1911, sec. 7 (11), and the Agricultural Holdings (Scotland) Act, 1908, second schedule, are not "expenses of and incidental to the arbitration" within the meaning of paragraph 14 of that schedule; and accordingly that they fall to be dealt with by the Lord Ordinary and not by the arbiter, unless remitted to him for his decision.

MacIntyre v Board of Agriculture, (O.H.) 1916 S.C. 983; 53 S.L.R. 316; 1915, 2 S.L.T. 198.

3. ENLARGEMENT OF HOLDINGS.

(59)

Available land for enlargement of holdings—Land owned by a different proprietor—Act 1886, sec. 13 (1)—Act 1911, sec. 16 (2) and 26 (2).

Held that, under the Small Landholders Acts, land belonging to one proprietor may be taken compulsorily for the enlargement of a holding on the estate of another proprietor.

Von Schroder's Trustees v Board of Agriculture, 1915 S.C. 1; 52 S.L.R. 1; 1914, 2 S.L.T. 262.

4. RESUMPTION OF HOLDING BY LANDLORD, SEC. 32 (15).

(60)

Duty of Land Court in applications for resumption of holding—Assessment of tenant's claim to compensation.

Whyte v Stewart, 1914 S.C. 675; 51 S.L.R. 596; 1914, 1 S.L.T. 451, No. 96, *infra*.

(61)

Appeal—Death of landlord—Right of his representatives to insist in appeal.

Whyte v Stewart, 1914 S.C. 675; 51 S.L.R. 596; 1914, 1 S.L.T. 451, No. 97, *infra*.

5. QUALIFICATIONS OF LANDHOLDER.

(1) RESIDENCE.

(62)

Residence on or within two miles of holding—Heir succeeding to holding—Whether obligation continuing—Act 1911, sec. 2 (1) (ii.) and (2).

The existing yearly tenant of a holding having died, his heir continued the cultivation of the holding, but at no time resided

on, or within two miles from, the holding. He renounced the holding as at the first term of Whitsunday ensuing after his predecessor's death, and claimed compensation for improvements executed by his predecessor. **Held** that the heir was not disqualified from being a landholder, and from claiming compensation, by the fact that he did not reside on, or within two miles from, the holding, in respect that the qualification of residence was not a continuing condition of the status of a landholder, but applied only at the commencement of the Small Landholders Act of 1911.

Rogerson v Viscount Chilston, 1917 S.C. 453; 54 S.L.R. 366; 1917, 1 S.L.T. 217.

(63)

Tenant from year to year—Application to Land Court by tenant who, before passing of Act, received notice to quit after Act came into operation—Competency—Act 1911, sec. 2 (1) (ii).

A yearly tenant in possession of a holding at 1st April, 1912, when the Small Landholders (Scotland) Act, 1911, came into operation, had, before the passing of that Act, received notice to remove at Whitsunday, 1912. In an application by him to the Land Court for an order fixing the rent and the period of renewal of his tenancy, **held** that the service of the notice of removal did not exclude the application as incompetent.

Morison's Trustees v Grant, 1913 S.C. 919; 50 S.L.R. 696; 1913, 1 S.L.T. 482.

(2) AUXILIARY OCCUPATION.

(64)

"Innkeeper"—Tenant holding licence for sale of porter and ale—Act 1886, secs. 1 (8) and 33—Agricultural Holdings (Scotland) Act, 1908, sec. 35 (1)—Act 1911, secs. 10 (1) and 26 (7).

At the commencement of the Small Landholders Act, 1911, the yearly tenant of a dwelling-house and 10½ acres of arable land held a licence for the sale of porter and ale, which he sold to occasional customers, the amount of trade done by him in this way being very small. The house was not larger than a suitable dwelling-house for the holding; no part of it was fitted up as an inn or public-house; and no travellers were received as lodgers there. **Held** (1) that the tenant was not an "innkeeper" within the meaning of the Small Landholders Acts, and therefore was not excluded as such from the benefits of the Acts; (2) that the subjects were not prevented, by reason of the trade carried on therein, from being a "holding" within the meaning of the Acts. **Opinion** (per Lord President Strathclyde) that the words in sec. 33 of the Crofters Holdings Act, 1886, "placed in the district by the landlord for the benefit of the neighbourhood," apply to "innkeeper" as well as "tradesman."

Taylor v Fordyce, 1918 S.C. 824; 55 S.L.R. 746; 1918, 2 S.L.T. 186.

See also Stormonth Darling v Young, 1915 S.C. 44; 52 S.L.R. 35; 1914, 2 S.L.T. 286, No. 79, *infra*.

(3) PROVISION OF IMPROVEMENTS.

(65)

Improvements provided by "predecessor in the same family"—Improvements by father-in-law and brother-in-law of tenant—Assignment of predecessor's interest in the lease—Act 1911, sec. 2 (1) (iii.) (a).

Held (1) that improvements provided by a tenant's father-in-law and brother-in-law, who were his predecessors in the holding, were not improvements provided by predecessors "in the same family" within the meaning of sec. 2 (1) (iii.) (a) of the Small Landholders Act, 1911; and (2) that the tenant could not, by means of an assignment from these predecessors of their interest in the lease, acquire a right in the improvements for the purpose of bringing himself within the operation of sec. 2 (1) (iii.) (a), and accordingly that the tenant was not a "landholder." **Question**, whether the word "predecessor" occurring in sec. 2 (1) (iii.) (a) could be read as including more than one predecessor.

Kidd v Morison, 1916 S.C. 759; 53 S.L.R. 604; 1916, 2 S.L.T. 28.

(66)

Improvements provided by a sub-tenant—Act 1911, sec. 2 (1) (iii.) (a)—Act 1886, sec. 6 (1).

Held that, in determining whether a tenant was a landholder or a statutory small tenant, and in fixing a fair rent, the Land Court were not entitled to take into consideration, as tenant's improvements, improvements which had been executed by a member of the same family while only sub-tenant, in respect that a sub-tenant was not a "predecessor" in the holding.

Hamilton v Duke of Hamilton's Trustees, 1918 S.C. 282; 55 S.L.R. 364; 1918, 1 S.L.T. 291.

(67)

Improvements provided without fair consideration—Proof to satisfaction of Land Court—Act 1911, sec. 2 (1) (iii.) (a).

In an application to the Land Court by a tenant, who had renounced his lease, for compensation in respect of the improvements executed or paid for by himself or his predecessors, circumstances in which **held** that the Land Court were entitled to find that it was proved to their satisfaction that payment or fair consideration had not been received from the landlord for certain permanent improvements made by a predecessor in the same family, and that the applicant was a landholder within the meaning of the Small Landholders Act, 1911.

Smith v Marquis of Aberdeen, 1916 S.C. 905; 53 S.L.R. 685; 1916, 2 S.L.T. 109.

See also Mackinnon v Duke of Hamilton's Trustees, 1918 S.C. 274; 55 S.L.R. 359; 1918, 1 S.L.T. 288, No. 83, *infra*.

6. CONDITIONS RELATING TO THE "HOLDING."

(1) "PRESENT RENT."

(68)

Period at which present rent falls to be ascertained—Act 1911, secs. 13 (c) and 26 (3) (a).

Held that, for the purpose of determining whether a tenant is excluded from the operation of the Small Landholders Act in respect that his "present rent" exceeds £50, the rent which has to be considered is the rent payable for the last year of his tenancy, and not the rent payable at the date of the commencement of the Act.

Scott v Duff, 1916 S.C. 813; 53 S.L.R. 621; 1916, 2 S.L.T. 60.

(69)

Tenant's share of fire insurance premium—Act 1911, secs. 13 and 26 (3) (a).

A tenant whose yearly rent was £50 also made to his landlord an annual payment of 1s. 10d., being his proportion of a premium of insurance over certain buildings on his holding. Held that this payment of 1s. 10d. did not fall to be taken into account in computing the tenant's "present rent" within the meaning of sec. 26 (3) (a) of the Act.

Marquis of Breadalbane v Robertson, 1914 S.C. 215; 51 S.L.R. 156; 1914, 1 S.L.T. 19.

(2) CHARACTER OF "HOLDING."

(70)

Subjects separately rented but worked together as one holding—Act 1911, sec. 26 (1) and (2).

A crofter, who in 1886 was tenant of a holding with a variable right of grazing on other land, acquired from his landlord in 1896 the tenancy of a barn and stable. Separate rents were paid, and receipts granted, for the original holding, the grazing right, and the barn and stable, but they were all worked together as one holding. Held that, in the circumstances, the grazing right and the barn and stable were separate tenancies and did not form part of the holding.

Murray v Pilkington, 1919 S.C. 156; 56 S.L.R. 104; 1919, 1 S.L.T. 9.

(71)

Separate subjects acquired under different tenancies—Act 1911, sec. 26 (1) and (2).

An application having been presented to the Land Court in respect of subjects consisting of a dwelling-house, offices, stable, and garden ground, with certain grazing rights in an adjacent pasture, and also a field of 3 acres situated less than 2 miles distant and held by the same tenants on a separate tenancy, held that the separate subjects had, in the circumstances, been worked as one holding, and accordingly formed a "holding"

within the meaning of the Small Landholders Acts.

Fullarton v Duke of Hamilton's Trustees, 1918 S.C. 292; 55 S.L.R. 371; 1918, 1 S.L.T. 294.

(72)

Subjects excluded—Heritages occupied by a sub-tenant—Act 1911, sec. 26 (6).

Opinions that a dwelling-house, erected on a small holding and let for twelve months to a sub-tenant who agreed to vacate it for summer letting by the landholder during two months in the year, was not excluded from the holding as being "occupied by a sub-tenant" within the meaning of sec. 26 (6) of the Small Landholders Act, 1911, in respect that the period of the tenancy was less than a year.

M'Neill v Duke of Hamilton's Trustees, 1918 S.C. 221; 55 S.L.R. 329; 1918, 1 S.L.T. 265.

(73)

Land within "municipal boundary"—Burgh—Burgh boundaries—Act 1911, sec. 26 (3) (c).

Subjects outside the parliamentary and police boundaries of a royal burgh but within the boundaries of the royalty of the burgh held to be within the "municipal boundary" of the burgh in the sense of sec. 26 (3) (c) of the Small Landholders (Scotland) Act, 1911, and accordingly to be excluded by that section from the operation of the Act.

Clark v Fraser, 1919 S.C. 201; 56 S.L.R. 132; 1919, 1 S.L.T. 23.

(74)

Subjects used as market garden—Act 1911, sec. 26 (3) (d) and (f)—Agricultural Holdings (Scotland) Act, 1908, sec. 35 (1).

A piece of ground measuring 10 acres or thereby was let to a tenant, who used it for the purpose of growing raspberries, which he sold mainly to jam makers, but occasionally to fruit dealers. The whole of the ground was planted with raspberry bushes permanently set out. In the lease of the ground it was stipulated that it was not let, and was not to be treated, as a market garden. Held that the subjects constituted a market garden, and were, therefore, excluded from the operations of the Landholders Acts by virtue of sec. 26 (3) of the Small Landholders Act, 1911, and sec. 35 (1) of the Agricultural Holdings Act, 1908. Opinions that the subjects, if they were not a market garden, would nevertheless be excluded from the operation of the Landholders Acts by sec. 26 (3) (f) of the Small Landholders (Scotland) Act, 1911, in respect that they would not fall within the definition of a "holding" in sec. 35 (1) of the Agricultural Holdings (Scotland) Act, 1908.

Grewar v Moncur's Curator Bonis, 1916 S.C. 764; 53 S.L.R. 596; 1916, 2 S.L.T. 20.

(75)

Buildings not required for agricultural or pastoral purposes — Excision of buildings, leaving remainder a statutory "holding"—

Act 1911, sec. 26 (3) (f)—Agricultural Holdings (Scotland) Act, 1908, sec. 35 (1).

Held that where, at the date of the Small Landholders Act, 1911, coming into operation, there existed on land, held on such a tenancy that it would otherwise constitute a "holding," a dwelling-house or other building forming an integral and material part of the subjects of tenancy but not erected or required for agricultural or pastoral purposes, such dwelling-house or other building with the pertinents and site thereof might be excised from the land held on such tenancy, leaving the remainder a statutory "holding" under the Act.

M'Neill v Duke of Hamilton's Trustees, 1918 S.C. 221; 55 S.L.R. 329; 1918, 1 S.L.T. 265.

(76)

Subjects consisting of a cottage with one rood of potato land and a share in common grazing—Act 1911, sec. 26 (3) (f)—Agricultural Holdings (Scotland) Act, 1908, sec. 35 (1).

Held that subjects consisting of a small thatched cottage in a village in Argyllshire, with a plot of garden ground and a byre, and one rood of potato land situated at a short distance from the cottage, and a one-fifteenth share in a common grazing extending to 58 acres for the grazing of one cow, all let to one tenant at a cumulo rent of £4 4s. 6d., were a "holding" within the meaning of the Small Landholders (Scotland) Act, 1911.

Malcolm v M'Dougall, 1916 S.C. 283; 53 S.L.R. 224; 1916, 1 S.L.T. 33.

(77)

"Lotted" lands.

Lady Seafield's Trustees v M'Currah, 1914 S.C. 174; 51 S.L.R. 141; 1913, 2 S.L.T. 429, No. 88, *infra*.

(78)

Commodious dwelling-house, with 3 acres of arable ground—Act 1911, sec. 26 (3) (f)—Agricultural Holdings (Scotland) Act, 1908, sec. 35 (1).

Held that subjects consisting of a commodious dwelling-house in Arran, having a byre and other offices, with 3 acres of arable land including garden ground, all let to one tenant at a rent of £30, of which the valuation roll disclosed £5 to be the value of the land and £25 to be the value of the buildings, were a "holding" within the meaning of the Small Landholders (Scotland) Act, 1911.

Hamilton v Duke of Hamilton's Trustees, 1918 S.C. 282; 55 S.L.R. 364; 1918, 1 S.L.T. 291.

(79)

Subjects consisting of smithy and land—Subjects not wholly agricultural or pastoral—"Tradesman placed in the district by the landlord for the benefit of the neighbourhood"—Act 1911, secs. 26 (3) (f), (7), (10), and 32—Agricultural Holdings (Scotland) Act, 1908, sec. 35 (1)—Act 1886, sec. 33.

The yearly tenant of subjects consisting of a blacksmith's shop, a dwelling-house, and 5½

acres of land, applied to the Land Court under the Small Landholders (Scotland) Act, 1911, to fix the first equitable rent payable by him as statutory small tenant of the subjects. The house and shop were built and maintained by the landlord, and the shop had always been occupied as a smithy by the applicant and the previous tenants; but the applicant was under no obligation either to use the shop as a smithy or to do blacksmith work for the tenants of the landlord's estate, nor were these tenants bound to employ him. The value of the smithy to the applicant was less than that of the house and lands. Held that the subjects did not form a holding to which the provisions of the Small Landholders Acts applied, in respect (1) that they were not "wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral," and accordingly did not constitute a "holding" as defined in sec. 35 of the Agricultural Holdings (Scotland) Act, 1908; and, further, (2) that they were let to "a tradesman placed in the district by the landlord for the benefit of the neighbourhood" within the meaning of sec. 33 of the Crofters Holdings (Scotland) Act, 1886.

Stormonth Darling v Young, 1915 S.C. 44; 52 S.L.R. 35; 1914, 2 S.L.T. 286.

See also *Taylor v Fordyce*, 1918 S.C. 824; 55 S.L.R. 746; 1918, 2 S.L.T. 186, No. 64, *supra*.

(80)

Subjects consisting of weaving mill and croft—Small Landholders (Scotland) Act, 1911, sec. 26 (3) (f)—Agricultural Holdings (Scotland) Act, 1908, sec. 35 (1).

Held that subjects consisting of a carding, spinning, and weaving mill, and a house and steading with 9 acres of agricultural land and 3 roods of pasture, let to one tenant at a cumulo rent of £19 5s. (of which £10 5s. effeired to the mill and £9 to the rest of the subjects) did not constitute a holding as defined in the Agricultural Holdings (Scotland) Act, 1908, and therefore were not a holding within the meaning of the Small Landholders (Scotland) Act, 1911.

Yool v Shepherd, 1914 S.C. 689; 51 S.L.R. 639; 1914, 1 S.L.T. 478.

(81)

Permanent grass park held for business not "primarily agricultural or pastoral"—Pasture tenanted by dairykeeper—Act 1911, sec. 26 (3) (g).

A dairykeeper was the yearly tenant of two fields of permanent pasture which he used for grazing and feeding five cows, whose milk he sold in his dairy business along with the milk, which he purchased, of ten other cows belonging to neighbouring farmers. Held that the subjects were held by him for the purposes of a business or calling which was "primarily pastoral," and accordingly did not fall within the provisions of sec. 26 (3) (g) of the Small Landholders (Scotland) Act, 1911, so as to exclude him from the benefit of the Act.

Howatson v M'Clymont, 1914 S.C. 159; 51 S.L.R. 153; 1913, 2 S.L.T. 441.

7. RIGHTS OF LANDHOLDERS.

(1) EXCLUSIVE POSSESSION.

(82)

Grazing rights of third party—Act 1911, secs. 10, 12, 24 (1) and (2).

Certain yearly tenants of holdings, which comprised buildings, arable land, and a right of common grazing, applied to the Land Court for orders declaring them to be landowners within the meaning of the Small Landowners (Scotland) Act, 1911, and fixing fair rents for their holdings. The winter grazing, both of the arable lands and of the common pasturage, was let by the landlord to the tenant of a neighbouring farm, and this fact was set forth in the applications in question. The Land Court having pronounced orders declaring the applicants to be landholders and fixing fair rents, they thereafter sought to interdict the farm tenant from grazing his stock upon the subjects, on the ground that, in virtue of these orders, they were entitled to the exclusive possession of their holdings. Held that the orders had no such effect, but applied only to the holdings as possessed at the time when the applications were made; and interdict refused.

M'Martin v Robertson, 1914 S.C. 783; 51 S.L.R. 677; 1914, 2 S.L.T. 37.

(2) EQUITABLE RENT.

(83)

Considerations in fixing fair rent—Improvements executed by tenant in implement of obligations in lease—Act 1886, sec. 6 (1).

Held that, in fixing a fair rent for a small holding under sec. 6 (1) of the Crofters Holdings Act, 1886, the Land Court were not bound to exclude from consideration as tenant's improvements such improvements as were executed by the tenant or his predecessors in the same family in implement of a specific agreement in writing to execute them. Observed that it will be for the Land Court to consider in every case whether the tenant or his predecessor has received fair value for the improvements.

Mackinnon v Duke of Hamilton's Trustees, 1918 S.C. 274; 55 S.L.R. 359; 1918, 1 S.L.T. 288.

(84)

Houses yielding revenue from letting to summer visitors—"Circumstances of the case, holding, and district"—Act 1886, sec. 6 (1).

Held that revenue derived by a small landholder from letting houses situated upon his holding to summer visitors should be taken into account by the Land Court in fixing a fair rent for the holding, in respect that, in terms of the Small Landholders Acts, "all the circumstances of the case, holding, and district" had to be considered.

M'Neill v Duke of Hamilton's Trustees, 1918 S.C. 221; 55 S.L.R. 329; 1918, 1 S.L.T. 265.

(85)

Risk of damage to crops by game—Act 1886, sec. 6 (1).

Held that, in fixing a fair rent for a holding, the Land Court is entitled to take into account the fact that the crops on the holding, by reason of its situation, are exposed to the risk of damage by game.

M'Kelvie v Duke of Hamilton's Trustees, 1918 S.C. 301; 55 S.L.R. 374; 1918, 1 S.L.T. 295.

(3) COMPENSATION FOR IMPROVEMENTS.

(86)

Landholder renouncing his tenancy—Discharge of claim for compensation—Discharge granted prior to creation of statutory right—Act 1886, sec. 8.

In an application to the Land Court by a tenant, who had renounced his lease, for compensation in respect of the improvements executed or paid for by himself or his predecessors, circumstances in which held that a certain discharge by the applicant's father, granted prior to the creation of the statutory right to compensation, of all claims for improvements did not preclude the Land Court from considering, and awarding compensation for, the improvements executed by him.

Smith v Marquis of Aberdeen, 1916 S.C. 905; 53 S.L.R. 685; 1916, 2 S.L.T. 109.

(87)

Death of landholder—Heir not residing on or within two miles of holding.

Rogerson v Viscount Chilton, 1917 S.C. 453; 54 S.L.R. 366; 1917, 1 S.L.T. 217, No. 62, supra.

8. STATUTORY SMALL TENANTS.

(1) QUALIFICATIONS.

(88)

"Lotted" lands.

Held that the provisions of the Small Landholders (Scotland) Act, 1911, applied to "lotted lands," not equipped with buildings, which had been voluntarily laid out by the proprietor of an estate for occupation as agricultural subjects by householders in an adjoining village, and that a yearly tenant of three of these lots was a statutory small tenant within the meaning of the Act.

Lady Seafield's Trustees v M'Currah, 1914 S.C. 174; 51 S.L.R. 141; 1913, 2 S.L.T. 429.

(89)

Joint tenants—Act 1911, secs. 2 (1) (iii.) (b) and 26 (8).

Held that the provisions of sec. 32 of the Small Landholders (Scotland) Act, 1911, as to statutory small tenants, applied to the case of a holding which at the commencement of the Act was held by joint tenants, and which continued to be held by the same tenants at the date of their application to the Land Court.

Carmichael v Maccoll, 1913 S.C. 916; 50 S.L.R. 693; 1913, 1 S.L.T. 480.

(2) EQUITABLE RENT.

(90)

Considerations in fixing rent—Tenant's previous loss in working—Act 1911, sec. 32.

Observed that, in fixing an equitable rent, the Land Court is not entitled to reduce the rent below what would otherwise be an equitable rent, for the purpose of recouping the tenant for loss incurred in working the holding or for the over-renting of the holding during the previous period of his tenancy.

Whyte v Stewart, 1914 S.C. 675; 51 S.L.R. 596; 1914, 1 S.L.T. 451.

(91)

Houses yielding revenue from letting to summer visitors—"Circumstances of the case, holding, and district"—Act 1911, sec. 32 (8).

Observed that revenue derived by a statutory small tenant from letting houses situated on his holding to summer visitors should be taken into account by the Land Court in fixing an equitable rent for the holding, in respect that, in terms of sec. 32 (8) of the Small Landholders Act, 1911, "all the circumstances of the case, holding, and district" had to be considered.

Fullarton v Duke of Hamilton's Trustees, 1918 S.C. 292; 55 S.L.R. 371; 1918, 1 S.L.T. 294.

(92)

Improvements—Improvement executed by tenant in implement of specific agreement—Act 1911, sec. 32 (8).

Held that the Land Court, in fixing an equitable rent, was entitled to take into consideration improvements executed by the tenant, notwithstanding that they were improvements which he was bound by a specific agreement in writing to execute.

Wilkie v Hill, 1916 S.C. 892; 53 S.L.R. 728; 1916, 2 S.L.T. 104.

(3) RIGHT TO RENEWAL OF LEASE.

(93)

Determination of tenancy—Application to Land Court to renew lease and fix rent—Objection that tenancy not determined owing to tacit relocation—Act 1911, sec. 32 (4).

In August, 1912, a tenant in occupation of a holding, whose lease had expired at Whitsunday without notice of removal either on his part or on that of the landlord, applied to the Land Court as a statutory small tenant under the Small Landholders (Scotland) Act, 1911 (which came into operation in April, 1912), for an order renewing his lease and fixing an equitable rent. The Land Court fixed the period of renewal as from Whitsunday, 1912. In an appeal by special case the landlord contended that the Land Court could only renew the lease as from Whitsunday, 1913, in respect that under sec. 32 (4) of the Act, renewal could only be granted "on any determination of the tenancy," and that in the present case

the tenancy did not terminate until Whitsunday, 1913, having been continued to that date by tacit relocation. Held that the determination of the Land Court was right, in respect that the Act itself, at the date when it came into operation, gave the tenant a right to a renewal of his tenancy at the expiry of his lease at Whitsunday, 1912.

Clyne v Sharp's Trustees, 1913 S.C. 907; 50 S.L.R. 688; 1913, 1 S.L.T. 476.

(94)

Date of renewal—Date of commencement—Tenant sitting from year to year by tacit relocation—Act 1911, sec. 32 (4).

A tenant, who after the expiry of his lease in 1908 continued his tenancy by tacit relocation yearly from Martinmas to Martinmas, applied to the Land Court in December, 1913, for an order declaring him to be a statutory small tenant, renewing his tenancy, and fixing an equitable rent. Held that, as by sec. 32 (4) of the Small Landholders (Scotland) Act, 1911, it is only "on any determination of the tenancy" that a small tenant is entitled to a renewal of his tenancy, the earliest date from which the renewal could run was Martinmas, 1914, when the current year of tenancy was completed.

Wilkie v Hill, 1916 S.C. 892; 53 S.L.R. 728; 1916, 2 S.L.T. 104.

(95)

Appeal against refusal by Land Court of application for renewal—Action of summary ejection brought pending appeal—Competency.

A statutory small tenant, whose tenancy was about to expire, presented an application to the Land Court for a renewal of his tenancy at a reduced rent. An order refusing the application having been pronounced by a single member of the court, the landlord, during the days in which an appeal to the full court was competent but before such appeal had been actually taken, brought an action for summary ejection of the tenant, without having given him previous warning to remove. Held that the defender was not possessing without a title, and accordingly that the action was incompetent and fell to be dismissed.

Walker v Kerr, 1917 S.C. 102; 54 S.L.R. 103; 1916, 2 S.L.T. 277.

(96)

Duty of Land Court in applications for resumption of holding—Assessment of tenant's claim to compensation—Act 1911, sec. 32 (15).

Held (1) that, where the Land Court is satisfied that the resumption of a holding is desired for a purpose specified in secs. 19 or 32 (15) of the Small Landholders (Scotland) Act, 1911, it is the imperative duty of that court, under the latter section, to authorise resumption at the earliest date reasonably possible, and it is not within the power of the court to postpone resumption beyond that date; (2) that under sec. 32 (15) the Land Court is not entitled to make actual

payment of compensation to the tenant a condition precedent to resumption of the holding; and (3) that, as compensation falls to be assessed by arbitration and not by the Land Court, an order pronounced by the court requiring the tenant to lodge a statement of his claim for compensation was incompetent.

Whyte v Stewart, 1914 S.C. 675; 51 S.L.R. 596; 1914, 1 S.L.T. 451.

(97)

Appeal—Death of landlord—Right of his

representatives to insist in appeal—Act 1911, sec. 32 (15).

The landlord of a small holding, who had obtained from the Land Court an interlocutor authorising him to resume the holding for the purpose of residing there, but only under certain conditions, died after initiating an appeal against the terms of that interlocutor. **Held** that his children, to whom he had bequeathed the holding, were entitled to insist in the appeal.

Whyte v Stewart, 1914 S.C. 675; 51 S.L.R. 596; 1914, 1 S.L.T. 451.

SMOKE. See JUSTICIARY; PUBLIC HEALTH.

SOLATIUM. See DAMAGES; REPARATION.

SOLWAY. See FISHINGS.

SPECIAL CASE. See PROCESS.

SPECIAL DISTRICTS, ASSESSMENT. See RATES AND ASSESSMENTS.

SPECIFIC IMPLEMENT. See CONTRACT.

SPECIFIC LEGACY. See SUCCESSION.

SPECIFICATIO.

(1)

Property in indivisible corporeal subject which is a joint production.

It is a general principle of equity that when the materials, skill, and labour of two or more persons are voluntarily and inseparably combined in the production of an indivisible corporeal subject, the same belongs to the contributors jointly, the interest of each being in proportion to the value of his contribution; and this principle will receive effect where there is no rule of positive law to the contrary.

A contracted to build for B a hearse for a specified sum, on condition that B should contribute certain portions of the materials and workmanship. B contributed his share, and the materials furnished by him were affixed to the hearse so that they could not be detached without injury to the general fabric. A became bankrupt before finishing the hearse, which was in his possession. **Held**, in a question between B and the trustee in A's sequestration, that the parties were joint proprietors of the subject in proportion to the value of their respective contributions.

Wylie & Lochhead v Mitchell, 1870, 8 M. 552; 42 J. 258; 7 S.L.R. 310.

(2)

Bona fide purchase of goods belonging to third party—Conversion into new species.

A purchased bona fide from B oil which

B had no right to sell, as it belonged to C. A paid for the oil and obtained delivery. With the oil and other materials A manufactured lard which was sold in the ordinary course of business to customers. In an action by C against A for delivery of the oil or payment of its value, **held** that the defender, by creating in the process of manufacture a new species, which could not be again resolved into its original element, became (under the doctrine of *specificatio*) proprietor of the substance manufactured, and was bound to pay to the pursuer a sum representing the value of the oil.

International Banking Corporation v Ferguson, Shaw & Sons, 1910 S.C. 182; 47 S.L.R. 139; 1909, 2 S.L.T. 377.

(3)

Where stolen goods are acquired by a bona fide purchaser and submitted to a manufacturing process so that restitution in forma specifica is no longer possible, the liability of the purchaser is to account to the owner of the goods for their value. Where a quantity of stolen type came into the possession of a typefoundry company by bona fide purchase and was converted by them into new type, **held** that the company were bound to pay to the owners the value of the type.

Oliver & Boyd v Marr Typefoundry Co., (O.H.) 1901, 9 S.L.T. 170.

SPES SUCCESSIONIS. See ASSIGNATION; BANKRUPTCY; HERITABLE AND MOVEABLE.

SPIRIT DUTIES. See REVENUE.

SPLIT IN TITLE. See SUPERIOR AND VASSAL.

STAMP DUTIES. See REVENUE.

STATUS. See INTERNATIONAL LAW; SHERIFF.

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I. CONSTRUCTION.

1. EFFECT OF PREAMBLE, HEADINGS, &c.

(1)

Preamble—Sunday and Ragged Schools (Exemption from Rating) Act, 1869.

In the preamble to the Sunday and Ragged Schools (Exemption from Rating) Act, 1869, it is stated that "it is expedient" that such schools should be exempted from liability for poor and other rates. By sec. 1 of the same Act a power is conferred upon local authorities to exempt such schools from liability for rates. **Held** that the words of the preamble could not be read as constituting an absolute right in all such schools to exemption from assessment, and that, in the absence of any exercise of the power conferred by sec. 1 of the Act, such schools were liable to assessment.

Renfrewshire County Council v Trustees of Orphan Homes of Scotland, 1893, 1 F. 186; 36 S.L.R. 143; 6 S.L.T. 229.

(2)

Reference to preamble and other sections of Act—United Parishes Act, 1876, sec. 4.

Held that, in construing sec. 4 of the United Parishes Act, 1876, regard must be paid to the preamble and to other sections of the Act.

Minister of Brydekirk v Minister and Heritors of Hoddam, 1877, 4 R. 798; 14 S.L.R. 509.

(3)

Burgh Police (Scotland) Act, 1892, sec. 38.

Tennent v Magistrates of Partick, 1894, 21 R. 735; 31 S.L.R. 619; 1 S.L.T. 594, No. 35, *infra*.

(4)

Title.

Observations as to the extent to which the title of an Act of Parliament may be called in aid in construing its provisions.

Millar & Lang v Macniven & Cameron, (O.H.) 1908, 16 S.L.T. 56.

(5)

Headings—Factors Act, 1889, secs. 3 and 9—Factors (Scotland) Act, 1890, sec. 1.

The Factors Act, 1889 (extended to Scotland by the Factors (Scotland) Act, 1890), in the series of sections embraced under the heading "dispositions by mercantile agents," enacts by sec. 3, that "a pledge of the documents of title to goods

shall be deemed to be a pledge of the goods." **Held** that sec. 3 did not apply to the case of an owner of goods pledging the documents of title, but only to pledges effected by mercantile agents.

Inglis v Robertson & Baxter, 1898, 25 R. (H.L.) 70; [1898] A.C. 616; 35 S.L.R. 963.

(6)

Factory and Workshop Act, 1901, sec. 104.

Opinions (per Lord Justice-Clerk Macdonald and Lord Kyllachy) that a heading in a statute, as distinguished from a marginal rubric, was part of the statute, and was to be taken into account in construing the section.

M'Ewan v Magistrates of Perth, 1905, 7 F. 714; 42 S.L.R. 456; 12 S.L.T. 846.

(7)

Rubric.

The rubric is no part of a statute.

Farquharson v Whyte, 1886, 13 R. (J.) 29; 1 White, 26; 23 S.L.R. 360.

(8)

Schedule — Variation between enacting clauses and schedule—Clyde Navigation Consolidation Act, 1858 (21 & 22 Vict. c. cxlix.), sec. 98 and schedule (H).

The terms of a schedule cannot extend the enactment in a body of the statute.

Laird & Sons v Clyde Navigation Trustees, 1879, 6 R. 756; 16 S.L.R. 401; and 1883, 10 R. (H.L.) 77; 8 App.Cas. 658; 20 S.L.R. 869.

(9)

Variation between enacting clauses and schedule—Summary Procedure (Scotland) Act, 1864.

Where language used in a schedule varies from that of the enacting clause to which it relates, the language of the enacting clause prevails.

Jacobs v Hart, 1900, 2 F. (J.) 33; 3 Adam, 131; 37 S.L.R. 648; 7 S.L.T. 425.

2. PRINCIPLES OF CONSTRUCTION.

(1) PENAL, TAXING AND REMEDIAL STATUTES.

(10)

Penal enactment—Burgh Police (Scotland) Act, 1892, sec. 430.

Held, on a construction of sec. 430 of the Burgh Police (Scotland) Act, 1892, read as

a whole, that a contravention may be committed either by a person who has exposed for sale articles that are incorrectly weighed, measured, or numbered, or by a person who has incorrectly weighed, measured, or numbered articles with a view to sale—dissenting Lord Stormonth-Darling, on the ground that as the concluding clause of the section, empowering the magistrates to impose a penalty, grammatically required that the person to be sentenced should have both exposed for sale and incorrectly weighed, measured, or numbered, it was not permissible in construing a penal enactment to extend the concluding clause by reference to the earlier part of the section.

Barty v Hill, 1907 S.C. (J.) 36; 5 Adam, 235; 44 S.L.R. 247; 14 S.L.T. 616.

(11)

Penalty—Construction in meliori sensu.

A statute enacted for contravention of certain of its provisions "a penalty not exceeding £10, and an additional penalty of 10s. for each salmon taken," &c. Held that the words "not exceeding" qualified the additional penalty of 10s. as well as the penalty of £10.

Johnston v Robson, 1868, 6 M. 800; 40 J. 512; 1 Coup. 41; 5 S.L.R. 537.

(12)

Remedial statute—Ambiguous words—Intestate Moveable Succession Act, 1855, sec. 1.

The Intestate Moveable Succession Act, 1855, sec. 1, provides that "in all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person." Observed (per Lord President Inglis)—"But if the words are not clear in themselves, we are quite entitled to resort to a canon of construction applicable to this case, because this is a remedial statute, and a remedial statute is always to be construed with reference to the mischief intended to be remedied."

Turner, 1869, 8 M. 222; 42 J. 97; 7 S.L.R. 130.

(13)

—Favourable construction—Education (Scotland) Act, 1872, sec. 60.

Observed (per Lord President Inglis)—"A remedial statute is not to be strictly construed . . . A remedial statute ought to receive a benign and favourable construction, and is often applied ad comiles casus."

Robb v Logiealmond School Board, 1875, 2 R. 417; 12 S.L.R. 286.

(14)

Taxing statutes—Liberal or strict interpretation—Exemption.

Observed (per Lord Ardmillan)—"We have been told that a taxing statute must be construed liberally and favourably to the subjects. In one sense that is true, and the remark is well founded; but, on the other hand, equality and impartial justice in

the incidence of taxation is of greater moment, and the statute should be construed so as to promote that equality and that impartiality of justice. There is no presumption in favour of the exemption of the few from the incidence of the general tax. I think the presumption is for equality, and rather against the partiality which is involved in special exemptions. Therefore, in deciding any case I would consider the question on the statutes according to their true meaning."

Edinburgh Life Assurance Co. v Solicitor of Inland Revenue—Scottish Widows' Fund v Solicitor of Inland Revenue, 1875, 2 R. 394; 12 S.L.R. 275.

(15)

—Words occurring in statute applicable to whole kingdom—Non-technical construction—Succession Duty Act, 1853, sec. 2.

Observed (per Lord President Inglis)—"This Act of Parliament has been framed designedly and carefully, so that everything contained in it shall be expressed in what may be called popular, or at least untechnical language, and it was very desirable and right that that should be so, because it is an Act of Parliament applying to all the three parts of the United Kingdom, and if the technical words of one system of jurisprudence had been used in any of the clauses of this Act of Parliament, there might have been great difficulty in applying them to another part of the United Kingdom, where a different system of jurisprudence prevails. It has always appeared to me that this is an example of very excellent legislation in that respect, and that the statute is very carefully and well prepared, and I quite assent to the proposition that we are not to construe this statute as if it contained any technical words whatever, but are to ascertain by the ordinary rules of construction what is the fair meaning and intention of the legislature."

Earl of Breadalbane v The Lord Advocate, 1870, 8 M. 835; 42 J. 513; 7 S.L.R. 523.

(16)

—Education (Scotland) Act, 1872, sec. 44.

Observed (per Lord Young)—"I think it proper to say that, in dubio, I should deem it the duty of the Court to reject any construction of a modern statute which implied the extension of a class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation."

Hogg v Parochial Board of Auchtermuchty, 1880, 7 R. 986; 17 S.L.R. 687.
Cf. Renfrewshire County Council v Trustees of Orphan Homes of Scotland, 1898, 1 F. 186; 36 S.L.R. 143; 6 S.L.T. 229, No. 1, supra.

(2) LOCAL AND PERSONAL ACTS.

(17)

Acts declared public—Operation.

Local Acts declared to be public (as to which see Interpretation Act, 1889, sec. 9)

must be judicially noticed and must have all the operation of public Acts.

Aiton v Stephen, 1876, 3 R. (H.L.) 4; 1 App.Cas. 456; 13 S.L.R. 734.

Scottish Drainage and Improvement Co. v Campbell, 1889, 16 R. (H.L.) 16; 14 App.Cas. 139; 26 S.L.R. 790, No. 25, *infra*.

(18)

Inconsistency between public and private Acts—Jurisdiction of High Court or Court of Exchequer—Parliamentary Deposits and Bonds Act, 1892.

The Parliamentary Deposits and Bonds Act, 1892, enacts that where any moneys have been deposited to secure the completion of any undertaking authorised by Parliament, and the undertaking has not been completed within the time limited in that behalf the "High Court may" make orders as to the application of the deposited moneys; and "High Court" is defined as meaning, in Scotland, the Court of Session in either Division. A private Act (obtained in 1904) provided that the moneys deposited in respect of the undertaking thereby authorised should be applied in payment of compensation to persons whose property had been interfered with as to the Court of Exchequer in Scotland might seem fit, or under other circumstances "applied in the discretion of the Court" or repaid to the depositors. Held that as the private Act was later in date than the Parliamentary Deposits and Bonds Act, 1892, and in respect that the provisions of that Act were merely permissive, an application by the depositor for power to uplift the deposited moneys was competently presented to the Lord Ordinary in Exchequer Causes.

Balfour, 1909 S.C. 358; 46 S.L.R. 294; 1909, 1 S.L.T. 76.

(19)

Effect of clause in local Act upon general provisions in public Acts—General Turnpike Act, 1831, sec. 91—Aberdeen Corporation Act, 1891 (54 & 55 Vict. c. cxxiv.), sec. 8.

A clause in a local Act which is entirely general in its nature and which repeals all laws, &c., which are inconsistent with its provisions must be carefully scrutinised before it can be held to apply in any particular case.

Russell v Magistrates of Aberdeen, 1899, 1 F. 792; 36 S.L.R. 510, No. 166, *infra*.

(20)

Effects of public Act on rights created by previous private Act—North British Railway Act, 1888 (51 & 52 Vict. c. clxiii.), sec. 47—Railway Companies (Accounts and Returns) Act, 1911, sec. 4 (1).

The North British Railway Co., in exercise of powers conferred by a private Act of 1888, created certain preferred and deferred ordinary stocks, the terms of the Act providing that a non-cumulative dividend of 3 per cent. should be payable out of the available profits of each half-year to the preferred stockholders, and that the balance

of such profits should go to the deferred stockholders. By the Railway Companies (Accounts and Returns) Act, 1911, every railway company was relieved of any obligation to prepare or submit to their shareholders or auditors accounts or balance sheets oftener than once a year. Held that the later Act did not relieve the railway company of the duty of calculating the dividends due to the preferred and deferred stockholders on the basis of the profits of each half-year.

North British Railway Co. v Wingate, 1913 S.C. 1092; 50 S.L.R. 857; 1913, 2 S.L.T. 127.

(21)

Transference of statutory obligations—Roads and Bridges Act, 1878, sec. 32—Great Western Road Act, 1836 (6 & 7 Will. IV., c. cxxxviii.), secs. 14 and 23.

Held that sec. 32 of the Roads and Bridges Act, 1878, in providing that county road trustees to whom a road is thereby transferred shall be liable in all the debts, liabilities, claims and demands in which the trustees of such road "are or were liable under any general or local Act then in force," does not continue and transfer to the county road trustees the statutory powers and duties conferred and imposed by such prior Acts upon the trustees from whom the road is transferred, as distinct from the powers and duties imposed upon them by the above Act as trustees for the general roads of the country.

County Road Trustees of Lower Ward of Lanarkshire v Kelvininside Estate Trustees, 1886, 14 R. (H.L.) 18; 24 S.L.R. 50.

(22)

Persons prejudiced—Glasgow Police Act, 1866 (28 & 29 Vict. c. cclxxiii.), sec. 366.

Observed (per Lord President Kinross)—"It appears to me that the Act of 1866 should be construed in accordance with the rules applicable to private Acts, in the case of which the benefit of any doubt is given to persons who might be prejudiced by the imposition of exceptional restrictions."

Bruce v Whyte, 1900, 2 F. 823; 37 S.L.R. 614; 7 S.L.T. 436.

(23)

Exclusion of public—Ferry and piers at Queensferry—Bye-laws—II. Geo. IV. and I. Will. IV. c. 115, sec. 20—Edinburgh and Glasgow Railway (Queensferry) Act, 1863 (26 & 27 Vict. c. cxxxvii.), secs. 31, 33, and 34.

By the Edinburgh and Glasgow Railway (Queensferry) Act, 1863, the North British Railway Co. were empowered to acquire from trustees, in whom they were then vested, the ferry and piers at Queensferry. By sec. 33 of the Act the railway company were given power to make bye-laws and regulations for the use and control of the ferry, and by sec. 34 it was made illegal for the public to use the piers save in the manner prescribed by the bye-laws or with the written authority of the company. Held that the effect of the statute and of the previous statute II. Geo.

IV. and I. Will. IV. c. 115, which vested the ferry in trustees, was to operate an exclusion of the public from all the piers connected with the ferry save as permitted by the bye-laws, or by the written authority of the company, thus abrogating the common law of navigation.

North British Railway Co. v Mackintosh, 1890, 17 R. 1065; 27 S.L.R. 825.

(24)

Construction contra proferentem — **Kirkcaldy and Dysart Waterworks Act, 1867 (30 & 31 Vict. c. cxxxix.).**

Observations on the construction of local and personal Acts.

Countess of Rothes v Kirkcaldy Waterworks Commissioners, 1882, 9 R. (H.L.) 108; 7 App.Cas. 694; 19 S.L.R. 907.

(25)

Grant of powers.

Observed (per Lord Herschell) that when a private Act is obtained by a company incorporated for purposes of profit, to confer upon them rights and powers which they would not have at common law, the provisions of such a statute must be somewhat jealously scrutinised, and that they ought not to be held to possess any right unless it be given in plain terms, or arises as a necessary inference from the language used.

Scottish Drainage and Improvement Co. v Campbell, 1889, 16 R. (H.L.) 16; 14 App.Cas. 139; 26 S.L.R. 790.

(26)

Impossibility of performing duty under private Act—Contract—Reparation.

In an action by shipowners against harbour trustees for damages in respect of the detention of a ship in harbour owing to a strike of harbour employees, **question** whether persons on whom a duty is laid by a private Act of Parliament can plead impossibility of performance of that duty as relieving them of liability for non-performance.

John Milligan & Co. v Ayr Harbour Trustees, 1915 S.C. 937; 52 S.L.R. 748; 1915, 2 S.L.T. 69.

(27)

Reparation for injury occasioned in execution of statutory works—Glasgow City and District Railway Act, 1882 (45 & 46 Vict. c. ccxvi.).

A railway company, with powers of opening up the streets of a town for the construction of an underground railway, were bound by their Act of Parliament to restore streets so opened up by them within three months, under a penalty of £20 for every day exceeding that period during which the streets were not restored. **Held** that the statute, in imposing this penalty, did not by implication deprive persons injured by the closing of a street beyond the legal period of the common law right to damages.

Clyde v Glasgow City and District Railway Co., 1885, 12 R. 1315; 22 S.L.R. 879.

v 6

(28)

Reservation of rights — **North British Railway (Waverley Station, &c.) Act, 1891 (54 & 55 Vict. c. cxcii.), sec. 35, sub-sec. (22).**

A railway company by private Act was authorised to take certain land in Edinburgh. Sec. 35 of the Act provided that "nothing contained in this Act shall prejudice or affect the rights of servitude or other rights of the corporation, or of the vassals of the corporation, in virtue of their title deeds." **Held** that this provision could not be construed as restricting the powers expressly given to the railway company by the Act.

MacGregor v North British Railway Co., 1893, 20 R. 300; 30 S.L.R. 404.

(29)

Private Acts declared to be granted salvo jure cujuslibet—Onus of proof—Adjudication—Office held jure sanguinis not adjudgeable—Act 1681, c. 192.

In April, 1902, an action was brought by the Earl of Lauderdale for declarator that he had right to the hereditary office of Royal Standard Bearer for Scotland. The pursuer averred that by the Act 1600, c. 44, the right to the office was confirmed to Sir James Scrymgeour and his heirs-male; that in 1661 the heir-male and successor was John Scrymgeour, Earl of Dundee, and that on his death in 1668 the office became extinct; that in July, 1670, a charter under the Great Seal of the office was granted to an ancestor of the pursuer on the narrative that the office had fallen to the Crown as ultimus hæres; that parliamentary sanction to the grant was given by, inter alia, the Act 1681, c. 72; that the office was possessed on a personal title by his successors till 21st February, 1761, when the heir made up a title by getting an adjudication (upon his own bond) assigned to him, in virtue of which he obtained a charter of adjudication, and was infeft. The defender, Henry Scrymgeour Wedderburn, who claimed to be the heir-male of Sir James Scrymgeour, founded on the Act 1681, c. 192, by which private Acts were declared to be granted salvo jure cujuslibet, and contended that therefore it was necessary for the pursuer to prove that there was no heir-male of the Scrymgeours existing; and that, as he had failed to do so, the action fell to be dismissed. In an appeal, the House of Lords, in respect that the office was held jure sanguinis and was not adjudgeable, and that the pursuer had failed to prove that there was no existing heir-male of the Scrymgeours, sustained the defence.

Earl of Lauderdale v Scrymgeour Wedderburn, 1910 S.C. (H.L.) 35; [1910] A.C. 342; 47 S.L.R. 532; 1910, 1 S.L.T. 347.

3. PRESUMPTIONS.

(1) AGAINST THE ABOLITION OF EXISTING JURISDICTIONS.

(30)

General rule.

Observed (per Lord Salvesen)—"A general rule applicable to the construction of statutes

is that there is not to be presumed, without express words, an authority to deprive the Supreme Court of a jurisdiction which it had previously exercised, or to extend what was once the privative jurisdiction of the Supreme Court to the inferior courts."

Dunbar & Co. v Scottish County Investment Co., 1920 S.C. 210; 57 S.L.R. 179; 1920, 1 S.L.T. 136.

(31)

Sheriff—Burgh Police (Scotland) Act, 1892, secs. 447, 454, 508, and 509.

The Burgh Police (Scotland) Act, 1892, does not deprive the sheriff of a county of jurisdiction to try persons for offences committed within a burgh in the county.

Cameron v Macniven, 1894, 21 R. (J.) 31; 1 Adam, 346; 31 S.L.R. 338; 1 S.L.T. 467.

(32)

Justice of peace—Transference of powers to magistrates—Burgh Police (Scotland) Act, 1892, sec. 38.

Held that the right of granting, refusing, renewing, and transferring certificates, under the Public-houses Acts, for premises within police burghs has not been transferred under the Burgh Police (Scotland) Act, 1892, sec. 38, from the county justices to the magistrates of such burghs.

Tennent v Magistrates of Partick, 1894, 21 R. 735; 31 S.L.R. 619; 1 S.L.T. 594.

(2) AGAINST THE ALTERATION OF RULES OF PRACTICE.

(33)

Summary Procedure (Scotland) Act, 1864.

Observed (per Lord Ardmillan)—"When we have a uniform and long continued rule of practice, we must be very careful not to construe a new Act in such a manner as to introduce an alteration not plainly intended by the legislature."

Kinnear v Whyte, 1868, 6 M. 804; 1 Coup. 56; 40 J. 435; 5 S.L.R. 538.

(34)

No specified remedy—Forms of process.

Observed (per Lord Justice-Clerk Moncreiff) "that where a well-known and recognised jurisdiction is invoked by the legislature for the purpose of carrying out a series of provisions which are important to the public without any specific form of process being prescribed, the presumption is that the ordinary forms of that court are to be followed in carrying out the provisions. . . ."

Magistrates of Portobello v Magistrates of Edinburgh, 1882, 10 R. 130; 20 S.L.R. 92.

4. REFERENCE TO INTENTION IN CONSTRUCTION OF STATUTES.

(35)

Reference to general intention of statute to explain meaning of particular section—Burgh Police (Scotland) Act, 1892, sec. 38.

In an action against the magistrates of a police burgh who claimed, under sec. 38 of

the Burgh Police (Scotland) Act, 1892, to be the licensing authority for the sale of exciseable liquors within the burgh, held that sec. 38 not being a self-contained section, it was necessary to construe it by reference to the general intention of the legislature as indicated in the other sections and preamble to the Act, and, accordingly, that the powers claimed by the magistrates had not been transferred to them.

Tennent v Magistrates of Partick, 1894, 21 R. 735; 31 S.L.R. 619; 1 S.L.T. 594.

(35a)

Reference to general intention of section—Sheriff Courts (Scotland) Act, 1907.

Observed (per Lord President Dunedin)—"It is not very difficult to get at the general idea which was underlying the draftsman-ship, and I think in these cases it is our duty, however inaccurate in terms we may find the Act, to give effect to what we consider the spirit, so long, of course, as the words do not absolutely preclude us from so doing."

Campbell's Trustees v O'Neill, 1911 S.C. 188; 48 S.L.R. 115; 1910, 2 S.L.T. 392.

(36)

Restrictive construction—Court of Session Consignation (Scotland) Act, 1895, secs. 2, 3 and 5—Titles to Land Consolidation Act, 1868, sec. 122.

Held that the Court of Session Consignation Act, 1895, which, notwithstanding the generality of certain of its provisions, should be read prima facie as an Act dealing with consignations in judicial proceedings, did not apply to surplus moneys deposited by a bondholder under sec. 122 of the Titles to Land Act, 1868, and was not intended to alter or repeal the provisions of that section.

Antrobus, 1896, 23 R. 1032; 33 S.L.R. 759; 4 S.L.T. 89.

(37)

Literal meaning opposed to intention of statute — North British Railway (Dundee and Arbroath Joint Line) Act, 1879 (42 & 43 Vict. c. clv.), sec. 6.

Observed (per Lord Chancellor Selborne) that the more literal construction of a section of a statute ought not to prevail if it is opposed to the intention of the legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

Caledonian Railway Co. v North British Railway Co., 1881, 8 R. (H.L.) 23; 6 App.Cas. 114; 18 S.L.R. 341.

(38)

Whether prohibition in one section controls proceedings under another section or another Act.

Held that sec. 87 of the Companies Act, 1862, which enacted that "no suit, action or other proceeding" shall be proceeded with or commenced against a company in liquidation except with the leave of the

Court did not limit the effect of sec. 163 of the same Act or of sec. 3 of the Companies Act, 1886, so as to authorise the Court to sanction diligence declared to be void by secs. 163 and 3 of these Acts respectively.

Allan v Cowan, 1892, 20 R. 36; 30 S.L.R. 114.

(39)

Whether generality of one enactment limited by other enactments in the same statute.

Held that sec. 111 of the Merchant Shipping Act, 1894, was a general prohibition against all persons not holding a licence from the Board of Trade, or otherwise qualified, from engaging seamen for any ship (British or foreign) in the United Kingdom, and that secs. 260 and 261 did not affect its generality.

Hart v Alexander, 1898, 1 F. (J.) 27; 2 Adam, 628; 36 S.L.R. 64; 6 S.L.T. 199.

(40)

Whether generality of enactment limited by terms of earlier Act.

Opinion (per Lord Kyllachy, Ordinary) that there is nothing in the Sea Fisheries Act, 1883, or relative international convention, to limit the generality of sec. 9 of the Herring Fishery (Scotland) Act, 1899, which prohibits the landing in Scotland of fish caught in contravention of the Act, and that sec. 9 applies to foreigners as well as British subjects.

Poll v Lord Advocate, 1899, 1 F. 823; 35 S.L.R. 637; 5 S.L.T. 167.

(41)

Effect of subsequent section of ambiguous meaning on rights expressly conferred by earlier sections.

Observations upon construing statutes with regard to the difficulty of inferring from a later section of ambiguous meaning the repeal of definite rights expressly conferred by earlier sections.

Moss' Empires v Assessor for Glasgow, 1917 S.C. (H.L.) 1; 54 S.L.R. 12; 1916, 2 S.L.T. 215.

(42)

Implied exceptions and qualifications.

The General Police and Improvement (Scotland) Act, 1862, sec. 363, provides that where the police commissioners of a burgh have provided and established shambles or slaughter-houses within the burgh, "no person shall thereafter slaughter any cattle or beasts . . . within the boundaries of the burgh in which such slaughter-houses are provided, or within a distance of two miles beyond such boundaries, elsewhere than within the said slaughter-houses." A butcher who carried on business in the burgh of Kirkcaldy, where a slaughter-house had been provided in terms of the above enactment, slaughtered certain animals in the legalised slaughter-house of the burgh of Dysart, which was within two miles of Kirkcaldy, and was convicted of a contravention of the Act. In an appeal the accused contended that there was an implied exception of the legalised slaughter-houses of an ad-

joining burgh. Held that no such exception was implied, but that the words "no person" fell to be construed as "no person carrying on the business of a butcher within the burgh," and that in that view the butcher had contravened the enactment, and was liable in the penalties provided.

Derrick v Black, 1889, 17 R. (J.) 9; 2 White, 366; 27 S.L.R. 192.

(43)

General terms limited by purpose of Act—Glasgow Court Houses Act, 1890 (53 & 54 Vict. c. lvi.), sec. 13.

Terms of a local statute empowering the Glasgow Court Houses Commissioners to apportion, assess, and charge sums of money borrowed by them under the Act upon three public bodies, the Corporation of Glasgow, the County Council of the county of Lanark, and the magistrates of Rutherglen, "in proportion to the gross valuation for the year ending on the 15th May, 1890, of the lands and heritages situated within the respective areas under the jurisdiction of such public bodies." By sec. 13 it was provided that the County Council of Lanark, "as representing the lower ward thereof," should pay to the Glasgow Court Houses Commissioners the sum chargeable against the County Council. In an action by the Commissioners against the County Council of Lanark for £7669 as their proportion of the sum chargeable under the Act against the three bodies, the sum sued for being arrived at by taking the gross valuation of all lands and heritages within the county as the area within the jurisdiction of the County Council, the defenders maintained that the valuation should have been limited to the Lower Ward of the county, which was alone liable for the assessment. Held that the words in sec. 13, "the respective areas under the jurisdiction of such public bodies," were to be read as referring only to areas which were under their jurisdiction for purposes connected with the Glasgow court houses, and that the Commissioners were not entitled to take the valuation of the whole county, but only the valuation of the Lower Ward, as the basis of assessment.

Lanarkshire County Council v Glasgow Court Houses Commissioners, 1902, 5 F. (H.L.) 5; 40 S.L.R. 191.

(44)

Reference to series of related statutes—Interpretation clause.

Observations (per Lord McLaren) on the construction of a series of statutes which are to be construed as one Act.

Lord Advocate v Sprot's Trustees, 1901, 3 F. 440; 38 S.L.R. 318; 8 S.L.T. 403; reported in House of Lords, sub nomine Lord Advocate v Stewart, 1902, 4 F. (H.L.) 11; [1902] A.C. 344; 39 S.L.R. 617; 10 S.L.T. 59.

(45)

—Merchant Shipping Act, 1894.

Opinion (per Lord Kyllachy) that the courts are not entitled in construing a particular Act of Parliament to do so with refer-

ence to previous legislation or to inferences which they may be disposed to draw from previous statutes, as to the probable intentions of the legislature, but that their duty is to interpret, in its natural sense, the language of the particular enactment which is before them.

Couper v. Mackenzie, 1906, 8 F. 1202; 43 S.L.R. 416; 13 S.L.T. 870.

(46)

—Reference to earlier repealed statutes to explain ambiguity in subsequent statute—Licensing (Scotland) Act, 1903, secs. 22 and 31.

Held competent to refer to the provisions of earlier statutes, all of which were repealed by the Licensing (Scotland) Act, 1903, in order to explain ambiguities arising under the terms of secs. 22 and 31 of that statute.

Sharp v. Morrison, (O.H.) 1922 S.L.T. 272.

(47)

Same words occurring in modern and ancient statute—Words to be construed in their ordinary meaning — “Merchants’ accounts” — Debts Recovery (Scotland) Act, 1867—Triennial Prescription Act, 1579.

Sec. 2 of the Debts Recovery Act, 1867, provides that it shall be competent for the sheriff to try all actions of debt for “house malls, men’s ordinaries, servants’ fees, merchants’ accounts, and other the like debts,” provided the debt does not amount to more than £50 sterling. The words “merchants’ accounts,” as occurring in the Triennial Prescription Act, had already been judicially construed prior to the passing of the Debts Recovery Act. Held that the Debts Recovery Act must be construed without reference to the Act of 1579, which was not to be read as taxative of the Debts Recovery Act or as controlling its meaning. Observed (per Lord Neaves)—“Some of the language certainly appears to be provincial, or, as I should rather say, peculiar to Scotland. But the words ‘merchants’ accounts’ are not. I think it is safe in construing an imperial Act, unless the contrary is expressed, to read words in their present and ordinary meaning, in so far as they have such a meaning. It is different with words unintelligible to English ears. But the words ‘merchants’ accounts’ are perfectly intelligible as English words, though in a wider sense than what is generally held to be their sense in the Scotch Act of 1579. Are we to go back upon words which are not technical, and to go into an antiquarian discussion as to their meaning three hundred years ago, when the words are still used in ordinary life?”

Sandys v. Lowden & Rowe, 1874, 2 R. (J.) 7; 3 Coup. 43; 12 S.L.R. 104.

(48)

Reference to proceedings prior to the passing of the Act—Trade Union Act, 1871, sec. 4.

Sec. 4 of the above statute is as follows:—“Nothing in this Act shall

enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely . . . any agreement for the application of the funds of a trade union . . . to provide benefits to members.” Opinions that, in view of the terms of the statute and of the history of previous proceedings in the report of a commission on the subject, it was the intention of the legislature that the taint of illegality in respect of the restraint of trade was to be absolutely removed, but that one of the things which trade unions were not to be allowed to enforce in a court of law was an agreement to provide benefits to members.

M’Kernan v. United Operative Masons’ Association, 1874, 1 R. 453; 11 S.L.R. 219.

See also Shanks v. United Operative Masons’ Association, 1874, 1 R. 823; 11 S.L.R. 356. TRADE UNION, No. 11.

(49)

Ejusdem generis—Valuation of Lands (Scotland) Act, 1854, secs. 5 and 30.

Observations upon construing statutes with regard to the application of the rule of ejusdem generis.

Moss’ Empires v. Assessor for Glasgow, 1917 S.C. (H.L.) 1; 54 S.L.R. 12; 1916, 2 S.L.T. 215.

(50)

—Clauses in special Act interpreted by reference to general Act—City of Glasgow Union Railway Act, 1873 (36 & 37 Vict. c. clxxxix.)—Railways Clauses Consolidation Act, 1845, sec. 16.

A railway company obtained powers under a special Act to “stop up and divert” a portion of a public road, according to certain deposited plans upon which a proposed deviation road was shown. The result would have been to cut off all access to and from a property which had been previously bounded by the public road. Held, in an application for interdict by the injured owner, that the proposed operations must be dealt with as ejusdem generis with the operations mentioned in the 16th section of the Railways Clauses Consolidation Act, 1845, and that, accordingly, the 46th and 49th sections of that Act applied to the effect that the company was bound to supply the petitioner with a substitute road “equally convenient as the former road, or as near thereto as circumstances will allow.”

Hay v. City of Glasgow Union Railway Co., 1874, 1 R. 1191; 11 S.L.R. 700.

(51)

—“Let off . . . any firework whatsoever”—General Turnpike Act, 1831, sec. 96.

Held that the words “let off . . . any firework whatsoever” in sec. 96 of the General Turnpike Act, 1831, do not include the setting fire to a fuse attached to powder for the purpose of blasting in a quarry.

Murray v. Keith, 1894, 22 R. (J.) 16; 1 Adam, 511; 32 S.L.R. 70; 2 S.L.T. 328.

(52)
Power to break open "sewers, drains, or tunnels" — **Waterworks Clauses Act, 1847, sec. 28.**

Sec. 28 of the Waterworks Clauses Act, 1847, enacts—"The undertakers . . . may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets or bridges, &c." Held that the "tunnels" referred to in the section must be ejusdem generis with sewers or drains, and that it was ultra vires of public water commissioners to break open the brickwork forming the arch of the bridge or roof of a railway tunnel.

Caledonian Railway Co. v Corporation of Glasgow, 1901, 3 F. 526; 38 S.L.R. 376; 8 S.L.T. 457.

(53)
"Every other building"—**Act 1845 (8 & 9 Vict. c. xciv.), sec. 18.**

A local road Act prohibited the erection of "all houses and every other building whatever within 30 feet of the centre of the road." Held that this prohibition did not apply to a parapet wall 1 foot in height, surmounted by an iron railing 5 feet 3 inches in height.

Partick Police Commissioners v Great Western Steam Laundry Co., 1886, 13 R. 500; 23 S.L.R. 318.

(54)
"Other building"—**Representation of the People (Scotland) Act, 1832, sec. 11.**

Held that the words "other building" in the enumeration in sec. 11 of the Representation of the People Act, 1832, of "any house, warehouse, counting-house, shop, or other building" within a burgh, were to be construed as including only such buildings as were ejusdem generis with the buildings specially enumerated.

Duncan v Jackson, 1905, 8 F. 323; 43 S.L.R. 341; 13 S.L.T. 932.

(55)
"Any matter or thing"—**Aberdeen Police and Waterworks Act, 1862 (25 & 26 Vict. c. cxlii.), secs. 140-145.**

Held that the words "any matter or thing whatever injurious to health or offensive to" the occupiers of adjoining premises in sec. 140 of the Aberdeen Police and Waterworks Act, 1862, were to be read as meaning any matter or thing ejusdem generis with those specified, and did not apply to goods stored for commercial purposes, although they might be injurious to health and offensive to the neighbourhood.

Walker v Lamb, 1892, 19 R. (J.) 50; 3 White, 194; 29 S.L.R. 481.

(56)
Resumption for "building, planting, feuing, or other purposes"—**Agricultural Holdings (Scotland) Act, 1908, sec. 18 (1) and (5).**

Under the Agricultural Holdings (Scotland) Act, 1908, sec. 18, in leases from year to

year six months' notice of termination must be given, except where there is a stipulation entitling the landlord to resume land for "building, planting, feuing, or other purposes." Observed that as building, planting, feuing, did not form a genus, no question of ejusdem generis construction could arise under the section.

Crichton Stuart v Ogilvie, 1914 S.C. 888; 51 S.L.R. 761; 1914, 2 S.L.T. 116.

5. CONTEMPORANEA EXPOSITIO—
 USAGE.

(57)
Contemporanea expositio — **Ancient and recent statutes.**

Observed (per Lord Watson)—"When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period; but I feel bound to construe a recent statute according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken; and in determining the true import of such a statute it appears to me to be quite immaterial to consider whether it was passed in the year 1858 or in 1883."

Clyde Navigation Trustees v Laird & Son, 1883, 10 R. (H.L.) 77; 8 App.Cas. 658; 20 S.L.R. 869.

(58)
Old Scottish statutes—**Act 1661, c. 41.**

Observations (per Lord McLaren and Lord Kinnear) on the weight to be given in the construction of ancient statutes to the contemporaneous decisions of the Court.

Graham v Irving, 1899, 2 F. 29; 37 S.L.R. 28; 7 S.L.T. 182.

See also *Middleton v Tough*, 1908 S.C. (J.) 32; 5 Adam, 485; 45 S.L.R. 605; 15 S.L.T. 991, No. 156, infra.

(59)
Usage—Unambiguous enactments—Emoluments of heritable office—Treaty of Union, 1706, article 20—Act of Union, 1707.

The Treaty of Union, 1706, ratified by the Act of Union, 1707, provided—"20. That all heritable offices, superiorities, heritable jurisdictions, offices for life, and jurisdictions for life be reserved to the owners thereof as rights of property in the same manner as they are now enjoyed by the laws of Scotland, notwithstanding of this treaty." At the time of the union the holder of the office of Principal Usher in Scotland was entitled to fees from all Scotsmen, and also from Englishmen in Scotland who received honours from the King as sovereign of Scotland. Held that as article 20 of the Act of Union did not enlarge the rights of the office, but merely reserved existing rights unchanged, its holders were not entitled to

fees from recipients of honours whose titles were not purely Scottish but were titles of the United Kingdom, and that, as the terms of article 20 were unambiguous, no consideration could be given to the fact that from 1766 to 1904 the holders of the office had claimed and received such fees.

Walker Trustees v Lord Advocate, 1912 S.C. (H.L.) 12; [1912] A.C. 95; 49 S.L.R. 73; 1911, 2 S.L.T. 455.

6. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

(60)

Proviso—Publicans' Certificate (Scotland) Act, 1876, sec. 4.

Observed that where a proviso such as that in the Publicans' Certificate (Scotland) Act, 1876, sec. 4, was attached to an enacting or exegetical section of an Act of Parliament, it did not necessarily fall to be construed on the principle *expressio unius est exclusio alterius*.

Stevenson v Hunter, 1903, 5 F. 761; 40 S.L.R. 534; 10 S.L.T. 754.

(61)

Extension of burgh boundaries—Apportionment of debts and obligations—Burgh Police (Scotland) Act, 1892, sec. 11.

Held that, as the Burgh Police (Scotland) Act of 1892 qualified the transfer of an area from a county to a burgh by express provisions as to the apportionment of certain of the county debts, it must be held to have excluded all other county debts from apportionment.

Inverness-shire County Council v Magistrates of Inverness, 1909 S.C. 386; 46 S.L.R. 305; 1909, 1 S.L.T. 59.

7. RETROSPECTIVE AND PROSPECTIVE.

(62)

Declaratory enactment—Trusts (Scotland) Act, 1867, sec. 2—Trusts (Scotland) Amendment Act, 1884, sec. 2.

Opinion (per Lord Kincairney) that sec. 2 of the Trusts (Scotland) Amendment Act, 1884, to the effect that, in the recited Acts, "trustee" shall include tutor, curator and judicial factor, and that "judicial factor" shall mean curator bonis, was declaratory, and therefore retrospective in its effect.

Scott v Craig's Representatives, 1897, 24 R. 462; 34 S.L.R. 304; 4 S.L.T. 264.

(63)

Finance (No. 2) Act, 1915, sec. 43 (1)—Finance Act, 1916, sec. 46 (2).

In a case relating to excess mineral rights duty, held that sec. 46 of the Finance Act, 1916, was declaratory of the meaning of sec. 43 (1) of the Finance (No. 2) Act, 1915, and applied to assessments for the years 1914 and 1915.

Murray v Inland Revenue, 1918 S.C. (H.L.) 111; [1918] A.C. 541; 55 S.L.R. 428; 1918, 1 S.L.T. 400.

(64)

Retrospective effect — Conveyancing and Land Transfer (Scotland) Act, 1874, secs. 38 and 39.

Observations on the cases in which statutory enactments should be construed retrospectively. Held that the enactments contained in secs. 38 and 39 of the Conveyancing and Land Transfer Act, 1874, regarding the execution of deeds were not retrospective in their operation so as to affect deeds executed prior to the date when the Act came into operation.

Gardner v Beresford's Trustees, 1878, 5 R. (H.L.) 105; 3 App.Cas. 582; 15 S.L.R. 740.

(65)

Conveyancing Act, 1874, secs. 38 and 39.

Question, how far the provisions of the Conveyancing Act, 1874, secs. 38 and 39, as to the authentication of deeds are retrospective in their effect.

Veasey v Malcolme's Trustees, 1875, 2 R. 748; 12 S.L.R. 479.

(66)

Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887, sec. 1.

Sec. 1 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887, is not retrospective in its operation.

Stuart v Jackson, 1889, 17 R. 85; 27 S.L.R. 178.

(67)

Market Gardeners' Compensation (Scotland) Act, 1897, sec. 4.

Held that sec. 4 of the Market Gardeners' Compensation Act, 1897, is not retrospective, and does not entitle tenants under leases current at the date of the Act to compensation in respect of improvements executed prior to the commencement of the Act.

Smith v Callander, 1901, 3 F. (H.L.) 28; [1901] A.C. 297; 38 S.L.R. 576; 9 S.L.T. 39.

(68)

Observed (per Lord Trayner) that an Act of Parliament will not be held to be retrospective in its operation unless this construction is warranted either expressly or by necessary implication, and that there was nothing in the Market Gardeners' Compensation Act, 1897, sec. 4, to justify the belief that it was intended to be retrospective.

Callander v Smith, 1900, 2 F. 1140; 37 S.L.R. 890; 8 S.L.T. 132. (See rubric of this case in the House of Lords, No. 67, supra).

(69)

Agricultural Holdings Act, 1883, secs. 28 and 40 — Statutory notice — Validity of notice given before Act came into force.

The Agricultural Holdings Act, 1883, received the royal assent on 25th August, 1883, and came into force on 1st January, 1884. It provides (sec. 28) that "notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an

end . . . (b) in the case of leases from year to year, or for any other period less than three years, not less than six months before the termination of the lease. Failing such notice by either party the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year." **Held** that six months' notice was necessary to enable a landlord to bring a yearly tenancy to a termination at Whitsunday, 1884, although the Act had not at that date been in force for six months. **Opinion** that a notice given to terminate the lease at Whitsunday, 1884, would have been valid if given after the Act had been passed but before it came into operation.

Lord Macdonald v Finlayson, &c., 1884, 12 R. 228; 22 S.L.R. 167.

(70)

Titles to Land Consolidation (Scotland) Act, 1868, sec. 117.

Sec. 117 of the Titles to Land Consolidation Act, 1868, enacts that, after 31st December, 1868, heritable securities, whether executed before or after that date, in whatever terms expressed, are to be held to be moveable as regards the succession of the creditor, unless executors are expressly excluded. In June, 1868, a creditor, holding a bond and disposition in security in ordinary form, died intestate, survived by her son, who died in 1869 without having served heir to his mother or made up a title to the bond. **Held**, in a competition between the heir at law of the mother and the executors of the mother and son that the statute had not a retrospective effect, and therefore did not regulate the succession, and that the heir at law had a right to the bond.

Brown v Macdonald, 1870, 8 M. 439; 42 J. 210; 7 S.L.R. 263.

(71)

Interpretation Act, 1850, sec. 4.

The 4th section of the Interpretation Act, 1850, is retrospective.

Farquharson v Whyte, 1886, 13 R. (J.) 29; 1 White, 26; 23 S.L.R. 360.

(72)

Conjugal Rights (Scotland) Act, 1861, sec. 16.

Held that sec. 16 of the Conjugal Rights Amendment Act, 1861, which entitles a wife, in certain circumstances, to a reasonable provision out of property to which she has succeeded, is retrospective in its effect, and applies to property to which the wife succeeded prior to the date of the Act.

Taylor v Taylor, 1871, 9 M. 893; 43 J. 487; 8 S.L.R. 589.

(73)

Mercantile Law Amendment Act, 1856, sec. 1.

Question, whether the Act applies in the case of transactions entered into prior to its date.

Edmond v Mowat, 1868, 7 M. 59; 41 J. 32; 6 S.L.R. 67.

(74)

Rules of volunteer corps—Volunteer Act, 1863.

Morrison v Neilson, 1887, 14 R. 452; 24 S.L.R. 318, No. 249, *infra*.

8. PROVISOS AND QUALIFICATIONS.

(75)

Proviso attached to enacting or exegetical section.

Stevenson v Hunter, 1903, 5 F. 761; 40 S.L.R. 534; 10 S.L.T. 754, No. 60, *supra*.

(76)

Enactment followed by proviso—Administration of Justice and Appeals (Scotland) Act, 1808, sec. 9.

Opinion (per Lord Cowan), that "as a matter of general construction, it is certain that, when an enactment is followed by a proviso, the terms of the latter are construed always with due regard to the subject of the enactment. The proviso may be held to explain this enactment, and to state the instances or cases to which it is not to be applicable. But, unless the contrary be explicitly declared, no proviso will enlarge the scope and operation of the enacting words."

Forster v Forster, 1871, 9 M. 397; 43 J. 204.

(77)

Substantive enactment in form of proviso—Representation of the People (Scotland) Act, 1832, sec. 11.

The clause beginning "provided also" in sec. 11 of the Representation of the People (Scotland) Act, 1832, which, while in form a proviso, was held to be in reality a substantive enactment, and to create a separate and distinct ownership franchise, subject to no conditions other than those expressed in the enactment itself.

Davidson v Johnston, 1903, 6 F. 239; 41 S.L.R. 171; 11 S.L.T. 503.

(78)

Whether qualifying words limited the whole or only a portion of a clause—General Turnpike Act, 1831, sec. 96.

Opinion (per Lord Justice-Clerk Macdonald) that upon a proper construction of sec. 96 of the General Turnpike Act, 1831, which made it an offence to let off fireworks or to play games on the side of or adjacent to a turnpike road, the words "to the annoyance of any passenger or passengers" should be read as applicable to the whole section, and that a complaint which did not state that the act complained of was to the annoyance of passengers was irrelevant.

Murray v Keith, 1894, 22 R. (J.) 16; 1 Adam, 511; 32 S.L.R. 70; 2 S.L.T. 328.

9. IMPERATIVE, DIRECTORY, OR PERMISSIVE WORDS.

(79)

Words imperative or directory—Summary Procedure (Scotland) Act, 1864, sec. 18 and schedule (K).

Sec. 18 of the Summary Procedure Act, 1864, provides that: "In cases of conviction

and judgment against the respondent in prosecutions and proceedings under this Act, the sentence of the court may be in one or other of the forms contained in the schedule (K) to this Act annexed, or as nearly as may be in such form, according to the nature and circumstances of the complaint, viz. . . .

(2) In complaints for the contravention of any Act of Parliament under which the accused is or shall be liable on summary conviction to be imprisoned, or to be imprisoned or fined in the discretion of the court, the sentence of the court awarding imprisonment shall be in the form No. 2 in the said schedule." **Opinions** that the expressions used in the section were merely directory and not imperative, and that a departure from the forms prescribed in the schedule did not involve the penalty of nullity.

Kinnear v Whyte, 1868, 6 M. 804; 1 Coup. 56; 40 J. 435; 5 S.L.R. 538.

(80)

Dunkeld Bridge Act, 1803 (43 Geo. III. c. xxxiii.).

A statute conferred upon a proprietor the right to erect a bridge and to levy pontage dues, "provided always, and be it further enacted, that the said 'proprietor' and his heirs shall be, and he and they is and are hereby required to keep, or cause to be kept, an exact account" of the expenditure, "and also an account" of receipts, "and shall cause the same to be laid before the Justices of the Peace and Commissioners of Supply . . . at their annual meeting in the month of April." **Held** that the clause as to the lodging of accounts was not to be construed as an imperative enactment, but that it was merely directory, and that failure to comply with it did not infer a forfeiture of the right to levy pontage dues.

Campbell, &c. v Duke of Atholl, 1869, 8 M. 308; 42 J. 142; 7 S.L.R. 186.

(81)

Rules for guidance of voters—Ballot Act, 1872, secs. 2 and 28, sched. 1, rules 22, 25 and 28.

Sec. 2 of the Ballot Act, 1872, lays down the method in which votes shall be taken at elections. Sec. 28 enacts that "the schedules to this Act, and the notes thereto, and directions therein, shall be construed and have effect as part of this Act." Sched. 1 contains rules for the guidance of those taking part in elections. **Observed** (per Lord Justice-Clerk Moncreiff) that, in so far as the rules concerned were mere matters of form such as, e.g., the form of the writs to be used, their words were directory and would be complied with by as exact an adherence as circumstances would permit, but that directions given to the elector or the returning officer were of a different class, and were of the nature of injunctions or prohibitions which must be as specifically complied with as if they had been specially provided in the body of the statute.

Robertson v Adamson, 1876, 3 R. 978; 13 S.L.R. 630.

(82)

Thirlage Act, 1799.

The Thirlage Act, 1799, provides for the recording of an abbreviate of the decree of commutation within sixty days after the verdict of the jury. **Held** that this provision was directory merely, and did not infer nullity of the decree if not complied with.

Duchess of Sutherland v Reid's Trustees, 1881, 8 R. 514; 18 S.L.R. 329.

(83)

Bankruptcy Act, 1856, sec. 150.

Sec. 150 of the Bankruptcy Act, 1856, enacts that in certain circumstances the creditors may present a petition to the Lord Ordinary or to the sheriff, and that, "if no cause be shown to the contrary, decree shall be pronounced accordingly." **Held** that the words "if no cause be shown to the contrary" did not confer a discretionary power upon the court before which the matter was brought to refuse to act upon the petition.

Pendreigh's Trustee v M'Laren & Co., 1871, 9 M. (H.L.) 49; L.R., 2 H.L. Sc. 120; 43 J. 381; 8 S.L.R. 483.

(84)

Negative and prohibitory words—Court of Session Acts, 1850 and 1868.

Observed (per Lord President Inglis) regarding sec. 11 of the Court of Session Act, 1850—"Now, it has not been suggested that this enactment has been repealed, and the words used are negative and prohibitory, a form of expression which, when it occurs in a statute, must always be read as imperative."

Cowper v Callender, 1872, 10 M. 353; 44 J. 212; 9 S.L.R. 227.

(85)

Imperative or permissive words—Straightening marches—Act 1669, c 17.

By the Act 1669, c. 17, it is provided that when a person intends to enclose his ground "it shall be leisome to him to require the next sheriff or other officer to visit the marches." **Held** that the above quoted words are imperative, and that even of consent the visit of the sheriff cannot be superseded by a remit to a man of skill.

Lord Advocate v Sinclair, 1872, 11 M. 137; 45 J. 86; 10 S.L.R. 82.

(86)

Words permissive in form imperative in effect—Highway (Scotland) Act, 1771, sec. 1.

Held that looking to the context and general scope of the Act, and to the fact that the powers therein conferred were to be exercised for the benefit of the public, the words of sec. 1 of the Highway (Scotland) Act, 1771, which empowers those responsible for the upkeep of statute labour roads to provide 20 feet of clear passable road, though permissive in form, is in effect imperative.

Gray v St. Andrews and Cupar District Committees of Fife County Council, 1911 S.C. 266; 48 S.L.R. 409; 1910, 2 S.L.T. 354.

10. CONSTRUCTION OF PARTICULAR WORDS.

[See also WORDS.]

STATUTES.

Act 1850—Interpretation Act, 1850 (13 & 14 Vict. c. 21).

Act 1889—Interpretation Act, 1889 (52 & 53 Vict. c. 63).

(87)

"Month"—Act 1850, sec. 4.

The word "month" is to be deemed and taken to mean a calendar month in all Acts of Parliament of whatever date, unless words be added showing lunar month to be intended.

Opinions that by the common law of Scotland "month" means a calendar month.

Farquharson v Whyte, 1886, 13 R. (J.) 29; 1 White, 26; 23 S.L.R. 360.

(88)

"Person"—Body corporate—Sale of Food and Drugs Act, 1875, secs. 13 and 33.

The Interpretation Act, 1889, sec. 2, sub-sec. (1), enacts:—"In the construction of every enactment relating to an offence . . . the expression 'person' shall, unless the contrary intention appears, include a body corporate." Held that the word "person" as used in sec. 33, sub-sec. (1), of the Sale of Food and Drugs Act, 1875, did not include the corporation of a burgh, the contrary intention appearing from the Act, and therefore that such a corporation had no title to prosecute for a contravention of the Act.

Colquhoun v Magistrates of Dumbarton, 1907 S.C. (J.) 57; 5 Adam, 275; 44 S.L.R. 465; 14 S.L.T. 847.

(89)

Singular to include plural—Act 1850, sec. 4.

The 4th section of the Act 1850 enacts that, "in all Acts words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural, and the plural the singular, unless the contrary as to gender or number is expressly provided." Observed (per Lord Mure and Lord Shand) that the provisions of that section applied to the language of the 88th section of the Roads and Bridges Act, 1878, and that therefore the words "county" and "burgh," as there used, must be held to include "counties" and "burghs." Opinion contra (per Lord President Inglis).

Magistrates of Glasgow v Police Commissioners of Hillhead, 1885, 12 R. 864; 22 S.L.R. 580; and 1886, 13 R. (H.L.) 110; 11 App.Cas. 699; 23 S.L.R. 620.

(90)

Act 1889, sec. 1 (b)—Insurance by one policy for a number of vessels—Stamp—Customs and Inland Revenue Act, 1867, sec. 1, sched. B, and sec. 4.

The Customs and Inland Revenue Act,

1867, sec. 1, enacts that there shall be charged the several duties respectively specified in schedules A, B, and C to the Act. Sched. B, inter alia, sets forth: "For every policy of sea insurance for time in respect of every full sum of £100 and in respect of every fractional part of £100 thereby insured, where the insurance shall be made for any time not exceeding six months, 3d." Sec. 4 defines sea insurance as meaning, inter alia, "any insurance . . . made upon any ship or vessel." Sec. 1 of the Interpretation Act, 1889, provides that in any Act passed after 1850 "unless the contrary intention appears . . . (b) words in the singular shall include the plural and words in the plural shall include the singular." Held that a time policy of insurance embracing a number of vessels with separate sums insured on each was properly stamped at the duty corresponding to the aggregate sum insured.

Great Britain Steamship Premium Association v Whyte, 1891, 19 R. 109; 29 S.L.R. 104.

(91)

"And" construed as "or"—Merchandise Marks Act, 1887, sec. 3 (3) (b) and (c).

Held that sub-secs. (b) and (c) of sec. 3 (3) of the Merchandise Marks Act, 1887, are to be read disjunctively, the word "and" between them being equivalent to "or"; and, accordingly, that it is an offence to use a name which contravenes sub-sec. (b) although it does not also contravene sub-sec. (c).

D. & J. McCallum v Doughty, 1915 S.C. (J.) 69; 7 Adam, 645; 52 S.L.R. 682; 1915, 2 S.L.T. 60.

(92)

Similar words occurring in different statutes—"Public place."

Observations on the method of construing such words as "public place" occurring in different statutes. Per Lord Justice-General Dunedin—"Each statute must be considered by itself. I think it ought to be considered in the light of the expressions used therein, and the evil which the statute seeks to check."

Woods v Lindsay, 1910 S.C. (J.) 88; 6 Adam, 294; 47 S.L.R. 774; 1910, 2 S.L.T. 68.

(93)

"Merchants' accounts."

Sandys v Lowden & Rowe, 1874, 2 R. (J.) 7; 3 Coup. 43; 12 S.L.R. 104, No. 47, supra.

(94)

"Satisfaction of Board of Trade"—North British Railway (New Tay Viaduct) Act, 1881 (44 & 45 Vict. c. cxxxvii.), sec. 21.

Observations upon the meaning of the words "to the satisfaction of the Board of Trade."

North British Railway Co. v Magistrates of Perth, 1885, 13 R. (H.L.) 37; 10 App.Cas. 579; 22 S.L.R. 593.

(95)

Assessment "in use to be paid in each county"—County General Assessment Act, 1868, sec. 3, sub-secs. (2) and (3)—Rogue Money Act, 1724, sec. 12—Administration of justice—Procurator-fiscal.

The County General Assessment (Scotland) Act, 1868, sec. 3, enacts that, inter alia, "(2) the salaries or fees and necessary outlays of procurators-fiscal" in the sheriff court, "in so far as such salaries, fees, and outlays are at present in use to be paid by each county"; "(3) the expenses incurred in searching for, apprehending, subsisting, prosecuting, or punishing criminals" may be defrayed out of the county general assessment, which was substituted for "rogue money," created by the Rogue Money Act, 1724. In 1899 the Procurator-Fiscal of the Lower Ward of Lanarkshire raised an action against the County Council of Lanark (which had come in place of the Commissioners of Supply), concluding for declarator that the defenders were bound to provide reasonable remuneration for work done by him in the administration of the criminal law, in so far as not covered by the salary paid to him from Exchequer. Held that the Commissioners of Supply under the County General Assessment Act were neither bound nor entitled to pay other fees to the Sheriff Court Procurator-Fiscal than were "in use" to be paid to him at the passing of the Act in the particular county; and that as fees of the character in question were not in use to be paid to the Procurator-Fiscal of Lanarkshire at the passing of the Act, the pursuer was not entitled to payment thereof from the defenders.

County Council of Lanarkshire v Hart, 1904, 6 F. (H.L.) 31; [1904] A.C. 235; 41 S.L.R. 374; 11 S.L.T. 766.

11. CONSTRUCTION OF GENERAL WORDS.

[See I. 4, supra.]

12. CONSTRUCTION OF GENERAL WITH LOCAL ACTS.

[See BURG XIX.]

13. INCORPORATION OF STATUTES AND DOCUMENTS.

(96)

Incorporation of statutory provisions—General Act incorporated "except where expressly varied by or inconsistent with" special Act—Railways Clauses Consolidation (Scotland) Act, 1845—Glasgow District Subway Act, 1890 (53 & 54 Vict. c. clxii.), sec. 73.

Held (following the rule laid down by Lord Westbury in *Vicar of St. Sepulchre's*, in re Westminster Bridge, 1864, 33 L.J. Chanc. 372) that "if the particular Act gives in itself a complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject-matter of the rule out of the general Act." Circumstances in which, applying the

above rule, it was held that where the Railways Clauses Consolidation (Scotland) Act, 1845, had been incorporated "except where expressly varied by or inconsistent with" the special Act, the provisions of the former Act were not superseded by those contained in the special Act.

Glasgow District Subway Co. v Robertson's Trustees, 1895, 22 R. 790; 32 S.L.R. 572; 3 S.L.T. 54.

(97)

Conditional incorporation—Education (Scotland) Act, 1878, sec. 31—Lands Clauses Consolidation (Scotland) Act, 1845, sec. 127.

The Lands Clauses Consolidation Act, 1845, is generally incorporated with the Education (Scotland) Act, 1878, but subject to the condition that, before any of the powers of the former Act are to come into operation, a provisional order and a confirming Act following thereon must be obtained. Held that, where the above procedure had not been followed, the conditions necessary for the operation of sec. 127 of the Lands Clauses Act did not exist.

Barony Parish Council v Glasgow School Board, 1895, 23 R. 221; 33 S.L.R. 170; 3 S.L.T. 178.

(98)

Limitation of meaning of general words in incorporating clause.

The Bankruptcy, Frauds, and Disabilities (Scotland) Act, 1884, sec. 4, enacts that a person doing certain things shall be guilty of a crime and offence, and may be dealt with and punished as if he had been guilty of a crime and offence under the Debtors (Scotland) Act, 1880, "and the provisions of that Act shall apply to proceedings under this section." Question, whether the Act of 1880 was incorporated with that of 1884 except as regarded the mode of trial and the punishment to be awarded.

Howman v Mackie, 1891, 18 R. (J.) 30; 2 White, 617; 28 S.L.R. 349.

(99)

Limitation of meaning of general words in incorporating clause.

Sec. 36 of the Public-Houses Acts Amendment Act, 1862, enacts that "the provisions and enactments contained in the recited Acts (including the Home Drummond Act), so far as not repealed, shall extend and be construed, deemed, and taken to extend to and form part of this Act, in the same manner and as fully and to all intents and purposes as if the said provisions and enactments were herein repeated and set forth at length." Held that sec. 13 of the Act 1828 was not incorporated with the Public-Houses Acts Amendment Act, 1862, except with reference to matters falling within the scope of the Home Drummond Act, and consequently, as the granting of search warrants was not a matter which fell within the scope of that Act, that a magistrate, although a licence holder, might competently grant a search warrant.

Costadasi v Boyes, 1894, 21 R. (J.) 75; 1 Adam, 459; 31 S.L.R. 903; 2 S.L.T. 175.

(100)

—“So far as applicable.”

Schulze v Magistrates of Galashiels, 1895, 22 R. (H.L.) 70; [1895] A.C. 666; 33 S.L.R. 94. **ROADS AND STREETS**, No. 238.

(101)

—**Effect of incorporation—Penalties—Tramways Act, 1870, Part III., sec. 56—Glasgow Corporation (Tramways, Libraries, &c.) Act, 1899 (62 & 63 Vict. c. clxvi.), sec. 6.**

The Tramways Act, 1870, Part III., sec. 56, enacts that “All tolls, penalties, and charges under this Act, or under any bye-law made in pursuance of this Act, may be recovered in Scotland before the sheriff or two justices as penalties under the Railways Clauses Consolidation (Scotland) Act, 1845.” The Glasgow Corporation (Tramways, Libraries, &c.) Act, 1899, sec. 6, incorporates, *inter alia*, sec. 56 of the Tramways Act. **Held** that sec. 56 applied to bye-laws made in pursuance of the Act of 1899.

Simpson v Corporation of Glasgow, 1902, 4 F. 611; 39 S.L.R. 371; 9 S.L.T. 401.

(102)

—**Incorporation of general Act with special Act—Railways Clauses Consolidation (Scotland) Act, 1845, sec. 16 — Lapse of powers under special Act—Effect on powers under general Act.**

Western District Committee of the County Council of Stirlingshire v North British Railway Co., 1896, 23 R. 929; 33 S.L.R. 459; 3 S.L.T. 323. **COMPULSORY POWERS**, No. 152.

(103)

—**Waterworks Clauses Act, 1847, sec. 28 — Edinburgh and District Waterworks Acts, 1869, 1874, 1876, and 1895.**

Clippens Oil Co. v Edinburgh and District Water Trustees, 1897, 25 R. 370; 35 S.L.R. 304; 5 S.L.T. 242. **PUBLIC HEALTH**, No. 104.

(104)

—**Incorporated agreement.**

A railway Act bound two companies to fulfil all the obligations contained in a certain agreement between them, which was set forth in a schedule to the Act. **Held** that the clauses of this agreement were as effectual as if embodied in a section of the Act.

Caledonian Railway Co. v Greenock and Wemyss Bay Railway Co., 1874, 1 R. (H.L.) 8; L.R., 2 Sc.App. 347; 11 S.L.R. 494.

(105)

—**Plans.**

When an Act of Parliament authorises works to be constructed in accordance with deposited plans and sections, these are incorporated with the Act.

Edinburgh Street Tramways Co. v Black, &c., 1873, 11 M. (H.L.) 57; 45 J. 582; L.R., 2 Sc.App. 336; 10 S.L.R. 654.

14. MISCELLANEOUS.

(106)

—**Contract with local authority on footing of adoption of Act.**

Where the requisite majority required by the Burghs Gas Supply Act, 1876, sec. 20, of the shareholders of an unincorporated joint stock company supplying a burgh with gas had entered into an agreement with the police commissioners of the burgh to sell the property of the company to the commissioners, the agreement bearing to proceed on the footing that the Act was to be adopted by the burgh, **held** that the Act was to be taken as having been adopted by the burgh at the date of the agreement, even in a question with shareholders not consenting to the agreement; and that such shareholders had no right to object to the sale, either under their contract of copartnery or at common law.

Browns v Kilsyth Police Commissioners, 1886, 13 R. 515; 23 S.L.R. 366.

(107)

—**Words read into local Act by implication—Tweed Fisheries Act, 1857, sec. 82—Summary Procedure (Scotland) Act, 1864, sec. 22.**

Sec. 22 of the Summary Procedure Act, 1864, provides that “expenses shall not be awarded to or against any public prosecutor or party prosecuting under the authority of any Act of Parliament for the public interest, unless such award of expenses is authorised by such Act.” Sec. 82 of the Tweed Fisheries Act, 1857, authorises an award of expenses against a person convicted of an offence under the Act, but is silent regarding an award of expenses against a public prosecutor. **Held** that the latter Act by implication authorised an award of expenses against the public prosecutor.

Walker v Bathgate, 1873, 11 M. 956; 2 Coup. 460; 45 J. 508; 10 S.L.R. 441.

II. APPLICABILITY OF STATUTES.

1. APPLICATION TO CROWN.

(108)

The doctrine that Crown rights are not affected by any statute in which the Crown is not named has no application to statutes not affecting the patrimonial interests or the prerogatives of the Crown, but regulating procedure in causes relating to public revenues under the control for public purposes of the Commissioners of Inland Revenue or the Commissioners of Customs.

Schulze v Steele, 1890, 17 R. (J.) 47; 2

White, 449; 27 S.L.R. 636.

See also County Council of Lanarkshire v Lord Advocate, 1892, 19 R. 617; 29 S.L.R. 497, No. 195, *infra*.

(109)

—**Observations as to the extent to which the rule, that the Crown is not bound**

by any statute if not expressly named therein, is recognised in Scotland.

Somerville v Lord Advocate, 1893, 20 R. 1050; 30 S.L.R. 868; 1 S.L.T. 172.

(110)

—Local Acts—Exemption of the Crown.

Observations on the extent to which the Crown is bound by restrictions contained in local Acts.

Magistrates of Edinburgh v Lord Advocate, 1912 S.C. 1085; 49 S.L.R. 873; 1912, 2 S.L.T. 133.

2. EXTRATERRITORIAL APPLICATION.

(111)

Infringement of copyright — Patents, Designs and Trade Marks Act, 1883.

Held that the manufacture and sale by British subjects in a foreign country of goods, the copyright design of which is protected under the Patents, Designs and Trade Marks Act, 1883, is not an infringement of copyright.

Potter & Co. v Braço de Prata Printing Co., 1891, 18 R. 511; 8 R.P.C. 218; 28 S.L.R. 364.

(112)

Fishing—Herring Fishery (Scotland) Act, 1889.

Wilson v Rust—Wilson v Mackenzie, 1896, 23 R. (J.) 56; 2 Adam, 114; 33 S.L.R. 421; 3 S.L.T. 308, No. 240, *infra*.

(113)

Trawling—Herring Fishery (Scotland) Act, 1889—Sea Fisheries Regulation (Scotland) Act, 1895.

Mortensen v Peters, 1906, 8 F. (J.) 93; 5 Adam, 121; 43 S.L.R. 872; 14 S.L.T. 227, No. 241, *infra*.

3. APPLICATION TO SCOTLAND.

(114)

Prevention of Fires Act, 1774.

Question, whether the Act for the Prevention of Fires, 1774, applies to Scotland.

Opinion (per Lord Watson) that it does not. *Westminster Fire Office v Glasgow Provident Investment Society*, 1888, 15 R. (H.L.) 89; 13 App.Cas. 699; 25 S.L.R. 755.

(115)

Amendment of law as to Illusory Appointments Act, 1830.

Question, whether the enactment in the above statute to the effect that all appointments under a power shall be valid, whether illusory or not, applies to Scotland.

Smith's Trustees v Graham, 1873, 11 M. 630; 45 J. 399.

(116)

Post Office Acts Consolidation Act, 1837, secs. 25, 35, and 36.

Held (per Lord Justice-Clerk Moncreiff) in an objection to an indictment libelling on the 35th and 36th sections of the above Act to the effect that the word "misdemeanour" as occurring in these sections was unintelli-

gible and incapable of construction according to the law of Scotland, that, as regards the 35th section the meaning of the word "misdemeanour" was sufficiently explained by a reference to the 25th section in which a "misdemeanour" in England or Ireland was stated to be equivalent to a "crime and offence" in Scotland; that the 36th section was self-explanatory to the same effect; and that the provisions of the two sections were accordingly capable of application and must be applied to Scotland.

H.M. Advocate v Holmes and Lockyer, 1869, 41 J. 318; 1 Coup. 221; 6 S.L.R. 389.

(117)

Gaming Act, 1845, c. 109.

Opinion (per Lord Justice-Clerk Moncreiff) that the Gaming Act, 1845, does not apply to Scotland.

Calder v Stevens, 1871, 9 M. 1074; 43 J. 543; 8 S.L.R. 636.

(118)

Gaming Acts—Acts 1845 and 1892.

Held that the Gaming Act, 1845, and the Gaming Act, 1892, do not apply to Scotland.

Levy v Jackson, 1903, 5 F. 1170; 40 S.L.R. 832; 11 S.L.T. 268.

(119)

Vagrancy Act, 1824, sec. 4—Prevention of Crimes Act, 1871, sec. 15.

Sec. 4 of the Vagrancy Act, 1824, enacted that any person committing one of a variety of offences should be deemed to be a rogue and vagabond within the meaning of the Act, and should be liable to a certain punishment. The Act was declared not to extend to Scotland. Sec. 15 of the Prevention of Crimes Act, 1871, made certain alterations in regard to the evidence necessary to prove one of the offences above referred to, and then proceeded:—"And the provisions of the said 4th section (of the Vagrancy Act), as amended by this section, shall be in force in Scotland." **Held** that under the 15th section of the Prevention of Crimes Act the whole of the 4th section of the Act of Geo. IV. was made applicable to Scotland.

M'Lean v Murdoch, 1882, 10 R. (J.) 34; 5 Coup. 193; 20 S.L.R. 293.

See also *Gerald v M'Intyre*, 1913 S.C. (J.) 59; 7 Adam, 114; 50 S.L.R. 703; 1913, 1 S.L.T. 495. JUSTICIARY, No. 38.

(120)

Petty Larcenies Act, 1861, sec. 116—Prevention of Crimes Act, 1871, sec. 9.

The 9th section of the Prevention of Crimes Act, 1871, provides as follows:—"The rules contained in the 116th section of the Act of the Session holden in the 24th and 25th years of the reign of Her present Majesty, c. 96, intituled 'An Act to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences' in relation to the form of and the proceedings upon an indictment for any offence punishable under that Act committed after previous conviction, shall, with the necessary variations, apply

to any indictment for committing a crime, as defined by the Act, after previous conviction for a crime, whether the crime charged in such indictment, or the crime to which such previous conviction relates, be or be not punishable under the said Act of the Session of the 24th and 25th years of the reign of Her present Majesty, c. 96." The Prevention of Crimes Act, 1871, applies to Scotland; the Larceny Act, 1861, does not. **Held** that the section above quoted does not apply to Scotland with the effect of altering the practice of the Scottish courts with regard to proving previous convictions.

H.M. Advocate v Cox, 1872, 44 J. 380; 2 Coup. 229; 9 S.L.R. 451.

(121)

Held in subsequent cases that the above-quoted section was not intended to subvert the established practice in Scotland and to make the procedure prescribed by the Petty Larcenies Act, 1861, with regard to pleading to charges aggravated by previous convictions, applicable to Scotland.

H.M. Advocate v Davidson, &c., 1872, 2 Coup. 278.

H.M. Advocate v Kelly, 1872, 2 Coup. 310.
[Obsolete under the Criminal Procedure (Scotland) Act, 1887, sec. 67.]

(122)

Municipal Corporations (Borough Funds) Act, 1872.

Opinion per curiam that the Borough Funds Act, 1872, enabling governing bodies in certain cases to apply the funds or rates under their charge in promoting or opposing local or personal bills in Parliament, applies to Scotland.

Perth Water Commissioners v McDonald, &c., 1879, 6 R. 1050; 16 S.L.R. 619.

(123)

Opinions that the Borough Funds Act, 1872, applied to Scotland.

Leith Docks Commissioners v Magistrates of Leith, 1897, 25 R. 126; 35 S.L.R. 132; 5 S.L.T. 207.

[This question was not discussed in the decision of the House of Lords in this case, 1899, 1 F. (H.L.) 65; [1899] A.C. 508; 36 S.L.R. 956; 7 S.L.T. 154.]

(124)

Question, whether the Borough Funds Act, 1872, applies to Scotland, except in so far as incorporated by the Local Government (Scotland) Act, 1889, sec. 56, and the Burgh Police (Scotland) Act, 1903, sec. 55.

Conn v Magistrates of Renfrew, 1906, 8 F. 905; 43 S.L.R. 664; 14 S.L.T. 106.

(125)

Sale of Food and Drugs Act Amendment Act, 1879, sec. 10.

Sec. 10 of the Sale of Food and Drugs Act Amendment Act, 1879, enacts that in prosecutions "the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned." **Held** that, notwithstanding the use of English nomenclature, the section

was applicable to Scotland, and required that a person accused should not be cited on less than seven days' induciæ.

Dunlop v Goudie, 1895, 22 R. (J.) 34; 1 Adam, 554; 32 S.L.R. 606.

(126)

Patents, Designs, and Trade Marks Act, 1883, secs. 29 and 107.

Held that sec. 29 of the Patents, Designs, and Trade Marks Act, 1883, applies to Scotland, and that in an action for infringement of patent particulars of the breach must be set forth, but that in view of the terms of sec. 107, which provides that nothing in the Act shall affect the forms of process of the courts in Scotland, the particulars fell to be set forth in the condescendence, and not in a separate statement.

Mica Insulator Co. v Bruce Peebles & Co., 1905, 7 F. 944; 22 R.P.C. 527; 42 S.L.R. 700; 13 S.L.T. 281.

(127)

Criminal Law Amendment Act, 1885, sec. 18.

The Criminal Law Amendment Act, 1885, sec. 18, deals with the costs of prosecutions for misdemeanours under the Act. **Question**, whether the section applies to prosecutions under the Act in Scotland on indictments at the instance of the Lord Advocate.

Creighton v H.M. Advocate, 1904, 6 F. (J.) 72; 4 Adam, 356; 41 S.L.R. 512; 12 S.L.T. 36.

(128)

Merchandise Marks Act, 1887, sec. 2 (6).

Question, whether the proviso in sec. 2 (6) of the Merchandise Marks Act, 1887, that a person charged before a court of summary jurisdiction shall be informed of his right to be tried on indictment, applies to Scotland.

Dunbar v Johnston, 1904, 7 F. (J.) 40; 4 Adam, 505; 42 S.L.R. 266; 12 S.L.T. 592.

(129)

Preferential payments in Bankruptcy Act, 1888, sec. 1 (1), (3).

Opinion (per Lord Low, Ordinary) that the provisions of the Preferential Payments in Bankruptcy Act, 1888, are applicable to Scotland, in so far as they deal with the case of companies which are being wound up under the Companies Acts.

Liquidators of Scottish Drug Depot v Fraser, 1905, 7 F. 646; 42 S.L.R. 550; 13 S.L.T. 46.

(130)

Advertising Stations (Rating) Act, 1889, sec. 3.

Question, whether the Advertising Stations (Rating) Act, 1889, applied to Scotland.

Beith v Assessor for Glasgow, 1904, 6 F. 504; 41 S.L.R. 589; 12 S.L.T. 97.

(131)

Opinions reserved upon the question whether the Advertising Stations (Rating) Act, 1889, applied to Scotland.

A. J. Wilson & Co. v Assessor for Kincardineshire, 1913 S.C. 704; 50 S.L.R. 240; 1913, 1 S.L.T. 29.

(132)

Motor Car Act, 1903, sec. 11.

Held that sec. 11 of the Motor Car Act, 1903, does not apply to Scotland, the only right of appeal in Scotland being that provided by sec. 18 (6); and consequently that a person convicted in Scotland under the Act and fined £9 has no right of appeal.

Bell v Mitchell, 1905, 8 F. (J.) 15; 4 Adam, 661; 43 S.L.R. 53; 13 S.L.T. 494.

4. APPLICATION OF SCOTTISH ACTS TO ENGLISH TRUSTS.

(133)

Trusts (Scotland) Act, 1867.

The Trusts (Scotland) Act, 1867, does not apply to English trusts.

Carruthers' Trustees—Allan's Trustees, 1896, 24 R. 238; 34 S.L.R. 166; 4 S.L.T. 193.

III. STATUTORY OBLIGATIONS—ENFORCEMENT AND REMEDY FOR BREACH.

(134)

Whether statutory provision pleadable by individual—Edinburgh Municipal and Police Act, 1879 (42 & 43 Vict. c. cxxxii.), sec. 163—Ventilating area.

Held that the arrangements as to the ventilation of a new house are, under sec. 163 of the Edinburgh Municipal and Police Act of 1879, matters in the discretion of the dean of guild, and that the Court will not interfere with his judgment unless gross error can be proved. **Opinion** (per Lord Shand) that neighbours have no title to take objection to the plans of a new building on the ground that the provisions of sec. 163 have not received effect.

Pitman v Burnett's Trustees, 1882, 9 R. 444; 19 S.L.R. 411.

(135)

Edinburgh Municipal and Police Amendment Act, 1891 (54 & 55 Vict. c. cxxxvi.), sec. 50—Open space—Ventilation.

An application for warrant to convert the ground and basement storeys of a house into business premises and for the erection of a saloon of two storeys for the manufacture of tobacco on an existing "open space" behind, was opposed by the proprietor of adjoining premises. The dean of guild granted the warrant. In an appeal held that as the dean of guild was satisfied in regard to the ventilation of the new premises, the objector had no title under sec. 50 of the Edinburgh Municipal and Police Amendment Act, 1891, to interfere with the discretion vested in the dean.

Scott's Trustees v Shaw, 1892, 19 R. 895; 29 S.L.R. 767.

(136)

Edinburgh Tramways Act, 1871 (34 & 35 Vict. c. lxxxix.)—Width of road.

Held that private individuals were entitled to complain of a breach of an obligation laid

upon a tramway company by statute regarding the width of roads in which rails were laid, and that the local authorities referred to in the Act were not the only parties entitled to do so.

Adamson v Edinburgh Street Tramways Co., 1872, 10 M. 533; 44 J. 279; 9 S.L.R. 369.

(137)

Glasgow Building Regulations Act, 1900 (63 & 64 Vict. c. cl.) secs. 60 and 62—Height of buildings—Dean of guild—Lining.

The Glasgow Building Regulations Act, 1900, imposes restrictions on the height to which buildings may be erected, but gives the corporation power to consent to such height being exceeded. In a petition for lining for the erection of buildings to a height beyond the statutory limitations, held that neighbouring proprietors who had an interest to object to the height of the buildings had a title to plead contravention of the statutory restrictions as an objection to the petition for lining.

Summerlee Iron Co. v Lindsay, 1907 S.C. 1161; 44 S.L.R. 854; 15 S.L.T. 306.

(138)

Glasgow Building Regulations Act, 1900 (63 & 64 Vict. c. cl.), sec. 60—Height of buildings—Consent of corporation—Appeal to dean of guild.

The Glasgow Building Regulations Act, 1900, provides, by sec. 60, inter alia, that whenever the corporation consents to any building being erected beyond the height specified in the section, "the owner or lessee of any lands or heritages within one hundred yards of any intended building who may deem himself aggrieved by the grant of such consent may . . . appeal to the dean of guild, who shall have power to deal with the case as shall seem to him just." Held that in disposing of such an appeal the dean of guild is not limited to the consideration of whether the corporation, in giving their consent, were acting capriciously or ultra vires, but must also take into consideration whether the individual owner appealing is, as a result of his proximity, unduly prejudiced by the increased height; and that the dean of guild should not take into account the invasion of any legal rights of the individual owner, such legal rights falling to be vindicated in the petition for lining.

Summerlee Iron Co. v Lindsay, 1908 S.C. 754; 45 S.L.R. 563; 15 S.L.T. 1057.

(139)

Glasgow Building Regulations Act, 1900 (63 & 64 Vict. c. cl.), sec. 38—Prohibition of class of buildings—Dean of guild—Lining.

In a petition for lining presented to the dean of guild in Glasgow, objection was taken by the proprietors of subjects adjoining those of the petitioner on the ground that the buildings which it was proposed to erect would be in contravention of the statutory restrictions on the erection of buildings in the back ground of a hollow square con-

tained in sec. 38 of the Glasgow Building Regulations Act, 1900. The dean of guild found that the objector's property would not be injuriously affected in any way by the proposed buildings, repelled the objection and granted the lining. In an appeal the Court, accepting this finding as a finding in fact, held that as the objectors had no interest they had no title to enforce the restrictions of the Glasgow Building Regulations Act, and refused the appeal.

Maguire v Smith's Trustees, 1912 S.C. 410; 49 S.L.R. 392; 1912, 1 S.L.T. 212.

(140)

—Statutory board—Title to sue—
Salmon Fisheries Act, 1862—Salmon Fisheries Act, 1868.

Under the Salmon Fisheries Acts of 1862 and 1868 fishery boards have power to sue for penalties for offences under the Acts and to apply summarily to the sheriff for the enforcement of rules and regulations made by them. In a note of suspension and interdict brought by a fishery board at common law to prevent persons fishing in a manner alleged to be illegal, held that the complainants, being merely a statutory board with statutory remedies, had no title to sue. **Opinion** that the remedy sought was incompetent, because the only competent remedy was that provided by the statute.

Tay District Fishery Board v Robertson, 1887, 15 R. 40; 25 S.L.R. 54.

(141)

Whether breach of statutory obligation involves civil liability—Scope and purpose of statute—Penalty—Coal Mines Regulation Act, 1887, secs. 49 and 50.

The Coal Mines Regulation Act, 1887, by sec. 49, lays down certain general rules for the conduct of coal mines, and by sec. 50 makes every contravention of or non-compliance with the general rules an offence against the Act punishable by a fine. A workman injured through breach of one of these rules was held entitled to claim reparation at common law.

Black v Fife Coal Co., 1912 S.C. (H.L.) 33; [1912] A.C. 149; 49 S.L.R. 228; 1912, 1 S.L.T. 20.

(142)

—Mines Inspection and Regulation Act, 1860.

Opinion (per Lord Chelmsford) that a breach of the provisions of the Mines Regulation and Inspection Act, 1860, does not infer civil liabilities other than the remedies imposed by the Act.

Wilson v Merry & Cuninghame, 1868, 6 M. (H.L.) 84; L.R., 1 Sc.App. 326; 40 J. 486; 5 S.L.R. 568.

(143)

—Patents, Designs, and Trade Marks Act, 1888, sec. 1.

The Patents, Designs, and Trade Marks Act, 1888, sec. 1, by sub-sec. (1) enacts that a person shall not be entitled to describe

himself as a patent agent unless he is registered, and by sub-sec. (4) enacts that if any person knowingly describes himself as a patent agent in contravention of this section, he shall be liable on summary conviction to a fine not exceeding £20. An action for declarator that the defender was not entitled to describe himself as a patent agent so long as he was not registered, and for interdict against him so describing himself dismissed as incompetent on the ground that the statute, in making the use of the designation "patent agent" by a person not registered a criminal offence, and subjecting the person so using it to a penalty, did not confer any civil right upon other persons to prevent him from using it.

Chartered Institute of Patent Agents v Lockwood, 1894, 21 R. (H.L.) 61; [1894] A.C. 347; 11 R.P.C. 374; 31 S.L.R. 942; 2 S.L.T. 106.

(144)

Whether statutory remedy exclusive—
Passenger steamer—Survey—Board of Trade—Ultra vires—Merchant Shipping Acts, 1854, secs. 307, 312, and 318; 1872, sec. 13; 1876, secs. 14 and 15.

The Merchant Shipping Acts provide for the survey of passenger steamers, and by the Act of 1876, sec. 14, provision is made "if a shipowner feels aggrieved," inter alia, by the declaration of a surveyor respecting a passenger steamer or by the refusal of a surveyor to give such a declaration, for appeal to a court of survey instituted by that Act. A surveyor having refused to give a statutory declaration relating to a certain steamer, her builders and owners brought an action for declaration that the instruction given by the Board of Trade to their surveyors, under which the declaration was refused, was ultra vires of the Board. **Held** that, whether the Board had gone beyond their powers or not, the matter was one for which the Act of 1876, by secs. 14 and 15, had provided a remedy, and that the jurisdiction of the Court of Session was in hoc statu excluded.

Denny & Brothers v Board of Trade, 1880, 7 R. 1019; 17 S.L.R. 694.

(145)

—Railway rates—Undue preference—
Repetition of alleged overcharges—Interdict—
Railway and Canal Traffic Act, 1854, secs. 2, 3, 6—Regulation of Railways Act, 1873, secs. 1 and 6.

A trader complained that a railway company had for years charged higher rates for his goods than for those of a neighbour. In an action for repetition of the alleged overcharges held that the only remedy open under the Railway and Canal Traffic Act was by application to the Railway and Canal Commissioners (under the Regulation of Railways Act, 1873) for interdict, and that the action as brought was incompetent.

Murray v Glasgow and South-Western Railway Co., 1883, 11 R. 205; 21 S.L.R. 147.

Caledonian Railway Co. v Cross & Sons, 1889, 16 R. 584; 26 S.L.R. 447.

(146)

Adjustment of debts under order of Boundary Commissioners—Local Government (Scotland) Act, 1889, secs. 49 and 50.

By the Local Government (Scotland) Act, 1889, sec. 49, the Boundary Commissioners acting under the Act are empowered to provide for the adjustment and disposal of the property, debts and liabilities of the various authorities affected by the orders pronounced by the Commissioners, and they are further (sec. 50) empowered to state a special case for the opinion of the Court of Session on any question of law. The Commissioners having, in pursuance of the Act, pronounced an order detaching a portion of one parish and annexing it to another parish, and the parochial boards of the parishes having applied to the Commissioners to adjust their respective liabilities consequent on this change, the Commissioners presented a special case for the opinion of the Court regarding the liabilities of the two parishes for the parochial relief of persons who were resident in the transferred portion at the date of the transference. The Court dismissed the case, holding that it presented no question of law.

Opinions that the question was one for the determination of the Commissioners.

Parochial Board of Borthwick v Parochial Board of Temple, 1891, 18 R. 1190; 28 S.L.R. 897.

See Inspector of Galashiels v Inspector of Melrose, 1892, 19 R. 758; 29 S.L.R. 633; and 1894, 21 R. 391; 31 S.L.R. 318; 1 S.L.T. 461. LOCAL GOVERNMENT, No. 36.

(147)

West Highland Railway Guarantee Act, 1896, sec. 2.

The West Highland Railway Guarantee Act provided that, so long as the Government guaranteed interest or dividend on the undertaking, the valuation of the railway should not be placed higher than the value of the lands had been before the railway was constructed. The Act did not, however, provide any means for ascertaining the value of the lands. **Held** that the Court of Session had no jurisdiction to ascertain the value by proof or otherwise.

West Highland Railway Co. v County Council of Inverness-shire, 1904, 6 F. 1052; 41 S.L.R. 795; 12 S.L.T. 225.

(148)

Mill dam—Salmon Fisheries (Scotland) Act, 1862, secs. 6 and 29.

The Salmon Fisheries (Scotland) Act, 1862, enacts by sec. 29 that "in the event of any person refusing or neglecting to obey any bye-law made by the commissioners . . . the clerk (to the district board) may apply to the sheriff by summary petition in ordinary form praying to have such person ordained to obey the same . . ." **Held** that a bye-law made by the commissioners with reference to mill dams could only be enforced by proceedings taken under sec. 29, and that an action by a proprietor of salmon fishings, which was in substance a proceed-

ing for the enforcement of such a bye-law, was incompetent.

Lyall v Carnegie, 1900, 2 F. 423; 37 S.L.R. 322; 7 S.L.T. 341.

(149)

Bursary—Educational Endowments (Scotland) Act, 1882, sec. 46.

The Educational Endowments (Scotland) Act, 1882, by sec. 46 provides that if the governing body of any educational endowment fail to give effect to the provisions of any scheme approved under the Act it shall be lawful for the Scotch Education Department upon the application of, inter alios, "any person or persons having a vested interest in the endowment" to require the governing body to give effect to the scheme, and that if the governing body fail to comply they may be summarily compelled to do so by the Court of Session in a petition and complaint at the instance of the Lord Advocate. Certain pupils of a school brought an action of suspension and interdict against the Perth Educational Trust seeking to interdict them from awarding certain bursaries until the parties entitled thereto had been ascertained by a competitive examination duly intimated in accordance with a scheme under the said Act. **Held** that the complainers were persons having a vested interest in the endowment and that they were not entitled to the remedy sought.

Grubb v Perth Educational Trust, (O.H.) 1907, 15 S.L.T. 492.

(150)

Invasion of common law right.

A railway company which had powers of opening up the streets of a town were bound by their Act of Parliament to restore the streets opened up by them within three months, under a penalty of £20 for every day exceeding that period for which the streets disturbed by them should not be restored. **Held** that the statute did not deprive persons injured by the closing of a street beyond the legal period of their common law right to damages.

Clyde v Glasgow City and District Railway Co., 1885, 12 R. 1315; 22 S.L.R. 879.

(151)

Neglect of common law duty—Merchant Shipping Act, 1854, secs. 243 and 244—Merchant Shipping Amendment Act, 1862, sec. 11.

The provisions of the Merchant Shipping Act, 1854, relative to the imprisonment of seamen and the forfeiture of their wages for continued misconduct and neglect of duty, do not by implication exclude a claim for damages at common law.

Sharp v Rettie, 1884, 11 R. 745; 21 S.L.R. 507.

IV. DESUETUDE.

(152)

Profanation of the Sabbath—Act 1661, c. 18—Act 1696, c. 31.

Held that while the Acts 1661, c. 18, and

1696, c. 31, "and the other Acts anent the profanation of the Sabbath" are largely in desuetude, they are not in desuetude in so far as they prohibit the keeping of open shop on the Sabbath. The general law as to when and under what circumstances a statute falls into desuetude discussed.

Bute v More, 1870, 9 M. 180; 1 Coup. 495; 43 J. 65; 8 S.L.R. 200.

(153)

Sunday trading—Act 1661, c. 18.

Question, whether the Act 1661, c. 18, is in desuetude.

Nicol v M'Neill, 1887, 14 R. (J.) 47; 1 White, 416; 24 S.L.R. 654.

(154)

Sunday labour—Act 1579, c. 70.

Question, whether the Act 1579, c. 70, prohibiting Sunday labour, is in desuetude.

Middleton v Paterson, 1904, 6 F. (J.) 27; 4 Adam, 321; 41 S.L.R. 256; 11 S.L.T. 610.

(155)

Held that, even if the Acts prohibiting Sunday labour were not in desuetude, they, and in particular the Act 1579, c. 70, did not apply to such employment as that of a watchman. **Question**, whether the Act 1579, c. 70, is in desuetude.

Smith v William Beardmore & Co., 1922 S.C. 131; 59 S.L.R. 94; 1922 S.L.T. 58.

(156)

—Acts 1579, c. 70, 1661, c. 18, and 1690, c. 5.

Question, whether these Acts are in desuetude. **Observations** (per Lord M'Laren) upon the working out by the courts of old Scottish statutes expressed in general terms.

Middleton v Tough, 1908 S.C. (J.) 32; 5 Adam, 485; 45 S.L.R. 605; 15 S.L.T. 991.

(157)

Act for staying unlawful conventions, 1606, c. 17—"Salvation Army."

Deakin, &c. v Milne, 1882, 10 R. (J.) 22; 5 Coup. 174; 20 S.L.R. 30. **ROADS AND STREETS**, No. 154.

(158)

Partial desuetude—Act for staying unlawful conventions (Act 1606, c. 17).

The Act 1606, c. 17, has fallen into desuetude. **Observations** on the extent to which a statute may fall into partial desuetude.

M'Ara v Magistrates of Edinburgh, 1913 S.C. 1059; 50 S.L.R. 829; 1913, 2 S.L.T. 110.

V. REPEAL.

1. GENERALLY.

(159)

Reference to practice under repealed statute.

Question, whether a repealing statute can be construed by reference to the practice

which prevailed under the statute which it repeals.

Thomson v Bent Colliery Co., 1912 S.C. 242; 49 S.L.R. 181; 1912, 1 S.L.T. 53.

(160)

Society formed in pursuance of statute subsequently repealed — Winding up—Building Societies Act, 1894, sec. 25—Companies Act, 1862, secs. 4, 199—Interpretation Act, 1889, sec. 38.

In a petition by a creditor for the winding up, under sec. 199 of the Companies Act, 1862, of a building society (unincorporated and not registered under this Act), consisting of more than 20 persons, and established and certified in 1873 under the Building Societies Act, 1836, **held** that, in virtue of sec. 38 of the Interpretation Act, 1889, the repeal of the Act of 1836 by the Building Societies Act, 1894, did not affect rights or liabilities acquired or incurred by the society under the repealed Act.

Smith's Trustees v Irvine and Fullarton Property Investment and Building Society, 1903, 6 F. 99; 41 S.L.R. 66; 11 S.L.T. 395.

(161)

Complaint founded on repealed section—Statute Law Revision Act, 1892.

A complaint labelled a contravention of sec. 26 of the Excise Licences Act of 1825, "as altered or amended by the 8th and 9th sections of the Licensing (Scotland) Act, 1853." The 8th and 9th sections of the Act of 1853 were repealed by the Statute Law Revision Act, 1892. **Held** that the complaint was irrelevant, in respect that it was founded on sections of a statute which had been repealed.

Morison v Stubbs, 1897, 24 R. (J.) 61; 2 Adam, 321; 34 S.L.R. 672; 5 S.L.T. 32.

2. REPEAL BY LATER AND INCONSISTENT STATUTE.

(162)

Repeal of statute in so far as inconsistent with repealing statute—Court of Session (Scotland) Act, 1810, sec. 36—Sheriff Courts (Scotland) Act, 1853, sec. 24.

Sec. 24 of the Sheriff Courts (Scotland) Act, 1853, states what interlocutors may or may not be competently brought under review by the Court of Session. **Held** that any provision of an earlier Act of Parliament allowing an interlocutor not falling within one of the definitions set forth in the above section is inconsistent therewith, and is therefore impliedly repealed.

Ross v Ross, 1894, 22 R. 174; 32 S.L.R. 140; 2 S.L.T. 349.

(163)

Appeal without leave—Inconsistency—Court of Session (Scotland) Act, 1810, sec. 36—Sheriff Courts Act, 1853, sec. 24.

By sec. 36 of the Court of Session Act, 1810, it is enacted that bills of advocacy from sheriffs and other inferior judges shall be allowed, *inter alia*, with respect

"to an interim decree for partial payment," "provided that leave is given by the inferior judge." By the 24th section of the Sheriff Courts Act, 1853, it is enacted that it shall be competent to take to review of the Court of Session "any interlocutor of a sheriff giving interim decree for payment of money." By the same section it is enacted that the provisions of the Court of Session Act, 1810, "are, in so far as inconsistent with this enactment, hereby repealed." **Held** that it was competent to appeal against an interlocutor of the sheriff giving interim decree for payment of money, without obtaining his leave.

Erskine v Lang, 1872, 11 M. 229; 45 J. 153; 10 S.L.R. 154.

(164)

Ballot Act, 1872, sec. 22—Police and Improvement (Scotland) Act, 1862, secs. 48 and 50.

Sec. 48 of the Police and Improvement (Scotland) Act, 1862, is repealed by the fifth sched. of the Ballot Act, 1872, "so far as their provisions are inconsistent with the provisions of this Act." Sec. 50 of the Police and Improvement Act is not directly repealed by the Ballot Act. **Held** that, the object of the Ballot Act being merely to introduce a new mode of voting, when it enacted that "all municipal elections shall be conducted in the same manner in all respects in which the elections of councillors in 'certain royal burghs' are directed to be conducted by the Acts in force at the date of the passing of this Act, as amended by this Act," it only prescribed the mode of conducting the election in the sense of taking the votes, adding them up, and declaring the result, and did not repeal the provisions of secs. 48 and 50 of the Police and Improvement Act, 1862, as to the mode of dealing with an equality of votes and fixing the day of election of police commissioners.

Hamilton v Police Commissioners of Dunoon, 1875, 2 R. 299; 12 S.L.R. 257.

(165)

General Act adopted at a date subsequent to passing of a local Act—Police and Improvement Act, 1862, sec. 35—Forfarshire Roads Act, 1874 (37 & 38 Vict. c. cxlvii.).

By the 35th section of the General Police Act, 1862, it is provided that "any general or local police Act within such burgh shall be repealed, excepting in so far as it may relate to matters not provided for in this Act." The 1862 Act was adopted by the burgh of Kirriemuir in 1875, a year subsequent to the passing of the Forfarshire Roads Act, 1874, which imposed certain burdens upon police commissioners. **Held** that the repealing clause did not apply to the provisions of the Forfarshire Roads Act, and that the enactments must be read together, and consistently with each other.

Kirriemuir Police Commissioners v Reid's Trustees, 1876, 3 R. 993; 13 S.L.R. 644.

(166)

Effect of repealing clause in local Act upon general provisions in public Acts—General

Turnpike Act, 1831, sec. 91—Aberdeen Corporation Act, 1891 (54 & 55 Vict. c. cxxiv.), sec. 8.

A clause in a local Act which is entirely general in its nature and which repeals all laws, &c., which are inconsistent with its provisions must be carefully scrutinised before it can be held to apply in any particular case. **Held** that in a case of inconsistency between the provisions of sec. 91 of the General Turnpike Act, 1831, and those of sec. 133 of the Aberdeen Municipality Extension Act, 1871, a general repealing clause in the Aberdeen Corporation Act, 1891, was not sufficient to repeal the provisions of sec. 91 of the General Turnpike Act, 1831.

Russell v Magistrates of Aberdeen, 1899, 1 F. 792; 36 S.L.R. 510.

3. IMPLIED REPEAL.

(167)

Adulteration Acts, 1860 and 1872.

By sec. 1 of the Adulteration Act, 1860, it is made an offence for any person to sell "as pure and unadulterated any article of food or drink which is adulterated or *not pure*." . . . Sec. 2 of the 1872 Act repeals this enactment with the omission of the italicised words. **Held** that the section in the later Act did not supersede sec. 1 of the Act of 1860 and that it was still competent to bring a complaint under that section. **Observed** (per Lord Justice-Clerk Moncreiff)—"In the first place, the repeal of one statute by another subsequently passed by mere implication is not easily to be presumed; and, secondly, before such repeal can be inferred by implication, repugnancy between the provisions of the two statutes must be proved in whole or in part."

Bain v Mackay, 1875, 2 R. (J.) 32; 3 Coup. 134; 12 S.L.R. 490.

(168)

Burgh Police (Scotland) Act, 1892, sec. 347—Burgh Sewerage, Drainage, and Water Supply (Scotland) Act, 1901, secs. 1, 2 and 3.

Sec. 347 of the Burgh Police Act, 1892, enacts that the lands and premises therein enumerated shall be assessed on one-fourth of their annual value, but adds the proviso that, where such lands and premises were, prior to the passing of the Act, liable to be assessed under any general or local Police Act or under the Public Health Acts or the Local Government (Scotland) Act, 1889, on the annual value thereof, and money had been borrowed on the security of the assessments so authorised, they are to be assessed on their annual value, and in the same manner as heretofore, until the borrowed moneys have been repaid. The Burgh Sewerage Act, 1901, merged the special water supply districts in the larger area of the burgh, and put an end to differential rating. **Held** that the proviso of sec. 347 of the Burgh Police Act, 1892, was impliedly repealed by the Burgh Sewerage, Drainage and Water Supply Act, 1901, and that lands and premises to which the proviso would

have applied now fall to be assessed on one-fourth only of their value, as provided in the unrepealed portion of the section, and not on their full value.

Magistrates of Cowdenbeath v Cowdenbeath Gas Co., 1915 S.C. 323; 52 S.L.R. 283; 1915, 1 S.L.T. 83.

(169)

Court of Session Consignation (Scotland) Act, 1895—Titles to Land Consolidation Act, 1868.

Antrobus, 1896, 23 R. 1032, 33 S.L.R. 759; 4 S.L.T. 89, No. 36, *supra*.

(170)

Companies Act, 1862, sec. 161—Companies Act, 1900, sec. 24.

Sec. 161 of the Companies Act, 1862, is impliedly repealed by sec. 24 of the Companies Act, 1900.

Liquidator of the Melville Coal Co. v Clark, 1904, 6 F. 913; 41 S.L.R. 715; 12 S.L.T. 194.

(171)

Dundee and Arbroath Railway Act, 1836—Poor Law Amendment Act, 1845—Mode of assessment of railways for poor rates.

The Dundee and Arbroath Railway Act, 1836, enacted that, when the railway company acquired a portion of the lands of any proprietor, the portion so acquired should not have any liability for "any public or parish burden whatever, but the same shall be paid by the original proprietor of such lands." At the date of the passing of the Act poor rates were levied from railway companies only qua owners and occupants of the lands held by them in each parish respectively, but in 1845 the Poor Law Amendment Act prescribed a special mode for the assessment of railways, requiring each railway to be valued as a composite subject, and directing the total annual value to be apportioned among the parishes through which it passed, according to the number of miles of railway in each. Held that the assessment of poor rates of a railway as a composite subject was a new assessment introduced for the first time by the Poor Law Amendment Act, 1845, and that previous statutes, in so far as they exempted railways from assessment, were abrogated.

Inspector of Poor of St. Vigeans v Scottish North-Eastern Railway Co., 1870, 8 M. (H.L.) 53; L.R., 2 H.L. Sc. 20; 42 J. 410; 7 S.L.R. 459.

(172)

Excise Acts Amendment Act, 1835, sec. 7—Public-houses (Scotland) Act, 1853, sec. 7—Public-houses Acts Amendment (Scotland) Act, 1862, sec. 5.

Held that the sale of drink in theatres having been made to form the subject of a separate and complete chapter of legislation, sec. 7 of the Excise Acts Amendment Act, 1835, had not been repealed by the general provisions of the Public-houses Acts of 1853 and 1862, and that the prohibition in the Public-houses Act, 1862, against issuing licences without a magistrates' certificate did not debar the Commissioners of Inland

Revenue from granting a retail licence to the holder of a theatre licence to sell beer, wine, and spirits in his theatre without the production by him of such a certificate.

Arthur v Lord Advocate, 1895, 22 R. 382; 32 S.L.R. 289; 2 S.L.T. 498.

(173)

Glasgow Central Railway Act, 1888 (51 & 52 Vict. c. xciv.)—Glasgow Corporation (Sewage) Act, 1896 (59 & 60 Vict. c. ccxxxiv.).

Held that sec. 11 (7) of the Glasgow Corporation (Sewage) Act, 1896, providing for arbitration, did not supersede in regard to all sewage questions the arbitration clause contained in sec. 41 (P) of the Glasgow Central Railway Act, 1888.

Caledonian Railway Co. v Corporation of Glasgow, 1897, 25 R. 74; 35 S.L.R. 67; 5 S.L.T. 200.

(174)

Glasgow Police Act, 1866 (29 & 30 Vict. c. cclxxiii.), sec. 135 (19).

Held that sec. 135 (19) of the Glasgow Police Act, 1866, which deals with places of public resort for the sale of provisions or refreshments, had not been repealed or superseded by the provisions of subsequent Burgh Police (Scotland) Acts which had been adopted by the Corporation of Glasgow.

M'Intyre v Wilson, 1915 S.C. (J.) 1; 7 Adam, 540; 52 S.L.R. 10; 1914, 2 S.L.T. 255.

(175)

Glasgow Police Act, 1866 (29 & 30 Vict. c. cclxxiii.), secs. 370 and 372—Glasgow Regulation of Buildings Act, 1892 (55 & 56 Vict. c. ccxxxix.), sec. 33.

Held that the exemption, in sec. 372 of the Glasgow Police Act of 1866, of corner buildings from the provisions requiring a certain amount of free space for air, was not repealed by sec. 33 of the Glasgow Building Regulations Act of 1892, the purpose of the latter section being merely to define the character of the requisite free space in the case of buildings which under the principal Act were required to have free space, but not to enact that buildings which had previously been exempt should for the future comply with the provisions regarding free space.

Raeside v White, 1893, 23 R. 1119; 33 S.L.R. 630; 1 S.L.T. 73.

See also *M'Dougal v Whyte*, 1896, 33 S.L.R. 630; 4 S.L.T. 18.

(176)

Glasgow Police Act, 1866 (29 & 30 Vict. c. cclxxiii.)—Glasgow Tramways Act, 1870 (33 & 34 Vict. c. clxxv.)—Glasgow Corporation Act, 1893 (56 & 57 Vict. c. ccviii.).

The Glasgow Police Act, 1866, contains a variety of provisions with respect to "stage carriages." The Glasgow Tramways Act, 1870, and the Glasgow Corporation Act, 1893, contain provisions empowering the Corporation to issue bye-laws for the regulation of tramways. The driver of a tramway car, for which the Corporation of Glasgow as owners held a licence under the Act of 1866, was charged with having contravened that

Act. He pleaded in defence that the Act of 1866 had been superseded quoad tramways by the Acts of 1870 and 1893. The magistrate repelled the objection, and convicted the accused. **Held**, in an appeal, that the objection had rightly been repelled.

Black v Neilson, 1898, 25 R. (J.) 98; 2 Adam, 424; 35 S.L.R. 258; 5 S.L.T. 226.

(177)

Highway (Railway Crossings) Act, 1839, sec. 1—Railways Clauses Consolidation (Scotland) Act, 1845, secs. 40 and 52.

Opinion that the provisions of the Act of 1839 with regard to level crossings had been altogether superseded by the Act of 1845.

Hendrie v Caledonian Railway Co., 1909 S.C. 776; 46 S.L.R. 601; 1909, 1 S.L.T. 328.

(178)

Leith Trinity House—Act 1 Geo. IV. c. xxxvii., sec. 35—Merchant Shipping Act 1894, sec. 604.

The Act 1 Geo. IV. c. xxxvii., sec. 35, which confirmed and regulated the powers of the Trinity House of Leith, contained a clause leaving it optional to the captain or master of a ship as to whether he would take a pilot on board when navigating within the territorial waters specified in the Act. Sec. 604 of the Merchant Shipping Act, 1894, made pilotage compulsory for all ships engaged in the home trade. **Held** that the section of the local Act above referred to was impliedly revoked by sec. 604 of the Merchant Shipping Act, 1894, which is universal in its terms.

Randall v Renton, 1902, 5 F. (J.) 16; 4 Adam, 45; 40 S.L.R. 273; 10 S.L.T. 495.

(179)

Roads and Bridges (Scotland) Act, 1878, sec. 86—General Police and Improvement (Scotland) Act, 1862, sec. 88.

Held that the 86th section of the Roads and Bridges Act, 1878, in giving local authorities power to relieve occupiers of lands and heritages under the annual value of £4 on the ground of poverty, was not inconsistent with and did not supersede the power given under sec. 88 of the General Police and Improvement Act, 1862, to remit payment of the assessment on the ground of poverty, irrespective of the amount of rent.

Govan Police Commissioners v Armour, 1887, 14 R. 461; 24 S.L.R. 324.

(180)

Sea Fisheries Act, 1883, sec. 20, sub-sec. (2)—Sea Fisheries (Scotland) Amendment Act, 1885, secs. 1 and 8.

Held that the Sea Fisheries Act, 1883, sec. 20, sub-sec. (2), is not impliedly repealed by sec. 8 of the Sea Fisheries (Scotland) Amendment Act, 1885, and accordingly that compensation adjudged to an injured person under the Act of 1885 may be recovered by distress, or pouncing and sale, in terms of sec. 20, sub-sec. (2), of the Act of 1883.

Ocean Steam Trawling Co. v Geestemunde Herring und Hochseefischerei Co., 1904, 6 F. 793; 41 S.L.R. 605; 12 S.L.T. 91.

(181)

Summary Prosecutions Appeals (Scotland) Act, 1875, sec. 7—Summary Jurisdiction (Scotland) Act, 1881, sec. 9, sub-sec. (4)—Statute Law Revision Act, 1894, sec. 1.

Held that sec. 7 of the Summary Prosecutions Appeals (Scotland) Act, 1875, which provides that in cases in which the jurisdiction is of a "criminal nature," the appeal shall be to the High Court of Justiciary at Edinburgh, and in cases of a civil nature to either Division of the Court of Session, is not impliedly repealed by sec. 9, sub-sec. (4), of the Summary Jurisdiction (Scotland) Act, 1881, which, as amended by sec. 1 of the Statute Law Revision Act, 1894, provides that "all appeals under the Summary Jurisdiction Acts shall be taken to the High Court of Justiciary."

Braid v Swan & Sons, 1903, 5 F. 579; 40 S.L.R. 426; 10 S.L.T. 721.

(182)

Taxes Management Act, 1880, sec. 21—Inland Revenue Regulation Act, 1890, sec. 22.

In a question as to the time within which actions must be brought for the recovery of penalties for failure to deliver correct income tax returns, **held** that the Taxes Management Act, 1880, sec. 21, sub-sec. (4), was superseded by the Inland Revenue Regulation Act, 1890, sec. 22.

Lord Advocate v Sawers, 1897, 25 R. 242; 35 S.L.R. 190; 5 S.L.T. 211.

(183)

Inconsistency between local and general Acts—Public Health (Scotland) Act, 1867, secs. 45 and 46—Glasgow Police Acts, 1862 and 1866.

The provisions of the Glasgow Police Acts, 1862 and 1866, dealing with underground dwellings, enact certain requirements from which such dwellings as are registered in pursuance of the Acts are exempted. The Public Health Act, 1867, contains similar but enlarged provisions regarding underground dwellings, but does not contain the exemption clause. **Held**, in a prosecution for contravention of the provisions of the Public Health Act, in the case of an underground dwelling in Glasgow, that while the provisions of the Police Acts were not repealed by the Public Health Act, it was not a good defence that the dwelling was registered under the Glasgow Police Acts, in view of the fact that the Glasgow Act was in the minds of the legislature when the Public Health Act was enacted and that the latter Act was intended to apply to places having local Police Acts.

Lang v Munro, 1892, 19 R. (J.) 53; 3 White, 201; 29 S.L.R. 612.

(184)

Act of Sederunt—Implied repeal—Repeal of statute on which Act of Sederunt depended—Sheriff—Act of Sederunt, 10th July, 1839—Sheriff Courts (Scotland) Act, 1907, second schedule.

Held that the Act of Sederunt of 10th

July, 1839, which followed on the Sheriff Courts Act, 1838, had fallen in consequence of the repeal of that Act by the Sheriff Courts Act of 1907.

Inglis' Trustees v Macpherson, 1910 S.C. 46; 47 S.L.R. 43; 1909, 2 S.L.T. 363.

4. SAVING CLAUSES IN REPEALING STATUTES.

(185)

Aberdeen Harbour Act, 1879 (42 & 43 Vict. c. lxxxviii.), schedule A — Aberdeen Harbour Act, 1895 (58 & 59 Vict. c. cxxvi.), sec. 10.

Under sched. A of the Aberdeen Harbour Act, 1879, the Harbour Commissioners were not entitled to levy harbour rates upon additional voyages of a certain class of ships which had completed ten voyages during the year. This schedule was repealed by sec. 75 of the Aberdeen Harbour Act, 1895, which by sec. 10 provided:—"Notwithstanding the repeal of the recited Acts . . . and except only as is by this Act otherwise expressly provided, everything before the commencement of this Act done or suffered under or confirmed by the recited Acts . . . shall be as valid as if such Acts . . . were not repealed, and the repeal thereof and this Act respectively shall accordingly be subject and without prejudice to everything so done or suffered or confirmed, and to all rights, liabilities, debts, claims and demands, both present and future, which, if the recited Acts . . . were not repealed, and this Act were not passed, would be incident to or consequent on any and everything so done, suffered, or confirmed . . ." In an action for rates against the owners of a vessel in class 3, which had made ten voyages prior to 1st October, 1895, and several voyages between that date and the end of the year, the defenders denied liability for rates for the voyages between 1st October and the end of the year on the ground that the Act of 1879 conferred a right of exemption from such rates, which was saved by sec. 10 of the Act of 1895. **Held** that no right of exemption had been conferred by the Act of 1879, but that the non-liability for further rates merely arose from the rating powers of the commissioners being restricted to ten voyages, and that the rating powers of the commissioners under the new Act being unrestricted, the exemption no longer existed.

Aberdeen Harbour Commissioners v Granite City Steamship Co., 1896, 23 R. 918; 33 S.L.R. 653; 4 S.L.T. 69.

(186)

Local Government (Scotland) Act, 1889, secs. 11, 26 and 27.

The Local Government (Scotland) Act, 1889, sec. 11, enacts that "subject to the provisions of this Act there shall be transferred to and vested in the council of each county," *inter alia*, "the whole powers and duties of the commissioners of supply," and that "the provisions of any Act of Parliament conferring, imposing, or regulating the

powers and duties by this Act transferred, or regulating the proceedings under any such Act, shall remain in full force and effect, except in so far as they are repealed by or are inconsistent with the provisions of this Act." Secs. 26 and 27 empower county councils to impose rates within the county to meet the deficiency in the county fund in respect of each branch of expenditure, declaring that "the rate in respect of each branch of expenditure for which provision is made under an Act of Parliament in force at the passing of this Act shall be deemed to be imposed under the powers and subject to the provisions of that Act, except in so far as these are inconsistent with the provisions of this Act," the sum of such rates to be the "consolidated rates." **Held** (1) that by secs. 26 and 27 of the Local Government Act, 1889, the whole assessing powers derived by a county council from prior Acts were merged in the power given to assess for consolidated rates, and that a county council had no other power to assess; and (2) that a county council's power to assess being limited to lands and heritages within the county as defined by the Act, they were not entitled to assess lands or heritages within a royal or parliamentary burgh.

Magistrates of Galashiels v County Council of Selkirkshire, 1896, 23 R. 818; 33 S.L.R. 622; 4 S.L.T. 50.

(187)

Statute Law Revision Act, 1893.

Observations on the construction of the Statute Law Revision Act, 1893, and in particular of the provision that the repeal by that Act of any enactment or schedule should not affect any enactment in which such enactment or schedule had been applied, incorporated, or referred to.

Cairney v Wright, 1909 S.C. 894; 46 S.L.R. 223; 16 S.L.T. 602.

(188)

Statute Law Revision Act, 1891 — Day Trespass Act, 1832, sec. 11—Poaching Prevention Act, 1862, sec. 3.

Sec. 1 of the Statute Law Revision Act, 1891, declares that repeal by the Act shall not affect any enactment in which a repealed enactment has been applied, incorporated or referred to. Sec. 11 of the Day Trespass Act, 1832, is repealed expressly by the Statute Law Revision Act, 1891. Sec. 3 of the Poaching Prevention Act, 1862, provides that penalties under that Act shall be recovered in Scotland under the Day Trespass Act, 1832. **Held** that, as regards proceedings taken under the Poaching Prevention Act, sec. 11 of the Day Trespass Act remained in force.

M'Donald v Milne, 1897, 25 R. (J.) 41; 2 Adam, 457; 35 S.L.R. 270; 5 S.L.T. 227.

(189)

Private Acts — Effect of consolidating statute—Forth and Clyde Navigation Act, 1841 (4 & 5 Vict. c. iv.).

In 1841 a private canal company obtained

a private Act consolidating previous Acts and containing a clause in the following terms:—"Provided always that nothing herein contained shall be held to limit or affect any liability which by law does or may attach to the said company, or to the property now belonging to or occupied by, or which may hereafter belong to or be occupied by them, to be rated and assessed for the relief of the poor, nor to impose any such liability for any such rate or assessment upon any lands remaining with any vendor or vendors after any partial alienation to the said company as aforesaid." **Held** that any exemption from poor rates held by the company under its previous statutes at the date of the passing of the Consolidation Act remained intact.

Caledonian Railway Co. v Meek, 1870, 8 M. 476; 42 J. 222; 7 S.L.R. 273.

(190)

Town Councils (Scotland) Act, 1900, secs. 33, 57, and 117—Aberdeen Corporation Act, 1891 (54 & 55 Vict. c. cxxiv.), sec. 15.

Held that the provisions of the Aberdeen Corporation Act, 1891, regarding the election and tenure of office of magistrates were not superseded by the general provisions of the Town Councils Act, 1900, which were inconsistent therewith, but which were subject to the qualification that "nothing in this Act shall supersede, prejudice, or affect the provisions of any local Act applicable to any burgh."

Magistrates of Aberdeen, 1901, 4 F. 6; 39 S.L.R. 6; 9 S.L.T. 210.

(191)

Town Councils (Scotland) Act, 1900, sec. 117—Irvine Burgh Act, 1881 (44 & 45 Vict. c. lxxi.).

Held that the provisions of the Irvine Burgh Act, 1881, in regard to audit of the burgh accounts had not been superseded by the general provisions of the Town Councils Act, 1900, which were inconsistent therewith, but which were subject to the qualification that "nothing in this Act shall supersede, prejudice, or affect the provisions of any local Act applicable to any burgh."

Smith v Magistrates of Irvine, 1902, 5 F. 113; 40 S.L.R. 76; 10 S.L.T. 351.

VI. BYE-LAWS, &c.

1. LOCAL GOVERNMENT.

(192)

Division of parish—Procedure—Order by Secretary for Scotland—Ultra vires—Local Government (Scotland) Act, 1889, sec. 51—Local Government (Scotland) Act, 1894, secs. 1 and 46.

The Local Government (Scotland) Acts, 1889 and 1894, empower the Secretary for Scotland to make orders altering the boundaries of parishes. Sec. 51 of the 1889 Act gives him power to divide any parish which it seems, for various reasons, to be expedient to divide and for uniting any such sub-

division with other parishes. Sec. 1 of the 1894 Act provides that that Act shall be read with the Act of 1889 as one Act. Sec. 46 of the 1894 Act provides with regard to orders made by the Secretary for Scotland altering the boundaries of parishes, *inter alia*, as follows:—"Before making any such order the Secretary for Scotland shall consult with the authorities concerned, and upon the application of any one or more of such authorities shall cause a local inquiry . . . to be held, and shall cause the proposed order to be published in the 'Edinburgh Gazette' . . . and shall consider all objections and representations respecting such order." A county council applied to the Secretary for Scotland for an order altering the boundaries of one of their parishes. The parish council opposed the application, and a local inquiry was held under sec. 46 of the 1894 Act, after which the Secretary for Scotland intimated that he was not "at present" prepared to grant the application. The application was subsequently renewed and, without holding a further inquiry, but after receiving a representation from the parish council, the Secretary for Scotland published a "proposed order" in the 'Edinburgh Gazette.' **Held** that the statutory procedure had been sufficiently complied with and that the order was legal and regular.

Dundee Combination Parish Council v Secretary for Scotland, 1901, 3 F. 848; 38 S.L.R. 619; 9 S.L.T. 54.

(193)

Bathing—Ultra vires—Burgh Police (Scotland) Act, 1892, sec. 300.

By the Burgh Police (Scotland) Act, 1892, provision is made for bye-laws, made in pursuance of powers therein conferred, being confirmed by the sheriff and by the Secretary for Scotland, for notice being given to the public of the intention to apply for such confirmation, and for the hearing and disposal of objections. The magistrates of a burgh, professing to exercise the powers conferred by sec. 300 of the Act, made certain bye-laws, one of which was in these terms—"4. No person shall bathe on or from any part of the seashore within the burgh except at such places as may from time to time be appointed by the magistrates." The bye-laws were confirmed by the sheriff and by the Secretary for Scotland, and thereafter the magistrates, by minute of meeting, fixed certain places for male bathers, and certain other places for female bathers. **Held** that the bye-law was ultra vires.

M'Gregor v Disselduff, 1907 S.C. (J.) 21; 5 Adam, 196; 44 S.L.R. 77; 14 S.L.T. 434.

(194)

Paving of common areas—Burgh Police (Scotland) Act, 1892, sec. 316 B (8).

Sec. 316 of the Burgh Police Act, 1892, enacts that "the commissioners may from time to time make bye-laws as they think fit for the purposes after mentioned, viz.:—B (8) . . . and also for paving private courts,

common passages, and common areas other than bleaching greens." **Held** that under the section it was competent for the burgh commissioners to make a bye-law requiring the owner of a common area, in addition to paving the area, to provide proper and sufficient means for taking off the surface water, and that a common area behind a tenement of houses in a burgh, which was set apart for drying clothes, but was not laid down in grass, did not come within the statutory exception of "bleaching greens."

A. Wilson Smart & Son v Partick Police Commissioners, 1903, 5 F. 427; 40 S.L.R. 349; 10 S.L.T. 621.

(195)

Valuation roll—Resolution of county council—"Regulation"—Approval of Treasury—Local Government Act, 1889, sec. 83.

Sec. 83 of the Local Government Act, 1889, provides that "where the assessor is an officer of Inland Revenue, any regulations made by the county council with respect to his duties shall be subject to the approval of the Treasury." A county council passed a resolution that the valuation roll of the county should be printed for a period of five years. **Held** that this resolution and the subsequent instruction to the assessor to have the valuation roll printed did not amount to a "regulation" in the sense of the above-quoted section.

County Council of Lanarkshire v Lord Advocate, 1892, 19 R. 617; 29 S.L.R. 497.

(196)

Statutory notice—Assessment for drainage—Glasgow Police Amendment Act, 1890 (53 & 54 Vict. c. ccxxi.), sec. 16.

Held that, where a notice was served under sec. 16 of the Glasgow Police Amendment Act, 1890, for the execution of certain works which did not fall within the terms of the statutory notice under sec. 16, the notice was invalid.

Glasgow Police Commissioners v M'Omish & Arthur, 1896, 23 R. 896; 33 S.L.R. 675; 4 S.L.T. 72. In House of Lords, 1899, 25 R. (H.L.) 45; 35 S.L.R. 949; 6 S.L.T. 35.

2. SUPERVISION OF LOCAL AUTHORITIES.

(197)

Determination of Secretary for Scotland—Ultra vires—Determination under Local Government (Scotland) Act, 1889, sec. 81, sub-sec. (2).

Held that a determination of the Secretary for Scotland under sec. 81, sub-sec. (2), of the Local Government Act, 1889, that a police burgh should be represented on a sub-committee in the proportion of eight members to six members appointed by the county council was ultra vires, and determination reduced.

Eastern District Committee of Dumbartonshire County Council v Police Commissioners of Clydebank, 1893, 21 R. 12; 31 S.L.R. 22; 1 S.L.T. 256.

(198)

Determination by Board of Supervision—Ultra vires—Recall of determination—Super-venient legislation—Local Government (Scotland) Act, 1889, sec. 27, sub-sec. (3)—Public Health (Scotland) Act, 1867, secs. 5 and 94.

After the passing of the Local Government Act, 1889, but before the date at which the Act came into operation, the Board of Supervision recalled a determination with respect to the territories of certain local authorities, issued by the Board under the Public Health Act, 1867, thereby depriving the defenders of a right to claim partial exemption from assessment to which they would otherwise have been entitled. **Held** that the recall must receive effect.

County Council of Renfrewshire v Water Trust of Greenock, 1892, 20 R. 164; 30 S.L.R. 157.

3. REGULATION OF TRAFFIC.

(199)

Carriage traffic—Edinburgh Provisional Order, 1867, sec. 109.

Held that the powers conferred by the Edinburgh Provisional Order, 1867 (30 & 31 Vict. c. 58), on the magistrates of Edinburgh to make bye-laws for omnibuses and other carriages for the conveyance of passengers extended to the regulation of all omnibuses and other public carriages running within the burgh, though on their way to or from places beyond the jurisdiction of the magistrates.

Croall v Linton, 1869, 7 M. 849; 41 J. 454; 1 Coup. 280; 6 S.L.R. 540.

(200)

Motor traffic—Motor Car Act, 1903—Burgh Police Act, 1892, secs. 270-272.

Held that the Motor Car Act has not superseded the said sections of the Burgh Police Act as regards motors plying for hire, and that it was competent for the defenders to make bye-laws requiring persons in charge of motor omnibuses plying for hire partly, though not wholly, within their jurisdiction to obtain licences from them.

Glasgow and South-Western Railway Co. v Magistrates of Saltcoats, (O.H.) 1906, 14 S.L.T. 560.

(201)

Motor car traffic—Burgh Police (Scotland) Act, 1892, sec. 270—Applicability.

Sec. 270 of the Burgh Police Act, 1892, authorises magistrates to license "hackney coaches, omnibuses, or carriages of any kind or description, adapted to the carriage of persons," to ply for hire. **Question**, whether bye-laws made under this section were applicable to the case of motor cars.

Glasgow and South-Western Railway Co. v Magistrates of Saltcoats, (O.H.) 1906, 14 S.L.T. 560.

(202)

Omnibus traffic—General Police Act, 1862, sec. 309—Standing and starting of omnibuses.

The magistrates of a burgh, in virtue of

the powers conferred by sec. 309 of the General Police Act, 1862, enacted a bye-law for the regulation of omnibuses, which enacted that "all omnibuses shall stand in and depart from County Square." **Held** that, although the magistrates might fix by a bye-law a stance at which omnibuses should stand, and from which they should start, it was ultra vires to compel all omnibuses to stand at the stance so fixed before starting when the proprietors desired that they should start from another place.

King v Hart, 1882, 5 Coup. 16.

(203)

Edinburgh Municipal and Police Amendment Act, 1901 (54 & 55 Vict. c. cxxxvi.), sec. 65.

By sec. 65 of the Edinburgh Municipal and Police Amendment Act, 1901, the magistrates and council are empowered to make bye-laws for the regulation of omnibus traffic within the city. A bye-law was passed prohibiting drivers and conductors of omnibuses from delivering bills or canvassing for passengers. **Held** that the bye-law must be read in the light of the circumstances to which it was meant to apply, and that, being one of a series of bye-laws for regulating omnibus traffic, it was to be read as applying only to such traffic in the streets, and that, so read, it was not ultra vires.

Rutherford v Somerville, 1901, 4 F. (J.) 15; 3 Adam, 510; 39 S.L.R. 276; 9 S.L.T. 252.

(204)

Regulation of hackney carriages — Edinburgh Municipal and Police Act, 1879 (42 & 43 Vict. c. cxxxii.), sec. 304.

Sec. 304 of the Edinburgh Municipal and Police Act, 1879, empowers the magistrates to make "orders and bye-laws" for (1) regulating the conduct of owners and drivers of hackney carriages, and (2) regulating all matters relating to the safety, comfort, or convenience of persons hiring or using hackney carriages and of the public. The magistrates issued a bye-law in the following terms:—"The driver of a hackney carriage shall not stand with the same longer than is necessary for taking up or setting down passengers on any part of the public streets not allotted as a hackney carriage stance, except at the dismissal of the theatres, assemblies, public meetings, and the like." A hackney cab driver, upon orders from the manager of the hotel, drove to a hotel and then awaited a hire. He waited an hour without getting a hire, and was then discharged by the boots of the hotel. **Held** that the bye-law was not ultra vires of the magistrates, and that the cab driver was rightly convicted of having contravened it.

Mackenzie v Somerville, 1900, 3 F. (J.) 4; 3 Adam, 203; 37 S.L.R. 926; 8 S.L.T. 149.

(205)

Lights on vehicles — Roads and Bridges (Scotland) Act, 1878, sec. 104.

The Roads and Bridges (Scotland) Act, 1878, sec. 104, empowers road trustees to

make bye-laws with respect to any road within their jurisdiction, inter alia, "for the general regulation of traffic on highways." **Held** that a bye-law requiring vehicles to exhibit lights at night was within the powers conferred by the above enactment.

Auld v Barr, 1897, 25 R. (J.) 13; 2 Adam, 363; 35 S.L.R. 35; 5 S.L.T. 152.

(206)

Use of locomotives on highway—Effect of confirmation by Secretary of State—Locomotives Amendment (Scotland) Act, 1878, secs. 6 and 7.

By sec. 6 of the Locomotives Amendment (Scotland) Act, 1878, the road authority is given power to make bye-laws for regulating the use of locomotives upon highways. By sec. 7 the sanction of the Secretary of State is necessary for the validity of such bye-laws. **Held** that it was not ultra vires of road trustees to make bye-laws affecting the construction of conveyances attached to locomotives, having regard to the special circumstances of the roads with which they were concerned.

Opinion (per Lord McLaren) that the Court had no power to review bye-laws framed by road trustees when confirmed by the Secretary of State in terms of the Act, and that this confirmation gave them the authority of an Act of Parliament.

Crichton v Forfarshire County Road Trustees, 1886, 13 R. (J.) 99; 1 White, 213; 23 S.L.R. 840.

See also Hepburn v Wilson, 1901, 4 F. (J.) 18; 3 Adam, 502; 39 S.L.R. 278; 9 S.L.T. 251, No. 211, infra.

(207)

General order—Ultra vires.

The road trustees for the county of Aberdeen made a bye-law prohibiting any wagon drawn by a locomotive carrying more than five tons on any road within their jurisdiction, except with the consent of the surveyor. **Held** that the bye-law was ultra vires, as sec. 6 of the Locomotives Amendment Act, 1878, authorised bye-laws for exceptional cases only.

Cadenhead v Smart, 1894, 22 R. (J.) 1; 1 Adam, 474; 32 S.L.R. 7; 2 S.L.T. 245.

(208)

Necessity of setting forth Act under which bye-law passed—Locomotives Amendment (Scotland) Act, 1878, sec. 8.

A bridge on a highway may be closed for locomotive traffic by the road authorities of the district by a bye-law relating to it passed under the powers given by the Locomotives Amendment Act, 1878, and, after the advertisement specified in that Act, duly confirmed; and, therefore, a complaint alleging a contravention of such bye-law does not require to libel the Locomotive Act, 1861, or to set forth that, as required by sec. 6 of that Act, a notice was placed at the bridge itself that it was insufficient for the ordinary traffic of the district.

Cadenhead v Milne, 1887, 14 R. (J.) 58; 1 White, 441; 24 S.L.R. 661.

(209)

Enforcement—Traffic regulations—General Police and Improvement (Scotland) Act, 1862, sec. 308.

Sec. 308 of the General Police and Improvement (Scotland) Act, 1862, empowers magistrates to make bye-laws "for regulating the conduct of the proprietors and drivers of hackney carriages plying within such prescribed distance in their several employments . . ." The magistrates of Leith made a bye-law in the following terms:—"Every driver shall, during the hours of divine service on Sundays, or other days set apart for public worship by lawful authority, drive at a walking pace while passing any place of public worship." Held that this bye-law only applied to drivers of hackney carriages which were licensed in Leith and that it was ultra vires of the magistrates to attempt to enforce it against the driver of a hackney carriage which was licensed in Edinburgh.

Gairns v Main, 1888, 15 R. (J.) 51; 1 White, 596; 25 S.L.R. 428.

(210)

Reasonableness—Tramway regulations.

A tramway company issued a bye-law to the effect that passengers on a journey, part of which was performed in one of their omnibuses, and the latter part in a tramway car, should have the ticket for the whole distance checked at the place where the change from one vehicle to the other was made. A person who was aware of this bye-law took a ticket for the whole journey, but did not, though warned to do so, have it checked. The tramway conductor refused to accept the unchecked ticket and demanded the fare applicable to the tramway part of the journey. This was refused, and the passenger was subsequently taken in charge by the police. Held that the bye-law was a reasonable one, and that the passenger, who was aware of it, was bound to conform to it.

Apthorpe v Edinburgh Street Tramways Co., 1882, 10 R. 344; 20 S.L.R. 256.

(211)

Regulations made under statutory powers—Secretary for Scotland—Direction that regulation to be laid before Parliament—Effect of non-compliance with direction—Locomotives on Highways Act, 1896, sec. 6.

Held that in a prosecution for a contravention of a regulation made by the Secretary for Scotland in virtue of sec. 6 of the Locomotives on Highways Act, 1896, it is not incumbent on the prosecutor to prove that the regulation has been laid before Parliament. Held, further, that a prosecution is competent even if the regulation has not been laid before Parliament, in respect that the enactment does not import that presentation to Parliament is a condition precedent of the regulation coming into force.

Hepburn v Wilson, 1901, 4 F. (J.) 18; 3 Adam, 502; 39 S.L.R. 278; 9 S.L.T. 251.

See also Crichton v Forfarshire County Road Trustees, 1886, 13 R. (J.) 99; 1 White, 213; 23 S.L.R. 840, No. 206, supra.

(212)

Statutory order—Competency of challenging validity in summary proceeding—Motor Car Act, 1903, secs. 9 and 18.

Question whether it was competent in a summary proceeding for recovery of penalties, or in the High Court when reviewing such a proceeding, to challenge the validity of a regulation made by the Secretary for Scotland under sec. 18 (3) of the Motor Car Act, 1903.

Stewart v Todrick, 1908 S.C. (J.) 8; 5 Adam, 432; 45 S.L.R. 235; 15 S.L.T. 622.

(213)

Order—Ultra vires — Permanent regulations—Burgh Police (Scotland) Act, 1892, sec. 385.

Under sec. 385 of the Burgh Police (Scotland) Act, 1892, the magistrates of a burgh may make "bye-laws and issue notices and orders," inter alia, "regulating the traffic, or any particular traffic, in streets within the burgh." The Act further provides that such bye-laws shall be confirmed by the sheriff and the Secretary for Scotland, but contains no such provision with regard to notices and orders. Held that an "order," made by magistrates in pursuance of this section, by which omnibuses were forbidden to turn in certain streets of the burgh was invalid, in respect that, as the regulation was intended to be permanent, it could be competently made only by bye-law.

Taylor v Nicol, 1912 S.C. (J.) 38; 6 Adam, 581; 49 S.L.R. 552; 1912, 1 S.L.T. 344.

Baikie v Charleson, 1901, 3 F. (J.) 54; 3 Adam, 323; 38 S.L.R. 552; 8 S.L.T. 488.

4. FOOD, LIQUOR, &c., REGULATIONS.

(214)

Ice-cream and aerated water shops—Burgh Police (Scotland) Act, 1892, secs. 316, 317 and 318—Burgh Police (Scotland) Act, 1903, sec. 82—Ultra vires.

By secs. 316, 317 and 318 of the Burgh Police (Scotland) Act, 1892, and sec. 82 of the Burgh Police (Scotland) Act, 1903, town councils are empowered "to make bye-laws in regard to the hours of opening and closing" of ice-cream and aerated water shops, "the hours for business not being more restricted than fifteen hours daily." The town council of Partick passed a bye-law prohibiting ice-cream and aerated water shops in the burgh from being open except between seven o'clock in the morning and ten o'clock at night. Certain ice-cream dealers in the burgh brought an action for reduction of the bye-law on the ground that the bye-law did not give them the statutory minimum of fifteen "hours of business." Held that the bye-law was not ultra vires or unreasonable and that the Court had no power to interfere with what the

town council had done in the bona fide exercise of their discretion.

Da Prato v Magistrates of Partick, 1907 S.C. (H.L.) 5; [1907] A.C. 153; 44 S.L.R. 366; 14 S.L.T. 874.

(215)

—Respective powers of town and county councils to make bye-laws and impose penalties—Burgh Police (Scotland) Acts, 1892, 1903 and 1911—Local Government (Scotland) Act, 1889, sec. 57.

Held that, whereas under the Burgh Police (Scotland) Acts, 1892, 1903 and 1911, town councils are empowered to make bye-laws in regard to the hours of opening and closing ice-cream shops and other places of public refreshment in burghs, and to impose a penalty not exceeding forty shillings for each breach, county councils under the same Acts and under the Local Government (Scotland) Act, 1889, may make similar bye-laws for counties, and may impose a penalty not exceeding £5 for infringement.

Lena v Davidson, 1913 S.C. (J.) 76; 7 Adam, 129; 50 S.L.R. 757; 1913, 2 S.L.T. 24.

(216)

—Conditions attached to licence—Ultra vires—Edinburgh Corporation Act, 1900 (63 & 64 Vict. c. cxxxiii.), sec. 80.

By sec. 80 of the Edinburgh Corporation Act, 1900, as amended by sec. 57 of the Edinburgh Corporation Order, 1901, the magistrates were empowered to grant licences to persons selling ice-cream, and any person selling ice-cream at a place or time not authorised by the magistrates was subjected to a penalty. The magistrates proposed that the licences issued by them should contain certain restrictions regarding the times and occasions upon which premises might be kept open or ice-cream sold, and should also contain a power to the magistrates to suspend or revoke licences granted by them at any time. Held in an action for a declarator that the magistrates were not entitled under the Act to issue licences containing the above conditions, that it was ultra vires of the magistrates to insert the conditions in the licences issued by them.

Rossi v Magistrates of Edinburgh, 1904, 7 F. (H.L.) 85; [1905] A.C. 21; 42 S.L.R. 79; 12 S.L.T. 435.

(217)

Licensing regulations—Hours of opening and closing licensed premises—Public-Houses Acts Amendment Act, 1862, sec. 2—Ultra vires.

The Public-Houses Acts Amendment Act, 1862, contains in a schedule forms of certificates for the sale of exciseable liquors which specify the hours of opening and closing to be 8 a.m. and 11 p.m. respectively. By sec. 2 it is provided "that in any particular locality within any county or district or burgh requiring other hours for opening and closing . . . than those specified in the forms of certificates in said schedule applicable thereto, it shall be lawful for such justices or magistrates respectively to insert

in such certificates such other hours, not being earlier than six of the clock or later than eight of the clock in the morning for opening, or earlier than nine of the clock or later than eleven of the clock in the evening for closing the same, as they shall think fit."

The magistrates of a certain burgh passed a general resolution that in a particular locality within the burgh, which included all the hotels and public-houses within the burgh, the hours of closing should be ten o'clock, and granted certificates accordingly. Held that the magistrates had only power to alter the general rule laid down by the schedule in exceptional cases and in particular portions of the district under their control, and that they had accordingly acted ultra vires in changing the statutory hours of closing all the licensed houses in the burgh, and remit made to the clerk to alter the certificates in accordance with the schedule.

Magistrates of Rothesay v Ashley, 1874, 1 R. (H.L.) 14; L.R., 2 Sc.App. 352; 11 S.L.R. 487.

(218)

—Order by Secretary for Scotland—Ultra vires—Public-house—Jurisdiction—Licensing (Scotland) Act, 1903, sec. 109.

The Licensing (Scotland) Act, 1903, which repeals all previous Licensing Acts, came into force on 1st January, 1904. The Act, by sec. 109, provides that the Secretary for Scotland may, by order before the date of the first general half-yearly meeting of a licensing court constituted by the Act, prescribe the statutory duties to be performed before such date by members and clerks of such courts, and otherwise provide for bringing the Act into full operation, and that any such order shall have effect as if enacted in the Act. The Licensing (Scotland) Act (Interim Provisions) Order, 1903, issued by the Secretary for Scotland on 21st December, 1903, under sec. 109 of the Licensing (Scotland) Act, 1903, enacts—Sec. 2. "No justice or magistrate shall after the 31st day of December, 1903, exercise any powers of trying offences vested in a justice or justices or in a magistrate or magistrates under the existing Acts." A publican was charged in a justice of peace court with a breach of his certificate alleged to have been committed on 5th December, 1903. The complaint was presented on 30th and served on 31st December, 1903. It was called on 11th January, 1904, and was tried on 28th January, 1904, on which latter date the accused was convicted of the contravention charged. Held that sec. 2 of the Licensing (Scotland) Act (Interim Provisions) Order, 1903, issued by the Secretary for Scotland, was not ultra vires, and that in view of its terms the justices had no jurisdiction to try and convict the accused in January, 1904, for an offence against the Licensing Acts in force in December, 1903.

M'Nish v Weir and Patrick, 1904, 6 F. (J.) 68; 4 Adam, 345; 11 S.L.T. 792.

(219)

—Order of Central Control Board (Liquor Traffic)—Ultra vires—Statutory

order imposing penalty of imprisonment on master for crime of servant.

An order of a board, acting under statutory authority, made it a criminal offence, involving a maximum penalty of six months' imprisonment, with hard labour, for a publican either himself or "by any servant" to supply liquor after certain hours. **Held** that the order was not ultra vires, although it imposed a severe penalty on one who was not the actual wrongdoer.

Mackenna v Sim, 1916 S.C. (J.) 24; 7 Adam, 732; 53 S.L.R. 411; 1916, 1 S.L.T. 297.

(220)

—**Liquor Control Regulations—Ultra vires—Power to regulate "consumption" of liquor—Defence of the Realm (Liquor Control) Regulations, 1915—Defence of the Realm Amendment (No. 3) Act, 1915, sec. 1, sub-sec. (2).**

Sub-sec. (2) of sec. 1 of the Defence of the Realm (Amendment) Act, 1915, gives power to His Majesty in Council to issue regulations for giving prescribed Government authorities right to regulate the power of "selling or supplying or controlling the sale or supply of" intoxicating liquor. Regulation 2 of the Defence of the Realm (Liquor Control) Regulations, 1915, was pronounced as an Order in Council under the above power, and prohibited the sale or supply of intoxicating liquor in certain circumstances in any area to which the regulations were applied. In pursuance of this Order in Council the central control board of a certain area pronounced an order prohibiting, inter alia, "consumption" of spirits in licensed premises or clubs. **Held** that the regulation above referred to did not confer on the central control board power to prohibit the consumption in licensed premises of liquor obtained by the consumer elsewhere.

Question, whether the order pronounced was intra vires of the central control board.
McElfrish v Barlow, 1917 J.C. 32; 54 S.L.R. 337; 1917, 1 S.L.T. 182.

(221)

Order made by Food Controller — Ultra vires—Competency of challenging in summary proceeding — Food Hoarding Order of 5th April, 1917 — Summary Jurisdiction (Scotland) Act, 1908, sec. 38 (2).

Held that an order made by a Government department in pursuance of powers conferred by statute, but which was not declared to have the force of statute, might competently be challenged as ultra vires by the accused in a summary complaint for contravention of the order brought in the sheriff court.

Shepherd v Howman, 1918 J.C. 78; 55 S.L.R. 396; 1918, 1 S.L.T. 300.

5. EDUCATION.

(222)

Deliverances of Board of Education—Ultra vires—Education Act, 1872, sec. 9.

Sec. 9 of the Education Act of 1872 enacts that "any question or dispute regarding the area of any parish or burgh for the purposes of this Act shall be settled by the

Board of Education, or by the sheriff of the county in which the same or the greater part thereof is situated, on an application by the school board authorised by the Board of Education, and the determination of the Board of Education or of the sheriff, as the case may be, shall be final." In a question between two parishes, in one of which a school board had not been constituted at the date of the deliverance, the Board of Education made a deliverance under this section. **Held** (1) that the deliverance was not final, as all parties interested had not been heard, and (2) that the Court could not pronounce upon the merits of the question, the decision of it being exclusively committed to the Board of Education or the sheriff.

Lochgilphed School Board v South Knapdale School Board, 1877, 4 R. 389; 14 S.L.R. 279.

See also *Lord Advocate v Stow School Board*, 1876, 3 R. 469; 13 S.L.R. 305. **EDUCATION, No. 3.**

(223)

Observed that the Board are entitled after refusing sanction to an "opinion and determination" of a school board to change their view and give approval.

Lord Advocate v School Board of Strathmiglo, 1876, 14 S.L.R. 108.

(224)

Regulation of Committee of Council on Education — Ultra vires — Public School Teachers Act, 1882, sec. 3, sub-sec. (2).

Opinion that a regulation of the Committee of Council making it a condition of giving assistance to school boards that the power of dismissing the teachers should be in the hands of the managers was ultra vires as being inconsistent with the Public School Teachers Act, 1882, sec. 3, sub-sec. (2).

School Board of Barvas v Macgregor, 1891, 18 R. 647; 28 S.L.R. 543.

(225)

General order of Scotch Education Department—Ultra vires—Education (Scotland) Act, 1878, schedule.

General order by the Scotch Education Department regulating the election of school boards, which was **held** to be unwarranted by the schedule of the Education Act of 1878, and therefore to be ultra vires.

Duncan v Crighton, 1892, 19 R. 594; 29 S.L.R. 448.

(226)

—**Education (Scotland) Act, 1878, secs. 26 and 27.**

By clause 9 of the General Order of the Scotch Education Department for the regulation of school board elections issued under the Education (Scotland) Act, 1878, the decision of the returning officer as to the validity of any nomination paper is made final. **Held** that this regulation, if meant to exclude the jurisdiction of the Court of Session, was ultra vires.

Kerr v Hood, 1907 S.C. 895; 44 S.L.R. 652; 15 S.L.T. 14.

(227)

Ordinances of statutory commissioners—Procedure—Ultra vires—Universities (Scotland) Act, 1889, secs. 15, 16, 19, and 20.

Sec. 15 of the Universities (Scotland) Act, 1889, permits the commissioners appointed under the Act "to make ordinances to extend any of the universities by affiliating colleges to them." Sec. 16 gave the commissioners power under certain conditions to affiliate the University College, Dundee, with the University of St. Andrews. Secs. 19 and 20 regulate the procedure to be followed by the commissioners in issuing ordinances. The commissioners issued an ordinance under sec. 16, but did not follow the procedure laid down in secs. 19 and 20. **Held** that the ordinances so pronounced were ultra vires and fell to be reduced.

Metcalfe v Cox, 1895, 22 R. (H.L.) 13; [1895] A.C. 328; 32 S.L.R. 402; 2 S.L.T. 599.

(228)

Affiliation of University College, Dundee, to University of St. Andrews.

McGregor v Cox, 1893, 25 R. 1216; 35 S.L.R. 273; 5 S.L.T. 215.

(229)

Ordinances of University Court—Universities (Scotland) Act, 1889, sec. 21.

By sec. 21 of the Universities (Scotland) Act, 1889, university courts were given power of altering or revoking "any of the ordinances affecting such university which may have been or may be framed and passed under the Universities (Scotland) Act, 1858, or this Act, and making new ordinances." **Held** that this section could not be construed as giving power to the University of St. Andrews, after Dundee College had been incorporated with it, to revoke the ordinance making the incorporation.

Metcalfe v Cox, 1896, 23 R. (H.L.) 60; [1896] A.C. 647; 34 S.L.R. 6; 4 S.L.T. 102.

6. HARBOURS AND PIERS.

[See also HARBOUR VII.]

(230)

Harbour commissioners—Harbours, Docks and Piers Clauses Act, 1847, secs. 33 and 83—Ultra vires.

Sec. 83 of the Harbours, Docks and Piers Clauses Act, 1847, enacts that harbour commissioners "may from time to time make such bye-laws as they shall think fit for all or any of the following purposes:—That is to say . . . for regulating the use of the harbour, dock or pier . . . Provided always that such bye-laws shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect, or the provisions of this or the special Act." Harbour commissioners passed a bye-law prohibiting steamers from certain ports from landing passengers on Sunday. Bye-law reduced (1) as inconsistent with the provisions of sec. 33 of the Harbours, Docks and

Piers Clauses Act, 1847, which provided that, upon the payment of rates, &c., the harbour, dock and pier should be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers; and (2) as ultra vires in respect that it differentiated between different ports.

Galloway Saloon Steam Packet Co. v Kirkcaldy Harbour Commissioners, (O.H.) 1888, 25 S.L.R. 732.

(231)

Harbour trustees—Greenock Port and Harbours Act, 1866 (29 & 30 Vict. c. clvi.), sec. 93—Harbours, Docks and Piers Clauses Act, 1847, sec. 83.

Sec. 93 of the Greenock Port and Harbours Act, 1866, authorises the harbour trustees to make bye-laws, inter alia, "for regulating the conduct of the owners, masters, and crews of vessels propelled by steam with regard to the rate of speed at which they may proceed within the port and harbours." Sec. 83 of the Harbours, Docks and Piers Clauses Act, 1847, authorises harbour trustees to make bye-laws for the purpose of "preventing damage or injury to any vessel or goods within the harbour or dock, or at or near the pier." The Greenock Harbour Trustees made a bye-law for the purpose of regulating the speed of vessels in the fairway of the navigable stream of the river Clyde ex adverso of the harbour works. **Held** that as the fairway of the navigable channel of the river Clyde ex adverso of the harbour works was not within the harbour, the bye-law was ultra vires of the trustees.

Kerr v Auld, 1890, 18 R. (J.) 12; 2 White, 561; 28 S.L.R. 305.

(232)

Power of railway company to make bye-laws excluding public from use of piers.

North British Railway Co. v Mackintosh, 1890, 17 R. 1065; 27 S.L.R. 825, No. 23, supra.

7. NUISANCES AND OFFENSIVE TRADES.

(233)

Ultra vires—Nuisance—Billsticking—Local Government (Scotland) Act, 1889, sec. 57.

Sec. 57 of the Local Government Act, 1889, empowers county councils to make bye-laws "for the administration of the affairs of the county, for the prevention of vagrancy, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the county . . ." A county council made a bye-law imposing penalties upon any person who, inter alia, "affixes or causes to be affixed . . . without the consent of the owner or occupier, to any other building, or to any wall, fence, hoarding, door, gate, pillar, post, tree, or notice board lawfully exhibited, any bill or other notice." **Held** that billsticking is not necessarily a nuisance, and that, accordingly, the terms

of the bye-law were too wide, and that it was ultra vires of the county council.

Eastburn v Wood, 1892, 19 R. (J.) 100; 3 White, 300; 29 S.L.R. 844.

(234)

——— **Public health — Offensive trades — Public Health (Scotland) Act, 1897, secs. 32 (3) and 185.**

A local authority acting under sec. 32 (3) of the Public Health (Scotland) Act, 1897, made the following bye-laws:—“(1) Every tallow melter shall cause all material used, or offensive material or refuse from the boiling pans, and all refuse, residue, or other matter from which any offensive effluvia, vapour, or gas is evolved, or is liable to be evolved, to be placed in properly closed receptacles, or to be otherwise dealt with in such manner as to prevent any such effluvia, vapour, or gas escaping into the external atmosphere. (2) Every tallow melter shall cause every process of his business in which any offensive effluvia, vapour, or gas is generated to be carried on in such manner that no offensive effluvia, vapour, or gas shall escape into the external air; and he shall cause all such offensive effluvia, vapour, or gas to be effectually destroyed.” Those bye-laws were duly confirmed by the Local Government Board. **Held** (1) that the bye-laws, being in conformity with the purposes of the statute were not invalid in respect of their being repugnant to the general law of Scotland; (2) that they were not unreasonable; (3) that they were not invalid in respect that they regulated matters regarding which there was already specific provision in the statute; and (4) that they were not ultra vires as being beyond the powers conferred by sec. 32 (3).

Rae v Hamilton, 1904, 6 F. (J.) 42; 4 Adam, 366; 41 S.L.R. 633; 12 S.L.T. 134.

(235)

——— **Reasonableness — Nuisance—Animal matter as manure—Local Government (Scotland) Act, 1889, sec. 57 (1).**

The Local Government (Scotland) Act, 1889, sec. 57 (1), gives power to a county council, under certain conditions, to make bye-laws for the “prevention and suppression of nuisances not already punishable in a summary manner by virtue of an Act in force throughout the county.” No. 3 of a series of bye-laws passed by a county council, for “regulating the application of animal matter to land as a fertilising agent,” provided “no flesh or offal shall be applied to land as a top dressing.” “Top dressing” was defined (bye-law No. 1) as “the application of flesh, blood, and offal which have not been mixed with other material or treated in such a way as to prevent the exhalation of noxious smells therefrom, to land as fertilising agents by merely applying those to the surface of the ground without afterwards ploughing or digging them into the ground.” **Held** that bye-law No. 3 was ultra vires of the county

council, in respect that in itself it was too absolute in its terms, and amounted to an unreasonable restriction on agriculture, and that, if read along with bye-law No. 1, it was too vague for enforcement.

Dunsmore v Lindsay, 1903, 6 F. (J.) 14; 4 Adam, 286; 41 S.L.R. 199; 11 S.L.T. 545.

(236)

——— **Reasonableness—Burgh Police (Scotland) Act, 1892, sec. 316, A (1)—Nuisance.**

In virtue of powers conferred by the Burgh Police (Scotland) Act, 1892, sec. 316, on commissioners of burghs to make bye-laws for the prevention of nuisances, the commissioners of a burgh passed a bye-law that “no person shall convey material of any description along the streets or courts in the burgh in carts or carriages so loaded that any part of the load fall on any street or court within the burgh.” **Held** that the bye-law was not invalid as being ultra vires or unreasonable.

Ronaldson v Williamson, 1911 S.C. (J.) 102; 6 Adam, 519; 48 S.L.R. 983; 1911, 2 S.L.T. 217.

8. MARKETS AND FAIRS.

[See MARKET.]

9. CLASSIFICATION OF LANDS FOR POOR RATE.

(237)

Classification of lands by parochial boards.—Jurisdiction of Court of Session—Powers of Board of Supervision—Poor Law Amendment (Scotland) Act, 1845, sec. 36.

Held that while the Court had no jurisdiction to set aside a classification of lands and heritages for occupants' rates, under sec. 36 of the Poor Law Amendment Act, 1845, on the ground that it was inequitable, or to order a parochial board to adopt a new classification, it had jurisdiction to declare a classification to be invalid on the ground that it was not exhaustive of the lands and heritages in the parish.

Opinion that the Board of Supervision, which has power under the statute to give or refuse assent to classifications, is not entitled to initiate proposals with regard to classifications, but may only use its discretion in approving or rejecting schemes submitted to it by parochial boards.

North British Railway Co. v Cardross Parochial Board, 1887, 14 R. 478; 24 S.L.R. 341.

(238)

Abandonment of classification — Approval of Board of Supervision—Poor Law Amendment (Scotland) Act, 1845, secs. 34 and 36—Poor Assessments Act, 1861, sec. 1.

Held that a parochial board, which had, under sec. 36 of the Poor Law Act, 1845, with the concurrence of the Board of Supervision, adopted, for purposes of assessment to poor rates, a classification of lands and heritages, was entitled to abandon the classi-

fication without obtaining the concurrence of the Board of Supervision.

Bruce v Ratepayers of Fordoun, 1889, 16 R. 568; 26 S.L.R. 431.

10. BOUNDARY COMMISSIONS.

[See also VI. 1, supra.]

(239)

Orders by boundary commissioners — Powers of boundary commissioners with respect to orders settling the boundaries of parishes.

Parochial Board of Borthwick v Parochial Board of Temple, 1891, 18 R. 1190; 28 S.L.R. 897, No. 146, supra.

Inspector of Galashiels v Inspector of Melrose, 1892, 19 R. 758; 29 S.L.R. 633; 1894, 21 R. 391; 31 S.L.R. 318; 1 S.L.T. 461. LOCAL GOVERNMENT, No. 36.

11. FISHING.

[See also FISHINGS I. 4 (3); III. 2 (1); and JUSTICIARY V. 20.]

(240)

Fishery Board — Ultra vires — Herring Fishery (Scotland) Act, 1889, sec. 7.

Sec. 7 of the Herring Fishery Act, 1889, enacts that "the Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling and otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness-shire, to Rattray Point, in Aberdeenshire, in any area or areas to be defined in such bye-law." Held (overruling Green v Leith, 1896, 23 R. (J.) 50) that it was within the powers of the Fishery Board to issue a bye-law prohibiting beam-trawling in the entire area within the lines specified in the section.

Wilson v Rust; Wilson v Mackenzie, 1896, 23 R. (J.) 56; 2 Adam, 114; 33 S.L.R. 421; 3 S.L.T. 308.

(241)

Bye-law imposing penalties for fishing outside the three-mile limit — Foreign vessel — Herring Fishery (Scotland) Act, 1889 — Sea Fisheries Regulation (Scotland) Act, 1895 — Bye-law of Fishery Board for Scotland.

A foreigner objected to the jurisdiction of the Scottish courts and to the validity of a bye-law in a prosecution in which he was charged with fishing within an area defined by bye-law in accordance with the powers conferred upon the Fishery Board for Scotland by the Herring Fishery (Scotland) Act, 1889. Part of the said area was outside the three-mile territorial limit but was in the Moray Firth within a line drawn from Duncansby Head to Rattray Point. Held that the Moray Firth being within territorial waters, notwithstanding that part of it is situated outside the three-mile limit, foreigners were bound by the aforesaid bye-law and were, accordingly, in prosecutions

arising thereunder, subject to the jurisdiction of the Scottish courts.

Mortensen v Peters, 1906, 8 F. (J.) 93; 5 Adam, 121; 43 S.L.R. 872; 14 S.L.T. 227.

See also Poll v Lord Advocate, 1899, 1 F. 823; 35 S.L.R. 637; 5 S.L.T. 167, No. 40, supra.

12. BETTING.

(242)

County council—Local Government (Scotland) Act, 1889, sec. 57 (1)—Ultra vires.

Sec. 57, sub-sec. (1), of the Local Government Act, 1889, gives the county council power to make bye-laws "for the administration of the affairs of the county, for the prevention of vagrancy, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the county," and to enforce these bye-laws by penalties. A bye-law was made by a county council forbidding persons to frequent or use roads or public places "for the purpose of book-making or betting, or wagering, or agreeing to bet or wager with any person, or paying or receiving or settling bets." Held that the words "for the administration of the affairs of the county" were wide enough to cover this bye-law, and that it was, accordingly, not ultra vires.

Slowey v Threshie, 1901, 3 F. (J.) 73; 3

Adam, 379; 38 S.L.R. 799; 9 S.L.T. 82.

Davies v Jeans, 1904, 6 F. (J.) 37; 4

Adam, 336; 41 S.L.R. 426; 11 S.L.T. 790.

13. PROVISIONAL ORDERS.

(243)

Secretary for Scotland—Ultra vires—Burgh Police (Scotland) Act, 1892, sec. 45.

Under sec. 45 of the Burgh Police Act, 1892, the commissioners are empowered to apply to the Secretary for Scotland for a provisional order for certain purposes. Where the boundaries of a burgh had been extended the magistrates applied to the Secretary for Scotland for a provisional order to enable them to communicate the benefit of the common good belonging to the old burgh to the extended burgh. **Opinions** that such an application was not contemplated by the section above referred to, and that it was not competent for the Secretary of Scotland to grant it.

Russell v Magistrates of Hamilton, 1897, 25 R. 350; 35 S.L.R. 313; 5 S.L.T. 242.

(244)

Interdict—Burgh Police (Scotland) Act, 1892, secs. 45 and 46.

In an application for a provisional order embracing two proposals, the Secretary for Scotland directed the sheriff to hold an inquiry. In a note of suspension and interdict the Court, sitting in the Bill Chamber, having held that the note should be passed to have the competency of one of the proposals

determined, granted interim interdict against the inquiry proceeding to any extent, on the ground that a limited inquiry would be different from that ordered.

Russell v Magistrates of Hamilton, 1897, 25 R. 350; 35 S.L.R. 313; 5 S.L.T. 242.

14. MISCELLANEOUS.

(245)

Vaccination—Regulations by Board of Supervision—Ultra vires—Vaccination (Scotland) Act, 1863.

By sec. 5 of the Vaccination Act, 1863, the Board of Supervision (afterwards the Local Government Board) is "authorised and required to make and issue regulations to which parochial boards must conform." Sec. 13 provides for the issue every six months by the registrar of each district to inspectors of poor of lists of names and addresses of persons who have failed to lodge certificates of vaccination under the Act, upon receipt of which lists the inspectors of poor were instructed to lay them before parochial boards which thereupon were to issue a vaccination order upon the persons named in the list. The Board of Supervision issued regulations regarding proceedings under the 18th section of the Act, in which it was provided that if any child named in the list had left the parish and gone to reside elsewhere in Scotland before a vaccination order had been pronounced, the inspector of poor should give immediate notice of the facts and circumstances to the inspector of poor of the parish to which the child had gone, whose duty it would then be to arrange for the child's vaccination. *Held* that this regulation, which had been in operation since the year 1864, was not ultra vires of the Board of Supervision.

Wallace v Summers, 1900, 3 F. (J.) 27; 3 Adam, 276; 38 S.L.R. 176.

(246)

Crown—Edinburgh Municipal and Police Acts, 1879 and 1882 (42 & 43 Vict. c. cxxxii. and 45 & 46 Vict. c. clxi.).

Opinions to the effect that, when the Crown acquires property in a burgh by purchase, it is bound to obey all local regulations, whether statutory or arising at common law, and, in particular, a regulation prohibiting the erection of new buildings without the previous warrant of the Dean of Guild.

Somerville v Lord Advocate, 1893, 20 R. 1050; 30 S.L.R. 868; 1 S.L.T. 172.

(247)

National Health Insurance—Regulations made by Commissioners—Regulations not submitted to Parliament—Jurisdiction of Court—National Insurance Act, 1911, sec. 65.

Sec. 65 of the National Insurance Act, 1911, authorises the Insurance Commissioners to make regulations to carry into effect part I. of the Act, and provides that such regulations shall be laid before both Houses of Parliament, and shall have effect as if enacted in the Act, unless annulled by His

Majesty in Council on an address presented by either House. *Held* that regulations made by the Commissioners which had not yet been laid before Parliament, could not be challenged in a court of law as being ultra vires of the Commissioners, provided they dealt with matters falling within the scope of part I. of the Act, but could be set aside only by means of the parliamentary procedure prescribed in the section.

Glasgow Insurance Committee v Scottish Insurance Commissioners, 1915 S.C. 504; 52 S.L.R. 378; 1915, 1 S.L.T. 217.

(248)

Patent agents—Registration—Rules of Board of Trade—Ultra vires—Rules under Patents, Designs, and Trade Marks Acts, 1883 and 1888—Parliamentary confirmation—Tax.

Under the Patents, Designs, and Trade Marks Acts, 1883 and 1888, the Board of Trade had power to make general rules regulating the registration of patent agents. These rules were to be laid before Parliament, and, if not annulled, were to be of the same effect as if contained in the Act. The Board of Trade made certain rules known as the "Register of Patent Agents' Rules, 1889," which were laid before Parliament, and were not annulled. They provided a mode by which a patent agent practising before the Act should be entered in the register of patent agents on proving to the satisfaction of the Board of Trade that he had bona fide practised before the Act. They also provided for the payment of a fee of £5 5s. on being entered on the register, and of an annual fee of £3 3s. by all patent agents on the register, and for erasure of the name from the register if these were not duly paid. The Second Division (1893, 20 R. 315) *held* that the rules imposing fees were ultra vires of the Board of Trade, since they imposed, without statutory authority, a tax as a condition of the right to be on the register. In an appeal *opinions* (the judgment proceeding on another ground) that the rules were ultra vires of the Board of Trade.

Opinions (per Lord Herschell, L.C., Lord Watson, and Lord Russell of Killowen) that by sec. 101 of the Act of 1883 the rules formed part of the statute, and that it was not competent for any court of law to entertain any question as to their validity.

Opinion (per Lord Morris) that the rules had only statutory effect in so far as they were made "for giving effect" to sec. 1 of the Act of 1888, and that the question whether they were so might competently be raised in and determined by a court of law.

Chartered Institute of Patent Agents v Lockwood, 1894, 21 R. (H.L.) 61; [1894] A.C. 347; 11 R.P.C. 374; 31 S.L.R. 942; 2 S.L.T. 106.

(249)

Rules of Volunteer corps—Ultra vires—Retrospective or prospective—Volunteer Act, 1863, sec. 24.

The rules of a volunteer corps, made in terms of the Volunteer Act, 1863, were

dated 26th March, 1885, and provided, inter alia, that subscriptions of members to the regimental funds should fall due on the 31st October in each year for the twelve months preceding; and that all members of the corps should be liable for the full year's subscription, provided they had been members of the corps for one calendar month of the year. **Held** that the passing of rules regulating the raising of subscriptions was authorised by the statute, and that a subscription was due for the year ending 31st October, 1885, although four months of that year had elapsed when the rules were made.

Morrison v Neilson, 1887, 14 R. 452; 24 S.L.R. 318.

(250)

Closing order—Ultra vires—Proof—Competency—Shop Hours Act, 1904, secs. 1 and 5.

In an appeal against a conviction under a summary complaint charging an offence against the Shop Hours Act, 1904, and a duly confirmed order purporting to have

been made thereunder, **held** that the sheriff at the trial under the complaint had rightly excluded evidence to prove that certain steps preliminary to the making of the order had not been taken as required by the Act.

Hamilton v Fyfe, 1907 S.C. (J.) 79; 5 Adam, 170; 44 S.L.R. 113; 14 S.L.T. 530.

(251)

Order of Board of Agriculture and regulations of local authority — Proof — Board of Agriculture Act, 1889, sec. 7.

A complaint charged a person with a contravention of "the Foot-and-Mouth Disease Order of 1892, and the Regulations of the Local Authority of the County of Caithness, dated 9th March, 1892." **Held** that the order and regulations following thereon having the force of an Act of Parliament, and there being no dispute as to their terms, they need not be proved as matter of evidence.

Sharp v Leith, 1892, 20 R. (J.) 12; 3 White, 351; 30 S.L.R. 34.

STATUTORY NOTICES FOR TAKING LAND. See COMPULSORY POWERS.

STATUTORY RULES AND ORDERS. See STATUTE.

STATUTORY TITLE. See COMPULSORY POWERS; HERITABLE PROPERTY.

STIPEND. See CHURCH; TEINDS.

STOCK EXCHANGE.

(1)

Right to close customer's account by selling out against him, where customer has misrepresented means.

Held that where a stockbroker has incurred personal responsibility by purchasing stock for a client on the faith of representations made by him as to his means, which proved not to be correct, and the client has refused to give satisfactory explanations or references, the stockbroker is entitled to realise the stock held for his client, and close the account.

Risk v Auld & Guild, 1881, 8 R. 729; 18 S.L.R. 520.

(2)

Carrying over.

An ordinary contract for settlement on a day named does not imply either a right in or an obligation on the broker or dealer to "carry over."

Newton v Cribbes, 1884, 11 R. 554.

(3)

Implied authority to carry over.

Circumstances in which held that a stockbroker had implied authority to carry over certain shares which he had purchased for a client.

Lamond, Macquisten & Co. v Inglis, (O.H.) 1903, 11 S.L.T. 10.

(4)

Retention—Stockbroker's right to retain share transfer in security of general balance due by client.

Held that a firm of stockbrokers in Edinburgh had a general lien on an uncompleted share transfer, handed to them for delivery to a client who had purchased and paid for the shares, which entitled them to retain the transfer until a claim by them against the client, arising out of a subsequent broking transaction between them, had been satisfied.

Glendinning v Hope & Co., 1911 S.C. (H.L.) 73; [1911] A.C. 419; 48 S.L.R. 775; 1911, 2 S.L.T. 161.

(5)

Agent and principal—Dealings between stockbrokers—Bankruptcy.

Stockbrokers in Edinburgh wrote to stockbrokers in Glasgow requesting them to buy certain shares for them. The latter, in reply, wrote that they had purchased the shares "on your order and on your account." The name of a client as transferee was subsequently sent by the brokers in Edinburgh to the brokers in Glasgow, that the transfer might be made out in time for settling day. It was so completed and transmitted to the Edinburgh brokers, who delivered it to the transferee, and in exchange got his cheque for the amount of price, commission, &c. The Edinburgh brokers then

granted their own cheque for a sum in excess of the price of the shares, so as to cover a balance then standing against them, and delivered it to the Glasgow brokers. Before payment the Edinburgh brokers failed, their client's cheque remaining in their hands uncashed, and their estates were afterwards sequestrated. Held that the Edinburgh brokers had bought the shares as principals and not as agents, and that the Glasgow brokers had no claim but as ordinary creditors.

Mackenzie & Aitken v Robertson, 1886, 13 R. 494; 23 S.L.R. 309.

(6)

Contract for differences.

A stockbroker, in carrying over at the settlement £10,000 "Trunk Thirds" stock bought for a client, sent his client a continuation note in these terms—"I have continued for you as under. Sold 10,000 Trunk 3rds at £50 3s. 3d. com. in a/c." In reality the broker had not bought that amount of stock at the price stated, but had bought a much larger quantity in different parcels and at different prices. These he lumped together and divided among those of his clients who had given him orders for Trunk Thirds, charging as the price the average of the different prices. This average price was that stated in the above continuation notes, and it corresponded to none of the individual prices. In an action by the stockbroker against the client for payment of the differences on a series of such transactions, held that in so purchasing the stock the pursuer was to be regarded as having bought it on his own account, and not as agent for the defender, and that the defender, having employed the pursuer merely as a broker, was not responsible, no special custom of trade in regard to brokers on the Stock Exchange having been averred or proved.

Maffett v Stewart, 1887, 14 R. 506; 24 S.L.R. 402.

(7)

Agent taking up shares—Custom of Stock Exchange.

Held that on a client refusing to pay to his stockbroker a balance due in respect of the purchase and carrying over of certain shares the stockbrokers were entitled, after intimation of their intention to take that course, to take over the shares themselves at a price fixed in accordance with the rules of the Stock Exchange.

Lamont, Macquisten & Co. v Inglis, (O.H.) 1903, 11 S.L.T. 10.

(8)

Purchase of shares—Privity of contract.

Held that a stockbroker who had instructions from a number of customers to buy the same class of shares was entitled to purchase

them all in the same transaction, and afterwards allocate them, and that he was not bound to establish a privity of contract between each client and some one selling to him.

Lamond, Macquisten & Co. v Inglis, (O.H.)
1903, 11 S.L.T. 10.

(9)

—Compensation.

The rule that a purchaser of goods from one whom he knows to be acting as agent for another, whose name is not disclosed, cannot plead compensation in respect of a debt due to him by the agent against a demand by the principal for the price of the goods, **held** to apply to a transaction on the stock exchange.

Matthews v Auld & Guild, 1873, 1 R.
1224; 45 J. 283; 10 S.L.R. 260.

(10)

A law agent bought shares in his own name on the employment of a person who neither paid for the shares nor would give instructions for re-selling them on the settling day. The agent, after giving notice that he would sell the shares, carried them over in his own name through his London brokers, and some time afterwards sold them without loss. He then claimed the difference between the price at which he had purchased the shares for his principal and the market price on the settling day. The claim was disallowed, on the ground that the claimant could not, while acting as agent for the owner of the shares, become the purchaser thereof, and that no loss had accrued upon the transaction.

Cunningham v Lee, 1874, 2 R. 83; 12
S.L.R. 58.

(11)

Concealment by constituent of material fact.

Where a mistake on the part of the stock-broker, occasioned by his employer having failed to disclose a material fact of which he knew that the broker was ignorant, led to loss, **held**, in the circumstances, that the employer was liable in the price of the stock and the broker's commission.

Mackenzie v Blakeney, 1879, 6 R. 1329;
16 S.L.R. 770.

(12)

Expulsion of member—Rule of Stock Exchange—Breach—Arrangement with creditors—Disqualification by interest of members of committee.

A rule of a stock exchange provided that, when a member made any "arrangement" with his Stock Exchange creditors, the committee should be entitled after certain procedure, if they saw fit, to declare him to be no longer a member. A member who had large liabilities agreed to settle these by paying differences on the next settlement day as at the date of the agreement, and these payments were duly made. **Held** (by the First Division) that this was not an "arrangement" in the sense of the rule. **Opinions** that a decision of the committee on the matter was not challengeable on the ground that members of the committee were parties to the "arrangement."

Filshill v Glasgow Stock Exchange Association, 1915, 1 S.L.T. 314. The House of Lords reversed the interlocutor of the First Division, allowed the pursuer to amend his record, and allowed a proof, 1915, 2 S.L.T. 115.

Gaming contracts.

[See CONTRACT I. 13 (2).]

STOPPAGE IN TRANSITU. See SALE OF MOVEABLES.

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SUBMISSION. See ARBITRATION.

SUBORNATION OF PERJURY. See JUSTICIARY.

SUBSCRIPTION, PUBLIC. See CHARITABLE TRUST; JUS QUÆSITUM TERTIO.

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I. SUCCESSION AB INTESTATO.

1. ORDER OF LEGAL SUCCESSION.

(1)

Widow.

A widow is not one of her husband's heirs in mobilibus, and accordingly has no right to a share of a legacy left to such heirs.

Inglis v Inglis, 1869, 7 M. 435; 41 J. 234; 6 S.L.R. 271.

(2)

Intestate Husband's Estate (Scotland) Act, 1911, secs. 1 and 2—Partial intestacy.

The Intestate Husband's Estate Act, 1911, does not apply to cases of partial intestacy. **Held**, accordingly, that a widow was not entitled, under sec. 2 of that Act, to payment of £500 out of the residue of the estate of her husband who had died leaving a will which purported to dispose of his whole estate, but which, in the event which happened, had left the fee of the residue undisposed of.

Taylor's Executors v Taylor, 1918 S.C. 207; 55 S.L.R. 234; 1918, 1 S.L.T. 126.

(3)

Nephews and nieces—Per capita or per stirpes.

When the nearest surviving relations of an intestate are his nephew and nieces, the intestate succession falls to be divided among them in their own right as his next of kin per capita, and not as representatives of their deceased parents per stirpes.

Observed that the representation in moveables introduced by the Intestate Moveable Succession Act, 1855, sec. 1, applies only to the case where some of the next of kin have predeceased the intestate leaving issue, who but for the remedy provided by the statute would have been excluded from participating in the succession.

Turner, 1869, 8 M. 222; 42 J. 97; 7 S.L.R. 130.

(4)

Period when heirs determined—Resulting intestacy.

Where intestacy results from the failure of a testamentary provision, the persons entitled to take are the heirs ab intestato of the testator at the time of his death.

Wilson's Trustees v Wilson's Trustees, 1894, 22 R. 62; 32 S.L.R. 54.

(5)

Heir at law—Accumulations struck at by Thellusson Act.

Trustees were directed to accumulate the rents of certain lands until the death of the last survivor of several persons, and on that event to purchase with the accumulated fund lands to be entailed, along with the original lands, on a series of heirs described. The accumulation having been stopped by operation of the Thellusson Act, and the future rents accruing until the entail came to be executed having been held to fall into intestacy, **held** further that each term's rent as it accrued belonged to the person holding at that time the character of heir at law of the testator.

Campbell's Trustees v Campbell, 1891, 18 R. 992; 28 S.L.R. 771.

(6)

Heir at law—Heirs in mobilibus—Accumulations struck at by Thellusson Act falling into intestacy.

Logan's Trustees v Logan, 1896, 23 R. 848; 33 S.L.R. 638; 4 S.L.T. 57, No. 1436, *infra*.

(7)

Heir at law or heirs in mobilibus—Testator directing lands to be sold—Resulting partial intestacy.

Thomas v Tennent's Trustees, 1868, 7 M. 114; 41 J. 59; 6 S.L.R. 113, No. 895, *infra*.

Cowan v Cowan, 1887, 14 R. 670; 24 S.L.R. 469. HERITABLE AND MOVEABLE, No. 90.

Moon's Trustees v Moon, 1899, 2 F. 201; 37 S.L.R. 140; 7 S.L.T. 257, No. 1420, *infra*.

(8)
Heritage—Right of succession—Alien ancestor—Papist ancestor.

Opinion (per Lord Justice-Clerk Patton) (1) that a right of succession to landed estates in Scotland might be transmitted through an alien who died prior to the passing of the Aliens Act, 1844 (now repealed by the Naturalization Act, 1870, sec. 18); and (2) that to establish the incapacity of a Papist to inherit landed estates in Scotland, under the Act 1700, c. 3, required a declarator of irritancy and the completion of a title by the next Protestant heir.

Earl of Perth v Lady Willoughby de Eresby's Trustees, 1869, 7 M. 642; 41 J. 413; 6 S.L.R. 335.

(9)
Intestate Moveable Succession Act, 1855—Representatives of grandaunt.

A man who died intestate leaving moveable property was survived by the children of a paternal granduncle and the grandchildren of a paternal grandaunt. The father of these grandchildren, who was the son of the grandaunt, had predeceased the intestate. **Held** that the children of the granduncle were entitled to succeed to the whole moveable property, as the grandchildren of the grandaunt did not represent their father under sec. 1 of the Intestate Moveable Succession Act, 1855.

Macmillan v Macmillan, (O.H.) 1909, 1 S.L.T. 35.

(10)
—Nephews and nieces consanguinean.

The issue of nephews and nieces consanguinean take by representation in terms of sec. 1 of the Intestate Moveable Succession Act, 1855.

Finlayson's Executor v Hastie, (O.H.) 1916, 1 S.L.T. 123.

(11)
Heirs-portioners — Præcipuum — Mansion-house — Necessary adjuncts — Subjects conducive merely to amenity—Ornamental grass parks.

Where the mansion-house of a landed estate falls to the eldest of heirs-portioners as a præcipuum, it carries with it such additional subjects only as are necessary adjuncts of the mansion; and, in determining what adjuncts are necessary, the amenity of the mansion is not an element which can be taken into consideration. Ornamental grazing parks, extending to about 25 acres, which enhanced the beauty and privacy of a mansion-house, but which had at times been let separately to outside tenants, **held** not to form part of the præcipuum.

Callander v Harvey, 1916 S.C. 420; 53 S.L.R. 344; 1916, 1 S.L.T. 176.

2. HERITABLE OR MOVEABLE.

[See HERITABLE AND MOVEABLE.]

3. APPORTIONMENT.

[See APPORTIONMENT.]

4. INCIDENCE OF DEBTS.

[See HERITABLE AND MOVEABLE IV.]

5. PASSIVE TITLE.

STATUTES.

Act 1503, c. 21 (12mo ed. c. 76)—Annus Deliberandi.

Act 1540, c. 24 (12mo ed. c. 106)—Comprising from Apparent Heir for Ancestor's Debt.

Act 1621, c. 27—Comprising from Apparent Heir for his own Debt.

Act 1661, c. 88 (12mo ed. c. 24)—Act concerning Apparent Heirs, their Payment of their Predecessor's and their own Debts.

Act 1695, c. 39 (12mo ed. c. 24)—Act to Obviate the Frauds of Apparent Heirs.

Act 1868—Titles to Land Consolidation (Scotland) Act—31 & 32 Vict. c. 101.

Act 1874—Conveyancing (Scotland) Act, 1874—37 & 38 Vict. c. 94.

(1) REPRESENTATION GENERALLY.

(12)
Limitation of liability for ancestor's debts —Transmission to heir of personal obligation in heritable bond over heritage—Act 1874, secs. 12 and 47.

A, who was personally liable under bonds affecting his heritable estate for payment of the sums thereby secured, died leaving a disposition and settlement, whereby he disposed his whole estate, real and personal, to B, whom he appointed his executor and universal legatee. **Held** that under the Conveyancing (Scotland) Act, 1874, secs. 12 and 47, the personal obligation contained in the bonds transmitted against B, but that his liability for the debts of the deceased (including the bonds) was limited to the value of the estate to which he succeeded.

Welch's Executors v Edinburgh Life Assurance Co., 1896, 23 R. 772; 33 S.L.R. 585; 4 S.L.T. 33.

(13)
Lease excluding assignees.

A nineteen years' lease of an urban subject was granted to a tenant and his heirs, but excluding assignees and sub-tenants without the consent of the lessor. On the death of the tenant, his heir took up the lease. **Held** that the heir did not incur passive representation for the debts of his predecessor, in respect that he took the lease, not as representing his ancestor, but in his own right under the lease.

Bain v Mackenzie, 1896, 23 R. 528; 33 S.L.R. 375; 3 S.L.T. 283.

(14)
Heir not renouncing succession—Estate adjudged.

Question, whether an heir who has incurred a passive title, by not renouncing his an-

cestor's succession when charged to enter, is entitled to renounce after the estate has been adjudged.

Dingwall v Burns, 1871, 9 M. 582; 43 J. 354; 8 S.L.R. 385.

(15)

Legacy declared to be real burden—Heir at law making up title by service.

A testator by mortis causa settlement disposed his whole estate to his wife in life-tenant and to his heirs in fee. By a codicil the testator bequeathed to his wife a legacy of £600, which, he declared, should form a real burden on his heritable estate, and he also gave her a power to sell the heritage. The wife survived, but did not exercise the power of sale, and the legacy of £600 was not paid during her life. The testator's heir at law made up a title to the heritage by service, passing over the disposition. **Held** that, although the legacy had not been made a real burden on the heritage, so as to be effectual in a question with creditors and singular successors, yet there was conferred on the wife a right to make her legacy effectual out of the heritable estate, and that the heir at law, having taken up the succession gratuitously, was bound to pay the legacy to the wife's executors.

Storeys v Paxton, 1878, 6 R. 293; 16 S.L.R. 199.

(16)

Marriage contract—Provision to younger children—Liability of heir.

The heir of a marriage who took an estate under the provisions of a marriage contract held liable as his father's heir to implement an obligation in his marriage contract in favour of younger children—the father's executry funds not being sufficient to meet it—but that only intra valorem of the estate.

Leslie v McLeod, 1870, 8 M. (H.L.) 99; 42 J. 489; L.R., 2 H.L. Sc. 44; 7 S.L.R. 661.

(17)

Act 1661, c. 24—Debt of apparent heir in competition with debt of ancestor.

A bond and assignation in security granted by an heir in possession for an instant advance, more than one year, but less than three years, after his ancestor's death, held not reducible at the instance of a creditor of the ancestor under the Act 1661, c. 24.

Macalpine v Lang, &c., 1885, 12 R. 604; 22 S.L.R. 401.

(18)

Act 1695, c. 24—Rational provisions by apparent heir.

Held that rational provisions made in a trust settlement by an heir who died after possessing an estate for three years upon apparenacy, in favour of his widow and children, were chargeable under the Act 1695, c. 24, against the next heir completing a title to the property.

Orr, 1871, 9 M. 500; 43 J. 264; 8 S.L.R. 354.

(19)

Onerous deed of apparent heir—Ratification of ancestor's null deed—Prescription.

A, who was duly infeft in certain heritable subjects, executed a disposition in his own favour of one-ninth share of the subjects pro indiviso, and disposed the other pro indiviso shares to his brothers and sister. He died on 1st July, 1836, without being infeft under his own disposition, leaving a disposition of his share to his wife. This disposition, however, was invalid, being unsigned and executed by one notary only, and four witnesses. Next day B, his immediate younger brother and heir at law (who afterwards survived A for upwards of three years), executed a ratification, written at the end of the deed, whereby he ratified, approved of, and confirmed it, and for himself and his heirs renounced all objections thereagainst. The ratification contained no words of conveyance. The widow proceeded to take infeftment under the assignation contained in her husband's disposition to her, and the procuratory and precept in A's disposition to himself, and possessed her husband's share of the subjects for thirty-three years, when she died, leaving a conveyance to trustees. Her trustees possessed for twelve years more, when C, as then heir at law of A, served to him, passing over B, and, raising a reduction of the various deeds, claimed the subjects. **Held** (1) in conformity with Adamson v Inglis, 11 S. 40, that the deed of ratification by the apparent heir must be presumed to have been granted, and was granted, for onerous causes; (2) following Yule v Ritchie, Mor. 5299, &c., that the possession of the widow during the heir-apparent's life was to be regarded as his possession; and therefore (3) that, under the Act 1695, c. 24, the deed of ratification was a burden on the succeeding heir serving to A. **Opinion** (per Lord Young) that the unexecuted disposition, though null ab initio, was, in virtue of the deed of ratification by the apparent heir, equivalent to a disposition by him, and—although proceeding a non habente potestatem—a sufficient title to found prescription. **Opinion** (per Lord Craighill) *contra*.

Glen v Scales' Trustee, &c., 1881, 9 R. 317; 19 S.L.R. 201.

(20)

Deed in fulfilment of ancestor's unfulfilled intention.

A, on the narrative of the unfulfilled intention of his late father, whose heir at law he was, and of his wish to implement it, granted and delivered to certain persons a disposition of heritable subjects which had belonged to his father, in trust for behoof of his mother in life-tenant, and of himself and his brothers and sisters and their heirs in fee. The trustees entered upon and administered the trust property for the purposes of the trust for ten years, when A died, leaving a pupil son and heir at law. No title to the subjects conveyed had, however, been made up in the person either of the trustee or of

his trustees, the truster's title remaining that of apparent heir to his father as last infeft therein. In a question between A's trustees under the above-mentioned disposition and his pupil son as heir at law of his grandfather, **held** that the trust disposition in question was delivered and enforceable, and was therefore a deed in the sense of the Act 1695, c. 24, to which the heir at law was bound to give effect.

Fleming's Trustees v Fleming's Tutors, 1882, 9 R. 1013; 19 S.L.R. 766.

(21)

Possession on apparenecy.

Observed (per Lord President Inglis) that, in consequence of the 9th section of the Conveyancing Act, 1874, possession on apparenecy is no longer known to the law.

M'Adam v M'Adam, 1879, 6 R. 1256; 16 S.L.R. 761.

(22)

Discussion of executors.

In an action at the instance of creditors of an heir who had possessed for three years on apparenecy, against the next heir, who had served to a remoter ancestor, **held** that the defender was not entitled to insist on the creditors in the first instance discussing their debtor's trust disponees and executors.

Morris v Beveridge, 1867, 6 M. 60; 40 J. 40; 5 S.L.R. 63.

(23)

Relief—Heir of line and provision.

The heir of line and not the heir of provision is the primary debtor in the heritable debts of the ancestor, but an heir of provision will be primarily liable if the granter has expressed his desire to that effect.

Park's Curator v Black, 1871, 9 M. 1078; 43 J. 590.

(2) VITIOUS INTROMISSION.

(24)

Next of kin—Act 1695, c. 41.

Next of kin charged under the Act 1695, c. 41, by a creditor of the deceased, having neither confirmed as executors nor renounced the succession, were pursued as vitious intromitters. The Lord Ordinary pronounced decree against them, but enforceable only to the extent of the succession devolving on them. In the Inner House the defenders gave in a minute renouncing the succession. The Court decerned against them cognitionis causa tantum, and found them liable in the expenses of process under deduction of the expense of the minute of renunciation.

Davidson v Clark, &c., 1867, 6 M. 151; 40 J. 82; 5 S.L.R. 119.

(25)

Onus.

A farmer, after the death of his uncle who lodged with him and assisted him on the farm, took from his uncle's repositories a cheque in his uncle's favour for £46, and in exchange for it got from the granter a cheque in his own favour. In an action by

a creditor of the uncle against the nephew as a vitious intromitter with the uncle's estate, after a proof, the Court **held** (1) that the uncle had no interest in the stock of the farm, and that the cheque represented the price of three bulls, part of the stock sold by him in the management of the farm, (2) that the pursuer had failed to prove that the uncle had any claim against the farm which would have entitled him to retain the cheque, and (3) that the defender was not liable as a vitious intromitter even to the extent of the sum in the cheque. **Opinion** (per Lord Low) that, even if the uncle had been joint owner of the bulls along with the nephew, the nephew, by acting as he did with regard to the cheque, would not have made himself liable as a vitious intromitter.

Greig v Christie, 1908 S.C. 370; 45 S.L.R. 274; 15 S.L.T. 667.

6. COLLATIO INTER HÆREDES.

(26)

Obligation to collate—Thellusson Act, 1800—Income of heritable and moveable estate falling into intestacy.

Where by the operation of the Thellusson Act the income of a testator's heritable and moveable estate falls into intestacy, the heir in heritage, who is also one of the next of kin, is not entitled to share in the income from the moveable estate without collation.

Moon's Trustees v Moon, 1899, 2 F. 201; 37 S.L.R. 140; 7 S.L.T. 257.

(27)

Where the accumulation of the revenue of a trust estate consisting of both heritage and moveables was struck at by the Thellusson Act, **held** that as each term's rents accrued, the person holding the character of heir at law of the truster at that time was entitled to elect whether or not he would collate that term's rents so as to share in the income of the moveable portion of the estate, and that he had the right of choice irrespective of whether the previous term's rents had or had not been collated.

Hunter's Trustees v Edinburgh Chamber of Commerce and Manufactures, (O.H.) 1911, 2 S.L.T. 287.

(28)

Where by the operation of the Thellusson Act the rents of a testator's heritage fell as they accrued to his heir at law at the time, and the income of his moveable estate to his next of kin, and where the heir at law was one of the next of kin, **held** that the heir at law was entitled to a share of the income of the moveable estate without collating.

Logan's Trustees v Logan, 1896, 23 R. 848; 33 S.L.R. 638; 4 S.L.T. 57.

(29)

Legacy to heirs of testator's son—Son's heir succeeding testator under entail.

The heir of entail in possession of an estate bequeathed a third of the residue of

his means to his son (who was then heir-apparent to the entailed estate), "partly in consideration of the burdens he will be subjected to on his succeeding me" in the entailed estate, "and to his heirs, executors, and successors." The son predeceased, leaving three children, the eldest of whom succeeded to the entailed estate on the death of his grandfather. In a question between him and the son's other two children as to whether he could take a share of the grandfather's bequest without collating his life interest in the entailed estate, **held** that there was no room for the doctrine of collation, as the heir of entail was entitled to a share of the residue in consequence of the expressed will of the testator.

Sinclair's Trustees v Sinclair, 1881, 8 R. 749; 18 S.L.R. 539.

(30)

———**Bequest of moveables to "next of kin as the law directs"—Heir ab intestato in heritage required to collate.**

A testator, who died in 1899, left his moveable estate to his mother in liferent, and provided that on her death the residue was to be divided among his "next of kin as the law directs." Quoad heritage he died intestate. The heir in heritage was A, the son of the immediate younger brother of the testator's father. The next of kin as at the date of the liferentrix's death in 1905, when the residue vested in them, were A, B, a sister of A, and the surviving children of the younger brothers of the testator's father. A died in 1907 intestate, leaving a son, C, who was his heir in heritage, and seven other children. C maintained that he was entitled to a share of the moveables as one of the testator's next of kin without collating the heritage, on the ground that the case must be taken as if he was claiming heritage as the heir of his father, A, and his share of the moveables as one of the testator's next of kin. **Held** that the question must be determined as if it had arisen in the lifetime of A after a share of the moveable estate had vested in him, and, as in that event, A would have had to collate, so must C.

Cochran v Purves, (O.H.) 1908, 16 S.L.T. 99.

(31)

———**Heir in heritage taking heritage under settlement—Collation as condition of claiming legitim.**

A testator left a trust disposition and settlement by which he directed his trustees to pay two-thirds of the residue to his said son, and to hold the remaining third in trust for his daughter. The trust disposition and settlement did not expressly put his children to their election between the testamentary provisions and legitim. The daughter claimed legitim. The son was *alioqui successurus* to the heritable estate. The daughter sought to have it declared that the son having succeeded to the heritable estate, she was entitled to one-half of the free moveable estate as her legitim; or in

the event of her brother claiming to share in the legitim, that he was bound to collate the heritage, and the pursuer was then entitled to claim as legitim one-half of both the heritable and the moveable estate. **Held** that if the defender claimed legitim he was bound to collate the value of the heritage to which he succeeded under the will, and that whether the will operated constructive conversion of the heritage or not.

Dawson v Dawson's Trustees, (O.H.) 1913, 2 S.L.T. 210.

(32)

Provision of qualified liferent of half estate consisting partly of heritage—Claim of legitim—Duty of heir accepting provision to collate.

Smith's Trustees v Smith, (O.H.) 1912, 1 S.L.T. 484, No. 91, *infra*.

(33)

Right to collate—Heir not one of next of kin—Intestate Moveable Succession (Scotland) Act, 1855, secs. 1 and 2.

Held that secs. 1 and 2 of the Intestate Succession Act, 1855, must be read together, and accordingly that the proviso contained in sec. 1, that no representation should be admitted among collaterals after brothers' and sisters' descendants, also applied to sec. 2, and excluded a deceased cousin's son, who was the heir in heritage of an intestate, from collating the heritage and claiming from a surviving cousin, who was the sole next of kin, a share of the moveable succession. **Observed** (per Lord President Strathclyde) "(1) that the first and second sections of this statute are not to be regarded as separate and independent enactments, but are to be read together as comprehending the whole scheme of representation in moveables introduced by the Act of Parliament; (2) that the proviso in the first section is applicable to the whole scheme of representation in moveables introduced by the statute; and (3) that the object of the second section of the statute is to apply, in the case of mixed successions, the rule of representation which is applied by the first section to estates consisting of moveables alone."

Colville's Judicial Factor v Nicoll, 1914 S.C. 62; 51 S.L.R. 62; 1913, 2 S.L.T. 345.

(34)

An intestate, leaving heritable and moveable estate, was survived by an aunt, his sole next of kin, and was predeceased by his uncle, who, had he survived, would have been his heir in heritage and one of his next of kin. **Held** that the only child of the uncle, being heir in heritage of the intestate, was entitled under sec. 2 of the Intestate Moveable Succession Act, 1855, to call upon the next of kin to collate, although in consequence of the proviso in sec. 1 of that Act she would not have been entitled under that section to a share of the moveable estate.

Jamieson v Walker, 1896, 23 R. 547; 33 S.L.R. 397; 3 S.L.T. 292.

(35)

Held that persons who were heirs in heritage by reason that they represented heirs-portioners, but who were not next of kin of the deceased nor entitled to a share of the deceased's moveable estate by virtue of the representation introduced by sec. 1 of the Intestate Moveable Succession Act, 1855, were entitled to collate under sec. 2 of the Act.

Robertson v Robertson, (O.H.) 1907, 15 S.L.T. 249.

(36)

—Sale of heritage by heir—Collation excluded.

A testator, who left heritable and moveable estate, by his settlement made certain provisions for his younger son, who was insane, and for his two daughters, and gave the residue of his moveable estate and the heritage to his elder son. The elder son accepted these provisions, and subsequently sold part of the heritage. On the death of the elder son, twelve years after his father, the curator bonis of the younger son claimed legitim for his ward. The curator bonis contended that the ward was entitled to one-third of the legitim. The representatives of the elder son contended that, as he would have been entitled to claim a share of legitim on collating the heritage, they were entitled to do so; that the legitim fund fell to be divided into four parts; and that the ward's share was one-fourth. Held that part of the heritage having been sold by the elder son, the heir at law, collation was excluded, and that the ward was entitled to one-third of the legitim.

M'Call's Trustee v M'Call's Curator Bonis, 1901, 3 F. 1065; 38 S.L.R. 778; 8 S.L.T. 299.

(37)

—Right of representatives of party predeceasing who would have been heir—Intestate Moveable Succession (Scotland) Act, 1855, secs. 1 and 2—Heir not collating—"Child"—"Parent."

The owner of heritable and moveable estate died intestate, without issue, and predeceased by his only brother and by that brother's eldest son. The intestate was survived by sisters, and the issue of deceased sisters, by the younger children of his deceased brother, and by a grandnephew and two grandnieces, the children of his brother's eldest son. The grandnephew was the intestate's heir in heritage, and declined to collate. An action of multiplepoinding having been brought to determine questions with regard to the succession to the intestate's moveable estate, held (1) that the children of the intestate's brother took no share in the intestate's estate, either (a) under sec. 1 of the Intestate Moveable Succession (Scotland) Act, 1855, as representing their father, in respect that their father, being heir in heritage, was not entitled to any share of the moveable estate except on condition of collating the heritage, which condition, owing to his predecease, he was unable to fulfil; or (b) under sec. 2 as the brother and sisters of an heir entitled to

collate, in respect that, as their brother had not survived to become heir, he was never in a position to collate. Held (2) that the intestate's grandnieces were not entitled, under sec. 2, as the sisters of an heir in heritage who had not collated, to the share of the moveable estate which their grandfather would have taken on collation had he survived, in respect that "child" meant immediate issue, and did not include grandson, and that "parent" meant father, and did not include grandfather. Opinion (per Lord Justice-Clerk Scott Dickson) that "the person predeceasing" in sec. 2 referred to the person predeceasing as used in sec. 1. Opinion reserved (per Lord Ormisdale).

Adam's Executrix v Maxwell, 1921 S.C. 418; 58 S.L.R. 254; 1921, 1 S.L.T. 221.

(38)

—Right of representatives of heir—Heritage not available for collation.

An intestate who left heritable and moveable estate was survived by her brother T, who was her heir at law, and by two sisters who were her heirs in mobilibus. T died without collating and without making up a title to the heritage, and his son P thereupon became heir-apparent to his aunt, the intestate. P was decerned heir-general to the intestate, and made up a title to the heritage. Held that the personal representatives of T who were unable to collate the heritage were not entitled to claim any share of the moveable estate of the intestate. Opinion (per Lord Ardmillan) that the right of an heir who is one of the next of kin is not that of a person primarily entitled to both moveable and heritable estate, but is a primary right to heritage which he may extend by collation so as to obtain a share of the moveables.

Newbigging's Trustees v Steel's Trustees, 1873, 11 M. 411; 45 J. 285.

(39)

Heir not claiming legitim—Whether heir to be counted as a child in the division of the legitim fund.

Gilmour's Trustees v Gilmour, 1922 S.C. 753; 59 S.L.R. 563; 1922 S.L.T. 596, No. 128, infra.

(40)

Whether collated fund to be added to legitim fund or to gross estate.

Held that, where an heir claims legitim and collates heritage, the value of the collated heritage falls to be added to the legitim fund, and not to the gross estate of the deceased.

Gilmour v Gilmour's Trustees, (O.H.) 1920, 2 S.L.T. 369.

(41)

Heir collating—Intestate Moveable Succession (Scotland) Act, 1855, sec. 2—Rule of division with heir—"Other issue of predeceaser."

A, the heir in heritage of a person who had died intestate and the eldest son of a person who, had he survived the intestate, would have been the heir in heritage of the

intestate, resolved to collate, and his right to do so was admitted by the next of kin of the intestate, of whom there were two. The value of the heritage was £2485, and of the moveables £21,685—together £24,170, one-third whereof was £8056 13s. 4d. The other issue of the predeceaser claimed to share equally with A the £8056, on the ground that after collation the whole fell to be divided as moveable estate; or, otherwise, they claimed to share equally with A £7228, being the third of the intestate's moveable estate. **Held** that the other issue were entitled to shares only of £5571—the difference between the value of the heritage and one-third of the mixed estate—as being the sum gained by A on collation.

Held further, that the words "other issue of the predeceaser" in sec. 2 of the Intestate Moveable Succession Act, 1855, were not limited to the predeceaser's immediate issue.

Innes v Coghill, 1897, 25 R. 23; 35 S.L.R. 20; 5 S.L.T. 139.

(42)

Effect of collation on succession of next of kin—Heritable or moveable.

Napier v Orr, 1868, 6 M. 264; 40 J. 150; 5 S.L.R. 190. HERITABLE AND MOVEABLE, No. 31.

II. LEGAL RIGHTS OF SPOUSES AND CHILDREN.

1. AFFECTING HERITABLE ESTATE.

(1) COURTESY.

(43)

Subjects—Entailed estate—Burgage subjects—Superiorities—Lands held in trust.

Courtesy extends (1) to lands in which a wife dies infert under an entail, unless it is expressly excluded by the deed of entail; and (2) to burgage subjects and superiorities; but not (3) to lands held by trustees for behoof of a wife.

Lord Clinton, 1869, 8 M. 370; 42 J. 168; 7 S.L.R. 200.

(44)

Conquest — Conveyancing (Scotland) Act, 1874, sec. 37.

Held that, by virtue of sec. 37 of the Conveyancing (Scotland) Act, 1874, a husband's right of courtesy attaches to his wife's conquest.

Walker v Walker's Trustees, 1917 S.C. 46; 54 S.L.R. 56; 1916, 2 S.L.T. 245.

(45)

Conquest—Heirs-portioners — Mortis causa conveyance to heir-portioner.

A father, who possessed several heritable properties, by his settlement distributed them among his four daughters, who were his heirs-portioners. One of the daughters, to whom the estate of G had been disposed, made up her title under the settlement. After her death her husband drew the rents for twenty years. After his death one of

his children (who, on their mother's death, succeeded to the estate) raised an action against his executor, calling upon him to account for three-fourths of the rents drawn by the husband, on the ground that his right of courtesy did not extend to more than that pro indiviso fourth of the estate of G to which his wife was alioquin successura. The defence was that the courtesy extended to the whole of G, as the share of heritage which the daughter took under the settlement did not exceed the fourth pro indiviso share of the testator's heritage, which she would have taken as an heir-portioner had there been no settlement. **Held** that the courtesy did not extend to more than a fourth of the estate of G.

Observations (per Lord President Inglis) as to the rules applicable to questions of courtesy.

Watt v Wilkin, 1885, 13 R. 218; 23 S.L.R. 131.

(2) TERCE.

(46)

(Per Lord Adam)—"The husband's sasine is the measure of the widow's right (to terce), and no proceedings which have not the effect of evacuating the husband's sasine can preclude her right."

Rossborough's Trustees v Rossborough, 1888, 16 R. 157; 26 S.L.R. 111.

(47)

Mineral rents—Rent of mansion-house.

Terce is not due either from profits derived from minerals or from the rent of the mansion-house.

Constable's Trustees v Constable, 1904, 6 F. 826; 41 S.L.R. 624; 12 S.L.T. 133.

(48)

Heritable security—Sale of security subjects—Disposition not granted.

A bondholder infert sold the security subjects under his bond, but died before granting a disposition. His widow maintained that the bond formed part of her husband's moveable estate at the date of his death, subject to jus relictæ. **Held** that the bond had not been rendered moveable in a question between the executor and the widow, but that the widow was entitled to terce out of the bonds.

Rossborough's Trustees v Rossborough, 1888, 16 R. 157; 26 S.L.R. 111.

(49)

Deductions—Estate duty.

A proportion of estate duty held to be a proper deduction against a terce.

Ross v Ross's Trustees, (O.H.) 1901, 9 S.L.T. 340.

(50)

Exclusion of terce—Entail excluding terce—Disentail with consents—Consenters imposing condition that lands be re-entailed on same condition as those of old entail.

Hay Newton v Hay Newton, 1870, 8 M. (H.L.) 66; L.R., 2 H.L. Sc. 13; 42 J. 404; 7 S.L.R. 467. ENTAIL, No. 171.

(51)
 ————**Provision to widow in full of legal claims—Resulting partial intestacy—Accumulations prohibited by Thellusson Act.**

Naismith v Boyes, 1899, 1 F. (H.L.) 79; [1899] A.C. 495; 36 S.L.R. 973, No. 1467, *infra*.

Moon's Trustees v Moon, 1899, 2 F. 201; 37 S.L.R. 140; 7 S.L.T. 257, No. 70, *infra*.

(52)
 ————**Act 1681, c. 10—Provision that wife should have right to terce.**

The Act of 1681, c. 10, provides "when a particular provision has been granted by the husband in favour of his wife in a contract of marriage, the wife is thereby excluded from a terce out of any lands belonging to her husband unless it be expressly provided in the contract of marriage . . . that the wife shall have right to a terce by and at the particular provision." An antenuptial marriage contract after making provision for the wife contained a declaration that the provision "shall not in any way be held as in full of terce." **Held** that this clause satisfied the exception contained in the Act.

Douglas v Douglas's Trustees, (O.H.) 1906, 13 S.L.T. 749.

(53)
 ————**Gifts during marriage—Act 1681, c. 10—Amount of terce.**

Held that sums of money gifted by a husband to his wife during marriage did not constitute a provision within the meaning of the Act 1681, c. 10, and did not exclude her right to terce. **Held** also that in calculating the amount of a widow's terce and *ius relictæ* sums gifted by a husband to his wife during the marriage should not be taken into consideration.

Moss's Trustees v Moss, (O.H.) 1916, 2 S.L.T. 31.

(54)
 ————**Abandonment of right to terce.**

A widow survived her husband for ten years and died intestate, without having made an express election between her provisions under her husband's will and her terce. The trustees consigned the amount of the testamentary provisions in bank and intimated this to the lady. They also called her in an action of multiplepounding which they brought for the purpose of dividing the husband's estate, but she did not appear. **Held** that she had abandoned her right to terce and that her representatives were not entitled to claim arrears.

Pringle's Executrices, 1870, 8 M. 622; 42 J. 317; 7 S.L.R. 335.

(55)
 ————**Implied renunciation—Wife's signature to husband's settlement.**

Edward v Cheyne, 1888, 15 R. (H.L.) 37; 13 App.Cas. 385; 25 S.L.R. 424. *DISCHARGE*, No. 26.

(56)
 ————**Right of widow's representatives—Right to elect—Arrears.**

Questions—(1) Whether in order to transmit any right to arrears of terce to her representatives, it is necessary for a widow to have been served to the terce; and (2) whether when a widow dies without electing between her conventional provisions and her right to terce her right to elect transmits to her representatives.

Pringle's Executrices, 1870, 8 M. 622; 42 J. 317; 7 S.L.R. 335.

[See also *Edward v Cheyne*, 1888, 15 R. (H.L.) 33; 13 App.Cas. 373; 25 S.L.R. 422, No. 105, *infra*.]

(57)
 ————**Brieve—Appeal—Competency—Act 1503, c. 77—Act 1681, c. 10.**

The heir at law is not entitled to obtain a sist of the proceedings under a brieve of service and cognition to terce on the ground that he is about to bring a declarator of the invalidity of the marriage, or on the ground that he is about to raise an action for declarator that the widow is barred from claiming terce by reason of having accepted a conventional provision out of heritage abroad belonging to the deceased. **Opinion** (per Lord McLaren) that under a brieve of terce it is competent for the inquest to consider whether the widow is barred from claiming terce by reason of having accepted a conventional provision. **Opinions** that a brieve of service and cognition to terce may be removed to the Court of Session by appeal at any time before trial before the sheriff. **Observations** as to the competency of an appeal after trial and verdict.

Craik v Penny, 1891, 19 R. 339; 29 S.L.R. 287.

(58)
 ————**Right of bondholder in competition with tercer.**

Bondholders claimed to apply the rent of heritage towards payment of the principal sum due under their bond. **Held** that they were not entitled to do so if the result would diminish the terce to which a widow had been served.

Black's Trustees v Scott, (O.H.) 1895, 3 S.L.T. 8.

2. AFFECTING MOVEABLE ESTATE.

(1) AMOUNT OF FUND.

(a) Heritable or Moveable.

[See *HERITABLE OR MOVEABLE*.]

(b) Subjects in Bonis of Deceased at Death.

(59)
 ————**Insurance policy on life of deceased.**

Held that the *ius relictæ* extended over sums contained in policies of insurance held by a husband on his own life, which were payable to the husband's executors, administrators, and assigns three months after the

insurance company received proof of his death.

Muirhead v Muirhead's Factor, 1867, 6 M. 95; 40 J. 57; 5 S.L.R. 88.

(60)

Sums advanced by a father to children on condition that they should be imputed towards legitim or other legal rights.

Gilmour's Trustees v Gilmour, 1922 S.C. 753; 59 S.L.R. 563; 1922 S.L.T. 596, No. 156, *infra*.

(61)

Insurance policy on life of surviving wife.

A husband predeceased his wife, on whose life he had effected two policies of insurance. **Held**, in a question with children claiming legitim, that these policies formed part of his moveable estate at the date of his death, and in calculating the amount of legitim were to be valued at their actuarial value at the date of the husband's death.

Pringle's Trustees v Hamilton, &c, 1872, 10 M. 621; 44 J. 345; 9 S.L.R. 377.

(62)

Policy of insurance on husband's life—Policy in favour of wife if surviving, but to revert to husband's executors on her predecease.

Hay's Trustees v Hay, 1904, 6 F. 978; 41 S.L.R. 809, No. 1460, *infra*.

(63)

Insurance policy on surviving son's life—Provision for son's family—Actuarial value.

Certain policies of insurance were taken upon a son's life by a father for behoof of himself and spouse, and payable to both "or to the survivor of them, their, his, or her heirs, executors, or assignees." After the father's death, the premiums were paid by his widow, who, in virtue of a mutual settlement by the spouses, had the absolute use of the whole estate, heritable and moveable. On the death of both, the settlement provided that the estate should be divided into twelve parts, one of which was to be retained to pay the policy premiums in the first instance. It was also provided that on the death of the son, the contents of the policies should go to the son's widow in liferent and his children in fee. **Held** that the actuarial value of the policies at the date of the father's death formed part of his moveable estate for the purpose of estimating legitim.

Chalmers' Trustees, 1882, 9 R. 743; 19 S.L.R. 493.

(64)

Provision in contract of partnership for payment of profits to executors of deceased partner for behoof of widow and children.

A contract of copartnership provided that if either of the two partners should die during the continuance of the partnership "leaving a widow, child, or children" surviving him, the surviving partner should, for a period of six months from the date of the deceased partner's death, pay to the latter's exe-

cutors, "for the benefit of his widow, child, or children, the share of profits to which the said deceased partner would have been entitled had he lived." One of the partners having died leaving a widow and one child, **held** that the share of the profits payable under the contract of copartnership did not form part of the deceased partner's executry estate, but fell to be equally divided between his wife and child.

Adamson's Trustees v Adamson's Executors, 1891, 18 R. 1133; 28 S.L.R. 869.

(65)

Widow's pension from military fund—Subscriptions by husband to fund.

Craigie's Trustees v Craigie, 1904, 6 F. 343; 41 S.L.R. 254; 11 S.L.T. 628, No. 1461, *infra*.

(66)

Gifts to wife during marriage—Deduction.

Moss' Trustees v Moss, (O.H.) 1916, 2 S.L.T. 31, No. 53, *supra*.

(67)

Legacy in favour of heirs of deceased.

Held that a widow had no right *jure relictae* to a share of a money legacy left to the heirs in *mobilibus* of her husband.

Inglis v Inglis, 1869, 7 M. 435; 41 J. 234; 6 S.L.R. 271.

(68)

Unrevoked donation inter virum et uxorem.

Held (by a majority of the whole Court) that *inter vivos* gifts of moveable estate made by a husband to his wife, and not revoked by him at his death, did not fall to be taken into account in ascertaining the amount of the legitim fund of his estate.

Hutton's Trustees v Hutton's Trustees, 1916 S.C. 860; 53 S.L.R. 668; 1916, 2 S.L.T. 74.

(69)

Property passing under irrevocable mutual settlement.

Spouses by a mutual settlement bequeathed all their property in favour of the survivor, and further bequeathed the remainder of the property, on the death of the survivor, equally between the heirs of the husband and the heirs of the wife. The husband survived and married again. On his death his widow claimed *jus relictae*. **Held** that her right was not defeated by the mutual settlement even assuming that it was irrevocable by the husband.

Bell v Sands, (O.H.) 1893, 1 S.L.T. 58.

(70)

Accumulations—Thellusson Act, 1800, sec. 1—Resulting intestacy.

Held that in addition to her testamentary provisions a widow was entitled to *jus relictae* out of accumulations of income, prohibited by the Thellusson Act, which had fallen into intestacy.

Moon's Trustees v Moon, 1899, 2 F. 201; 37 S.L.R. 140; 7 S.L.T. 257.

M'Gregor's Trustees v Kimbell, 1911 S.C. 1196; 48 S.L.R. 950; 1911, 2 S.L.T. 154.

(71)
Income which a testator directed to be accumulated fell into intestacy under the Thellusson Act. **Held** that the testator's widow was not entitled, in virtue of her right of *jus relictæ*, to claim any portion of the surplus income, in respect that it did not form part of the testator's estate at the date of his death.

Wilson's Trustees v Glasgow Royal Infirmary, 1917 S.C. 527; 54 S.L.R. 468; 1917, 1 S.L.T. 328.

(72)
Liferent falling to mother's executry through mother having divorced her husband.

A wife by antenuptial marriage contract conveyed to trustees her whole estate then belonging to her or that should pertain to her during the subsistence of the marriage. Her father by the contract bound himself on his death to make payment of £5000 to the trustees for behoof of the wife in liferent, and after her death for the husband in liferent, and on the death of the survivor for certain beneficiaries in fee. The wife divorced her husband, and thereafter died. **Held** that the husband's liferent, which was forfeited by reason of the divorce, fell to the wife's executry, and (2) that the only child of the marriage was entitled to claim legitim out of the interest on the sum of £5000 so falling to the wife's executry.

Gavin's Trustees v Walker's Trustees, (O.H.) 1907, 15 S.L.T. 681.

(73)
Goodwill of medical practice—Recommendation of widow.

Bain v Munro, 1878, 5 R. 416; 15 S.L.R. 260. GOODWILL, No. 13.

(c) Simulate Transactions.

(74)
IO U's taken in favour of deceased's children—Delivery—IO U's returned to deceased and retained till his death.

A advanced the sum of £1000, being nearly the whole of his moveable estate, to one of his sons, who at his father's request wrote upon one sheet of paper three IO U's (the sums in which together amounted to £1000), one being in favour of each of A's other children, except a son whom he desired to exclude from all share in his succession. The paper containing the IO U's was then handed in turn to two of the creditors in the obligations (the third was deaf and dumb), and finally to the father, by whom it was retained till his death, which occurred nine months after the transaction. **Held**, in a claim for legitim by the excluded son against his father's trustees, that while the form of the transaction might be sufficient absolutely to divest the father of the sum of £1000, provided that such was the real intention of the parties, the whole circumstances, and particularly the retention of the obligatory documents

by the father, showed that the transaction was simulate, and that the fund formed part of the personal estate of the father at the time of his death.

Buchanan v Buchanan, 1876, 3 R. 556; 13 S.L.R. 353.

(75)
Gift of whole estate.

Circumstances in which **held** that a widow's claim for *jus relictæ* was defeated by a donation of his whole estate, which had been made to a third party by the husband the donation having been absolute and irrevocable.

Allan v Stark, (O.H.) 1901, 8 S.L.T. 468.

(76)
Assignment of farm lease and stock.

A farmer assigned his whole estate including the lease and stock of his farm to his son by his second marriage, who had previously assisted in managing the farm. The assignment was delivered to the son and was intimated to the factor on the property, who recognised the son as tenant, and the policies of insurance over the farm were transferred to the son's name. The object of the transaction was to exclude a claim of legitim by the children of the father's first marriage. **Held** that the assignment was an effectual transfer of the lease and stock, and was not reducible as being in fraud of legitim.

Skinner v Beveridge, 1872, 10 S.L.R. 12.

(77)
Payment on deathbed—Act to Abolish Reductions ex Capite Lecti, 1871.

A father executed a deed of provision "to come into operation during my lifetime," whereby he conveyed to trustees for behoof of three of his children nominatim, "the sum of £6000 (£3200 of which I have handed to them in cash). . . ." The deed was delivered immediately after its execution, and the £3200 was at the same time handed by the granter to the trustees by cheque payable to one of them. A child of the granter of the deed, who had not been mentioned in it, sought to have it declared that she was entitled to legitim out of the £3200 handed over in cash, averring that the sum had been handed to the trustees by her father on deathbed. **Held** that the pursuer's averment was irrelevant, in respect the payment of the money was to be regarded as made in implement of the deed of provision, and not as an independent transaction.

Hay v Coutts' Trustees, 1890, 18 R. 244; 28 S.L.R. 205.

(78)
Relevancy of averments.

A daughter, who claimed legitim from her father's estate, raised a reduction of certain minutes of agreement entered into between her father and brother with respect to the transference of a business, in which they had been partners for several years, from the father to the son. She averred

that the minutes were "not bona fide absolute transfers" of the father's estate, that "the transaction was nominal and fictitious, and in fraudem of the pursuer's claim of legitim." **Held** that there was no sufficient or relevant averment in support of the reasons of reduction.

Boustead v Gardner, &c., 1879, 7 R. 139; 17 S.L.R. 67.

(d) Valuation of Estate.

(79)

Date of valuing estate.

Observed (per Lord Ardmillan)—"Legitim must be calculated as at the date of the father's death, and profit or loss arising after realisation, in consequence of the executor's mode of dealing with the funds, cannot augment or diminish the claim of the child."

Earl of Dalhousie v Crokatt, 1868, 6 M. 659; 40 J. 341; 5 S.L.R. 406.

(80)

Appreciation after death.

A right to legitim is a debt to be measured by the actual value of the moveable estate left by the father at his death, and its ascertainment does not involve realisation of his estate. The estate of a deceased person included the shares of certain ships which were not marketable at the date of his death, but soon after increased in value. In an action for payment of legitim the Court allowed a proof of the value of the shares of the ships as at the date of the father's death.

Gilchrist v Gilchrist's Trustees, 1889, 16 R. 1118; 26 S.L.R. 639.

(81)

On the death of a husband his executors carried on his business for some time and then realised it for a sum exceeding its value at the date of the husband's death. **Held** that the amount of his widow's *jus relictæ* must be calculated with reference to the value of the estate at his death and not the amount ultimately realised.

Maben v Maben's Executors, (O.H.) 1901, 8 S.L.T. 486.

(82)

Delay in realisation.

Trustees delayed realising certain securities for four years after the husband's death. **Held** that the widow's *jus relictæ* was to be calculated on the value of the estate at her husband's death and not as at the date of realising the securities.

Moss' Trustees v Moss, (O.H.) 1916, 1 S.L.T. 321.

(83)

Depreciation in investments subsequent to realisation.

In estimating the amount of *jus relictæ* the wife's estate is valued as at her death, and when the estate has been duly realised no change in its value occurring in the course of the executor's subsequent administration will, apart from specialities, affect the

amount of the *jus relictæ*. The executor of a married woman, who died in England, brought an administration suit in the Court of Chancery, in the course of which, the executor having realised the estate, it was ordered that the proceeds should be lodged in Court, and invested in specified investments. **Held** that the husband's *jus relictæ* was not subject to deduction in respect of depreciation of the value of these investments made under order of the Court.

Russel v Attorney-General, 1917 S.C. 28; 54 S.L.R. 32; 1916, 2 S.L.T. 207.

(84)

Losses subsequent to realisation.

In a question between a son claiming legitim and his deceased father's executor, who had allowed the agent employed to ingather the executry estate to retain in his own hands funds belonging thereto, part of which had been lost through the insolvency of the agent, **held** that whether there was negligence on the part of the executor or not, this was a loss incurred after realisation, which could not diminish the amount of the legitim.

Question, whether the executor or the dead's part should sustain the loss.

Earl of Dalhousie v Crokatt, 1868, 6 M. 659; 40 J. 341; 5 S.L.R. 406.

(85)

Claim for share of *ipsa corpora* of estate.

Cameron's Trustees v Maclean, 1917 S.C. 416; 54 S.L.R. 355; 1917, 1 S.L.T. 226, No. 99, *infra*.

(e) Debts Deductible from Estate.

(86)

Marriage contract provisions—Father twice married—Legitim of children of first marriage—Provisions to children of second marriage.

A testator, who had been twice married, was survived by seven children, five of the first marriage and two of the second, and was predeceased by his second wife. The children of the first marriage had not discharged their legitim, but with respect to those of the second, the testator, by antenuptial contract with his second wife, in order to make a provision for the children of that marriage, bound himself to pay to them, at the first term after his death "a just proportion and share of the means and estate that may happen to belong to him at his decease, along with the children of his former marriage, and along with the children of any future marriage," and that equally or in such proportions as he might appoint, which provision was declared to be in full of legitim. By his settlement the testator directed his whole estate to be divided among all his children equally. One of the children of the first marriage, who had survived the testator, died before the period of vesting under the settlement, and his representative claimed the share of legitim which had vested in him at his father's death. The children of the second

marriage made no claim under the antenuptial contract. **Held** that whether the children were or were not creditors under the marriage contract, as they made no claim under that deed, the father's trustees were not entitled to deduct two-sevenths from the executry before computing the amount of the legitim fund.

Bishop's Trustees v Bishop, 1894, 21 R. 728; 31 S.L.R. 590.

(87)

Marriage contract provisions—Provisions in favour of children of earlier marriage.

A man, on entering into a second marriage, executed a marriage contract by which he conveyed the whole estate which might belong to him at the date of his death to trustees for behoof of the children of the first and second marriages. He subsequently married a third time. On his death **held** that the widow and children of the third marriage were entitled to receive their legal rights before the executors conveyed the husband's estate to the marriage contract trustees.

Allan's Trustees v Allan's Trustees, (O.H.) 1907, 15 S.L.T. 73.

(88)

Provision in favour of children claiming legitim.

In an antenuptial contract of marriage, the husband, besides undertaking certain other provisions, undertook to make over at his death to the children of the marriage, if any, one-half of the whole estate, heritable and moveable (after deducting a proportional part of his debts) which he should thereafter conquest and acquire in any manner of way, reserving power to divide and apportion the provisions made by him among the children, if more than one, as he should see fit. The contract did not exclude legitim. Certain of the children having at their father's death claimed legitim, **held** that the half of conquest being an onerous provision due to the whole children by contract, fell to be deducted from the estate before computing legitim, and that those children who took legitim were therefore entitled both to a share of the half of the conquest and to legitim.

Murray's Trustees v Murray, 1881, 18 S.L.R. 690.

(89)

Testamentary provision to widow—Liferent of portion of estate.

A testator, who had married without entering into a marriage contract, executed a testamentary deed of appointment directing his trustees to pay the income of three-fifths of his estate to his widow for her life-rent alimentary use, and to pay the income of the remaining two-fifths to his children equally during her life, and after her death to divide the whole trust fund equally among his children then surviving and the issue of those who might predecease her. These provisions were declared to be in satisfaction of *jus relictæ* and legitim. Owing to the

character of the investments the legitim fund extended to one-half of the trust estate. The children having claimed legitim, **held** (1) that the provision in favour of the widow, being testamentary, had not the effect of postponing payment of any part of the legitim fund.

M'Leod v Love, 1914 S.C. 983; 51 S.L.R. 779; 1914, 2 S.L.T. 165.

(90)

Chargeability of debts against moveable estate—Part of estate consisting of bond heritable quoad *jus relictæ* and moveable quoad succession.

A bond which was moveable quoad the creditor's succession but heritable quoad *jus relictæ* was assigned by him to a bank in security of advances. **Held** (1) that in a question with the widow claiming *jus relictæ* the ordinary moveable debts of the deceased were chargeable against the fund available for *jus relictæ*, no portion of them being chargeable against the bond; but (2) that advances made by the bank on the security of the assignation formed a charge against the bond.

Heath v Grant's Trustees, 1913 S.C. 78; 50 S.L.R. 38; 1912, 2 S.L.T. 320.

(91)

Burden affecting heritage — Annuity.

A testator, in satisfaction of an obligation in his marriage contract, by his trust settlement directed his trustees to pay an annuity to his widow. Terms of the settlement under which **held** that the testator intended the annuity to be paid out of his heritable estate, and accordingly that in estimating the amount of the legitim fund the value of the annuity did not fall to be deducted from it as if it had been a debt exigible from his executry estate.

Smith's Trustees v Smith, (O.H.) 1912, 1 S.L.T. 484.

(92)

Burden on heritable estate of deceased.

A husband died leaving heritable and moveable estate. His widow claimed *jus relictæ*. The heritable estate was burdened by an obligation to erect buildings on it. **Held** that this burden was a charge against the moveable estate which must be met before the amount of *jus relictæ* was ascertained.

Ross v Ross's Trustees, (O.H.) 1901, 9 S.L.T. 340.

(93)

Aliment of widow.

A husband died leaving a will by which he gave his widow a life-rent of his whole estate, with power to appropriate such part of the capital as from time to time she should think necessary for her maintenance. Some months after the husband's death a child claimed legitim. **Held** that the widow was not entitled in an accounting for legitim to credit for aliment out of the estate from

her husband's death till the claim for legitim was made.

Morrison v Tawse's Executrix, 1888, 16 R. 247; 26 S.L.R. 160.

(94)

Calls on shares after death of deceased.

Where calls were paid in respect of certain shares some months after a father's death, **held** that these were debts which must be deducted from his estate before legitim was ascertained.

Davidson v Mackenzie, (O.H.) 1898, 6 S.L.T. 25.

(95)

Unprofitable lease of music hall—Losses resulting after death of deceased.

A testator in his trust settlement directed his trustees to pay the income of the residue of his estate to his sister and her children, and after her death, and when the youngest attained the age of twenty-five years, to divide the capital of the residue among them. He was tenant under lease of a music hall, and when he died some years of the lease were still to run. His trustee failed to dispose of the lease or to sublet the premises. His widow claimed her legal rights. **Held** that the loss occasioned by the lease of the music hall fell to be charged against the moveable estate in a question with the widow.

Rosborough's Trustees v Rosborough, 1888, 16 R. 157; 26 S.L.R. 111.

(96)

Expenses—Realising estate.

The expenses of the deceased's executor in making up a title to and realising the estate fall to be deducted in ascertaining the amount of *jus relictæ*.

Russel v Attorney-General, 1917 S.C. 28; 54 S.L.R. 32; 1916, 2 S.L.T. 207.

(97)

—Litigation—Subsequent to deceased's death—*Jus relictæ*.

The executor of a married woman who had died in England brought an administration suit in the Court of Chancery, in the course of which it became necessary to ascertain the husband's domicile in consequence of his having claimed *jus relictæ*. After inquiry the husband's domicile was found to be Scottish. **Held** that the *jus relictæ* was not subject to deduction in respect of the costs of the inquiry as to his domicile.

Russel v Attorney-General, 1917 S.C. 28; 54 S.L.R. 32; 1916, 2 S.L.T. 207.

(2) *JUS RELICTÆ*.

(98)

Nature of *jus relictæ*—Right to share of *ipsa corpora* of estate or *jus crediti*.

Question, whether the *jus relictæ* is a right of property in one-third (or one-half) of the *ipsa corpora* of the deceased husband's estate or is merely a *jus crediti* for one-third (or

one-half) of the money value of the estate upon realisation.

Stewart v James Keiller & Sons, 1902, 4 F. 657; 39 S.L.R. 353.

(99)

Jus relictæ is a right of the same nature as legitim. It is not a right of property in a certain share of the *ipsa corpora* of the deceased husband's estate which is vested in the wife at the date of his death; it is merely a *jus crediti* for payment of a certain portion of the value of the estate as at that date. **Held**, accordingly, that a widow was not entitled to obtain a transfer in *forma specifica* of one-third of her husband's shares in a company in *pro tanto* satisfaction of her *jus relictæ*, but was merely entitled to have the value of the shares, as at the date of his death, brought into computation in ascertaining the amount of her right.

Cameron's Trustees v Maclean, 1917 S.C. 416; 54 S.L.R. 355; 1917, 1 S.L.T. 226.

(100)

—Special right to certain shares.

A widow brought an action against her late husband's trustees for an accounting of their whole intromissions with his moveable estate in order that the true balance due by them to her in name of *jus relictæ* might be ascertained. She also claimed transfer of one-half of certain shares belonging to her deceased husband at the date of his death. **Held** that she was, in the circumstances, entitled to a transfer of the shares belonging to her husband.

Millar v Millar's Trustees, (O.H.) 1914, 1 S.L.T. 414.

(101)

Interest—Rate of interest.

A widow threatened to raise an action of reduction of a postnuptial marriage contract and to claim her legal rights. After ten years' delay she raised the action and was successful. **Held** that she was only entitled to interest on the amount of her *terce* and *jus relictæ* at deposit-receipt rates and that income tax fell to be deducted from this sum.

Summers v Summers' Trustees, (O.H.) 1893, 1 S.L.T. 77.

(102)

Maintenance of widow as set-off.

The tenant of a small farm died intestate, survived by his wife, two sons, and a daughter. No executor was appointed, and no claims were made by any of the family on the deceased's estate. The second son, who had remained in family with his parents, became tenant of the farm and worked it with the assistance of his mother and sister. The mother died seventeen years after her husband, aged seventy-seven, leaving nothing except the sum payable to her *jus relictæ*. **Held**, in an action by the eldest son against the second son for payment of his share of his mother's estate, that it must be presumed that the sum due to the mother *jus relictæ* had been ex-

hausted in her maintenance and consequently that she left no estate.

Wick v Wick, 1898, 1 F. 199; 36 S.L.R. 180.

(103)

A widow was maintained during the eleven years of her viduity by her eldest son, who was also her husband's executor. She made no claim for *jus relictae*, but a claim was made by her representatives. **Held** that the sums expended by the son on the widow's maintenance fell to be set off against the claim for *jus relictae*.

Mackenzie v Mackenzie's Trustees, 1873, 11 M. 681; 45 J. 433; 10 S.L.R. 470.

(104)

Divorce — Effect of husband's divorce — Domicile—Jurisdiction.

A, a Scotswoman, who in 1873 was married in Edinburgh to B, a Scotsman, raised an action of divorce against her husband in January, 1898. B, who had been personally cited, did not appear in the action, and the pursuer, after a proof, obtained decree of divorce on 23rd February, 1898. In March, 1898, A raised a second action against B, who was a proprietor of heritage in Scotland, concluding for declarator that she was entitled to terce and *jus relictae* as at the date of the decree of divorce, and for count and reckoning to fix the amount of *jus relictae*. B averred that at the date of the divorce he was domiciled in the Isle of Man. **Held** (1) that, standing the decree of divorce, it was to be assumed that the Court had jurisdiction to pronounce it, and therefore (2) that the Court had jurisdiction to entertain the present action, and (3) that the pursuer was entitled to declarator of her right to *jus relictae* as if her husband had died at the date of decree of divorce.

Manderson v Sutherland, 1899, 1 F. 621; 36 S.L.R. 432; 6 S.L.T. 364.

(105)

Implied renunciation—Wife's signature to husband's settlement.

A husband by his trust disposition and settlement gave his wife the *liferent* of his whole means and estate, and in the fourth purpose directed his trustees, "after the death of the survivor of me and my said wife, and with her consent and full approval (in token of which she has subscribed this deed)," to pay over a large number of legacies, many of them to relatives of his wife. By the fifth purpose he directed that after the death of his widow his household furniture should be divided among certain of her relatives. The residue was to be devoted to religious and charitable purposes. The wife signed the deed. She survived her husband only a few weeks. Her executor claimed her terce and *jus relictae*, maintaining that her consent had been given to the legacies only, and not to the whole settlement. **Held** that although it could not be inferred from the wife's signature to the deed that she gave any consent thereto further than the deed bore, her consent to the

fourth purpose implied an acceptance of the *liferent* provided to her in the deed in lieu of terce and *jus relictae*.

Edward v Cheyne, 1888, 15 R. (H.L.) 33; 13 App.Cas. 373; 25 S.L.R. 422.

(106)

—Mutual settlement.

In a mutual settlement, entered into by a husband and wife, the husband left to the wife £3000, "reserving to myself the full right of disposal by testamentary writing or otherwise of the whole remainder of my personal estate as well as my heritable estate, so far as not required for fulfilling the obligations hereby undertaken by me." The wife made over the whole of her estate to her husband. The husband died intestate. **Held** that the wife had not discharged her legal rights.

Wright's Trustees, (O.H.) 1897, 4 S.L.T. 358.

(107)

Implied exclusion — Marriage contract executed abroad.

Terms of an antenuptial marriage contract executed abroad in foreign form, between a domiciled Scotsman and a foreign lady, from which it was **held** that an exclusion of the *jus relictae* was to be implied.

Durrant Stuart's Trustees v Durrant Stuart, 1891, 18 R. 1114; 28 S.L.R. 824.

(108)

—Marriage contract provisions declared not to be in full of *jus relictae*—Will declaring testamentary provisions should supersede marriage contract provisions.

A marriage contract declared that the wife's provisions therein contained "shall not in any way be held as in full of her terce, *jus relictae*, or other marital rights which she could legally claim" from the husband's representatives, but in the event of the husband dying intestate "shall only be reckoned as a payment to account of her legal share; and in the event of his leaving a will . . . shall unless specially mentioned in such will . . . be held to be over and above the provisions in her favour in such will." The husband left a will declaring that the provisions therein should supersede the marriage contract provisions. **Held** that the wife was entitled to claim *jus relictae*.

Douglas v Douglas's Trustees, (O.H.) 1906, 13 S.L.T. 749.

(109)

Mora.

A widow was maintained during the eleven years of her viduity by her eldest son, who was her husband's executor, during which time she made no claim for *jus relictae*. In an action brought by her representatives fifteen years after her death against the representatives of her son, **held** that the claim was not barred by *mora* and acquiescence.

Mackenzie v Mackenzie's Trustees, 1873, 11 M. 681; 45 J. 433; 10 S.L.R. 470.

(110)

Discharge during marriage—Revocability.

A wife who had married without a marriage contract signed a will, which was executed by her husband, in token of her consent to accept a liferent of his whole estate in lieu of her legal rights. Eighteen months after her husband's death she claimed her legal rights. **Held** that she was entitled to do so.

Taylor v Taylor's Trustees, (O.H.) 1897, 5 S.L.T. 125.

(111)

Effect of discharge—Right to *jus relictæ* out of funds falling into intestacy—Provision by inter vivos deed in full of legal claims.

By antenuptial contract the husband bound himself and his heirs to pay his wife after his death an annuity of £250 during her life, which provision she accepted "in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she, *jure relictæ* or otherwise, could ask, claim, or demand from the said" husband, "or his heirs, executors, and representatives, by and through his death, if she shall survive him." The husband predeceased his wife, intestate and leaving a large amount of moveable estate. **Held**, in a question between the widow and the children of the marriage, that the widow was not entitled *jure relictæ* to one-third of the moveable estate left by the husband, and that the whole of that estate fell to the children of the marriage.

Sim v Sim, 1901, 4 F. 944.

Testamentary provision accepted—Right to claim *jus relictæ* out of funds falling into intestacy.

[See Nos. 1467 to 1470, *infra*.]

(112)

Construction of discharge — "Right or claim competent to widow"—Mournings.

A widow's allowance for mournings is a privileged debt due by her husband's estate, and is not discharged by her acceptance of provisions under her husband's will which are therein declared to be "in full satisfaction of all terce of lands, *jus relictæ*, or legal share of moveables, and any other right or claim competent to her" through his decease.

Griffiths' Trustees v Griffiths, 1912 S.C. 626; 49 S.L.R. 486; 1912, 1 S.L.T. 247.

(3) *JUS RELICTI*.

(113)

Nature of *jus relictæ*.

Jus relictæ is in the nature of a debt which attaches to the wife's free succession after the claims of onerous creditors and the expenses of the executor in making up a title to and realising the estate have been satisfied. It is a certain share of the wife's estate, fixed, so far as regards value, as at the date of her death; and, when the estate has been duly realised, no change in its

value occurring in the course of the executor's subsequent administration will, apart from specialities, affect the amount of the *jus relictæ*.

Russel v Attorney-General, 1917 S.C. 28; 54 S.L.R. 32; 1916, 2 S.L.T. 207.

(114)

Married Women's Property Act, 1881, secs. 3 (2) and 6—Marriage prior to Act.

Held that sec. 3, sub-sec. (2), of the Married Women's Property Act, 1881, is applicable only to the preceding provisions of the Act, and does not restrict the application of sec. 6 to the case of marriages contracted after the passing of the Act.

A woman, who was married in 1878, died in 1882, without issue, intestate, and domiciled in Scotland, possessed of moveable estate, to part of which she had succeeded before her marriage and before the Married Women's Property Act, 1881, was passed, and to part after her marriage and after that Act was passed. In an action at the instance of her husband against her executrix and next of kin, **held** that her husband was entitled to the half of her whole moveable estate under sec. 6 of the Act.

Paterson v Poë, 1883, 10 R. (H.L.) 73; 8 App.Cas. 678; 21 S.L.R. 48.

(115)

Divorce not equivalent to death.

Held that sec. 6 of the Married Women's Property (Scotland) Act, 1881, which confers a *jus relictæ* on a surviving husband, applies only upon the death of a wife, and that a decree of divorce pronounced against a wife is not equivalent to her death in the sense of the Act.

Eddington v Robertson, 1895, 22 R. 430; 32 S.L.R. 312; 2 S.L.T. 547.

(116)

Marriage contract executed prior to 1881—Wife's estate conveyed to trustees for her behoof—Renunciation of *jus mariti*—Husband entitled to *jus relictæ*.

By an antenuptial marriage contract entered into prior to the passing of the Married Women's Property Act, 1881, which dealt exclusively with the wife's estate, the wife conveyed to trustees her moveable estate with directions to them to hold the same "for behoof of herself, whom failing, then for behoof of her own representatives . . . excluding always the *jus mariti* and right of administration of her said intended husband, and the debts and diligence of his creditors," and "in order that this trust and arrangement may receive effect" the husband renounced his *jus mariti* and right of administration over the estate so conveyed. The wife died leaving children of the marriage, but without having executed any further writing disposing of her estate. **Held** that the husband was entitled, under sec. 6 of the Act of 1881, to one-third of his wife's estate.

Fotheringham's Trustees v Fotheringham, 1889, 16 R. 873; 26 S.L.R. 609.

(117)

By antenuptial marriage contract, entered into in 1862, a wife conveyed to trustees her whole estate, heritable and moveable, for payment of the free yearly income to herself during her life, exclusive of her husband's *jus mariti* and right of administration, and after her death for payment to her husband of an alimentary *liferent* of it, which was to cease on his entering into a second marriage. On the death of the spouses the capital was to be conveyed and paid to the issue of the marriage, if any, and failing them, in the event of the wife predeceasing the husband, to the wife's "own heirs whomsoever." The wife predeceased her husband, and there was no issue of the marriage. She left no further writing disposing of her estate. The husband took no benefit from his *liferent*, and married a second time shortly afterwards. **Held** that the husband was entitled, under sec. 6 of the Married Women's Property Act, 1881, to take one-half of his wife's estate.

Simons' Trustee v Neilson, 1890, 18 R. 135; 28 S.L.R. 119.

(118)

Husband's claim for *jus relictii* inconsistent with terms of marriage contract.

By antenuptial contract of marriage, dated in 1874, the wife conveyed her whole estates *acquisita et acquirenda* to trustees, for the purpose, *inter alia*, that in the event of the dissolution of the marriage by her death, without issue, her husband should enjoy the *liferent* of her whole estates, the trustees being, in that event, directed to hold the fee for behoof and at the absolute disposal of the wife or her heirs or assignees. The husband, *inter alia*, renounced his "*jus mariti* and rights of courtesy and of administration in, of, and in relation to the whole estate and effects, heritable and moveable, now owing and belonging, or which may hereafter be owing and belonging to" the wife. The marriage was dissolved in 1883 by the death of the wife, intestate, and without issue. The husband thereafter for several years enjoyed the *liferent* of his wife's estate, and then claimed one-half of the moveable estate, in virtue of the Married Women's Property (Scotland) Act, 1881, sec. 6. **Held** that the husband's claim was inconsistent with the provisions of the marriage contract.

Buntine v Buntine's Trustees, 1894, 21 R. 714; 31 S.L.R. 580; 1 S.L.T. 592.

(119)

By antenuptial contract of marriage, dated in 1871, between spouses who were married in that year, the wife conveyed to trustees the sum of £450, for payment of the interest to herself during her life, and on her death to her husband during his life if he should survive her, and on the death of the longest liver of the spouses, for payment of the principal sum to the children of the marriage and their descendants equally *per stirpes*, and if there should be no issue or descendants of issue "then the whole balance of said trust estate remaining under the

management of said trustees shall be paid to the heirs, executors, and successors whomsoever of the said" wife. These *liferent* interests were not to be subject to the husband's *jus mariti*. The marriage was dissolved by the death of the wife in 1899. No children were born of the marriage. The wife left a *mortis causa* settlement disposing of her whole property. The husband claimed one-half of the whole moveable estate left by his wife, including one-half of the £450 conveyed by her to the marriage contract trustees, as falling to him *jure relictii*, and also the *liferent* of the balance of the £450 thereafter remaining in the hands of the marriage contract trustees. **Held** by the whole Court that the legal rights of the husband in the £450 conveyed to the marriage contract trustees were restricted to the *liferent* provision, and did not include any part of the fee.

Murray's Trustees v Murray, 1901, 3 F. 820; 38 S.L.R. 598; 9 S.L.T. 74.

(120)

Wife conferring on husband *liferent* of her whole estate—Husband's right to claim *jus relictii*.

A wife by antenuptial trust deed conveyed the whole estate then belonging to her, or which she should acquire during the subsistence of the marriage, to trustees to hold for herself in *liferent* and her children in fee, and, failing children, she directed her trustees to pay or convey the estate to her assignees or disponees, whom failing to her lawful heirs. The husband knew of the deed, and after the marriage signed along with his wife the necessary transfers to the trustees. The marriage was dissolved by the death of the wife. There were no children. She left a trust disposition and settlement by which she gave her husband a *liferent* alimentary provision of the free annual proceeds of her estate, and directed her trustees on his death or second marriage to realise the estate and to pay and make over the residue to the children of her brother and sister. **Held** that the husband was entitled to claim one-half of his wife's estate as *jus relictii* in place of the provision made for him in the trust disposition and settlement.

Lyon's Trustees v Millar, 1903, 5 F. 1096; 40 S.L.R. 774; 11 S.L.T. 211.

(4) LEGITIM.

(a) Generally.

(121)

Per Lord President Inglis—"Legitim is a debt due by the entire free executry, and does not constitute a burden upon one part of the estate more than upon another."

Snody's Trustees v Gibson's Trustees, 1883, 10 R. 599; 20 S.L.R. 392.

(122)

Division of deceased's estate—Survivance of divorced husband and child.

When a wife was survived by a husband

whom she had divorced for desertion and a child, **held** that the proper division of the estate for the purpose of ascertaining the amount of legitim was tripartite.

Gavin's Trustees v Walker's Trustees, (O.H.) 1907, 15 S.L.T. 681.

(123)

———**Heritable bond—Deceased survived by widow and children—Children's share.**

Held that when a man leaves a widow and children, and part of his estate consists of a bond which is heritable quoad jus relictæ, and moveable quoad legitim, the children are entitled to one-half of the sum in the bond as legitim.

Dawson's Trustees v Dawson, 1896, 23 R. 1006; 33 S.L.R. 749; 4 S.L.T. 101.

(124)

———**Heir disinherited.**

Held that an heir has the same right to legitim as any other child in the event of his collating and that where he has been disinherited by his father's will he must be counted as one of the children entitled to share on the legitim fund.

Cairns v Cairns' Trustees, (O.H.) 1916, 1 S.L.T. 42.

(125)

Acceptance of testamentary provision—One son not claiming legitim.

A father left two sons, in whose favour he made certain provisions by will. One of the sons brought a declarator that, in the event of the other not claiming his legal rights, the pursuer would be entitled to claim the whole legitim fund. **Held** that he would only be entitled to claim half of the fund.

Stewart v Stewart's Trustees, (O.H.) 1909, 1 S.L.T. 340.

(126)

A testator died leaving two children. The elder, who was the heir at law, accepted his conventional provisions, but the younger claimed legitim. The testator's heritage was entirely disposed of by the will, the elder child receiving thereunder a qualified liferent of one-half of the testator's estate. **Held** (1) that the younger child had only right to one-half of the legitim fund, the other half enuring to the testator's general dispoonees in substitution for the provision which the elder son had accepted; but (2) that the elder son was bound to collate the value of the liferent interest so far as payable out of heritage, and that the value of that interest fell to be added to the legitim fund.

Smith's Trustees v Smith, (O.H.) 1912, 1 S.L.T. 484.

(127)

Right of grandchild to claim legitim—Representation—Intestate Moveable Succession Act, 1855.

A testator died in 1867 survived by three sons, Alexander, James, and John. James died survived by children. Thereafter John died intestate and childless without having elected between legitim and the provisions made to him in his father's settlement. Alexander was appointed John's executor.

A daughter of James sued Alexander as such executor for a share of the legitim which John might have claimed. Alexander having pleaded that James was personally barred from claiming in respect of that legitim and that the pursuer as representing her father under the Intestate Moveable Succession Act of 1855, was equally barred, **held** that she claimed in her own right and was not barred.

Macnab v Macnab's Executor, 1894, 32 S.L.R. 177; 2 S.L.T. 350.

(128)

Division of legitim fund—Heir not claiming legitim—Whether heir counted as a child in division of fund.

A testator, by his trust disposition and settlement, directed his trustees, inter alia, to convey his heritable property to his eldest son (who also succeeded his father as heir of entail in possession of certain other lands), and, further, to make over the residue of his estate to him. The testator was survived by his eldest son, who accepted the conventional provisions in his favour, and by younger children. **Held**, in a question with younger children claiming legitim, that, unless the eldest son collated the heritage falling to him under the testator's settlement and his interest as heir of entail, he could not be counted as a caput (for the benefit of the residuary estate) in the division of the legitim fund; but that the whole fund would fall to be divided among the children claiming legitim.

Gilmour's Trustees v Gilmour, 1922 S.C. 753; 59 S.L.R. 563; 1922 S.L.T. 596.

(129)

Marriage contract provision of legitim from mother's estate — Liferent of whole estate to father.

Bell v Bell, 1897, 25 R. 310; 35 S.L.R. 242; 5 S.L.T. 237, No. 142, *infra*.

(130)

Child claiming legitim—Right to aliment and education out of father's estate.

A testator conveyed his estate to trustees for payment of his whole estate to his wife, subject to payment of his debts and to the cost of upbringing and maintaining his children. **Held** that the children were entitled to legitim out of the testator's moveable estate and also to the expense of their upbringing and education out of the remainder of the estate, but only in so far as the shares of legitim were insufficient for these purposes.

Urquhart's Executors v Abbott, 1899, 1 F. 1149; 36 S.L.R. 896; 7 S.L.T. 114.

(131)

Wife's legitim—Whether vesting in husband ipso jure—Right of husband's executor.

A left a settlement whereby he made a provision for his daughter, B, which was declared to be exclusive of the jus mariti and right of administration of her husband. After the death of A, his widow and three children, including B (whose husband had deserted her) entered into a minute of agree-

ment, whereby they agreed to hold that the estate was intestate succession, and proceeded to divide it among themselves. The husband of B was no party to this agreement, nor, though he afterwards returned and lived with his wife for a short time, did he either approve of or challenge it. After the death of B's husband, **held** that when B's right to legitim emerged on the death of her father, the same did not vest in her husband ipso jure, and that whether he could have claimed it effectually or not his executor was not entitled to claim it. **Opinions** that B's husband would not have been entitled to claim her legitim.

Millar v Birrell, 1876, 4 R. 87; 14 S.L.R. 58.

(b) Interest.

[See also INTEREST IX.]

(132)

Liability for interest—Personal bar—Delay in claiming legitim—Interest not due.

Wick v Wick, 1898, 1 F. 199; 36 S.L.R. 180, No. 147, *infra*.

(133)

Rate—Delay in payment of legitim.

Held (per Lord Fraser, Ordinary) that interest at five per cent. is due upon a claim for legitim which an executor delays to pay without justifiable excuse.

Gilchrist v Gilchrist's Trustees, 1889, 16 R. 1118; 26 S.L.R. 639.

(134)

Held that interest at the rate of five per cent. per annum was due upon a child's legitim from the date of the father's death, although the funds in the hands of the father's testamentary trustees had been earning only about two per cent.

Bishop's Trustees v Bishop, 1894, 21 R. 728; 31 S.L.R. 590.

(135)

Election delayed owing to minority.

Where a son raised an action for payment of legitim thirteen years after his father's death, and election could not, owing to the son's minority, have been made at an earlier date, the Court **held** that the father's executrix was only liable in interest on the son's legitim at the rate which the money would have earned under prudent administration, and found her liable in interest at the rate of 4 per cent., that being the rate which the estate was admitted to have earned.

Ross v Ross, 1896, 23 R. 802; 33 S.L.R. 607; 4 S.L.T. 41.

(136)

An only child, who was thirteen years of age at the date of her father's death, was entitled under his will to the income of his estate after deducting two small annuities. On attaining majority she claimed and received legitim. During her minority her father's trustees, in terms of the will, had applied for her behoof the whole free income of the trust estate. The income applied for

her behoof amounted to four per cent. on the legitim. **Held** that the daughter was not entitled to the difference between the sums received and five per cent. on the legitim. Grant v Grant's Trustees, 1898, 25 R. 948; 35 S.L.R. 740; 6 S.L.T. 38.

(c) Exclusion and Discharge.

(i) Exclusion by Parent's Antenuptial Contract.

(137)

Where no provision.

Question, whether an antenuptial marriage contract can effectually exclude the right of a child of the marriage to legitim when it contains no provision for him in place thereof. **Opinion** (per Lord Fraser, Ordinary) that it cannot.

Earl of Kintore v Countess-Dowager of Kintore, 1884, 11 R. 1013; 21 S.L.R. 647; affirmed, 1886, 13 R. (H.L.) 93; 11 App.Cas. 394; 23 S.L.R. 877.

[See also Simpson's Trustees v Taylor, 1912 S.C. 280; 49 S.L.R. 215; 1912, 1 S.L.T. 41. MARRIAGE CONTRACT, No. 134.]

(138)

Illusory share.

By antenuptial marriage contract a provision in favour of the children of the marriage was made, subject to a power of appointment by the spouses. The contract contained a stipulation that no appointment should be invalid by reason of the smallness of the amount appointed to any of the children. The provisions in favour of children were declared to be in full of legitim. **Held** that the stipulation as to the validity of appointments was a lawful stipulation, and that a claim for legitim was excluded, notwithstanding that the share appointed to the claimant was illusory.

Ramsay v Ramsay's Trustees, (O.H.) 1904, 12 S.L.T. 654.

(139)

Construction of marriage contract—“Children of this marriage”—Eldest son and heir of entail.

An heir of entail in possession, in an antenuptial marriage contract, provided an annuity to his wife, and made certain provisions for the children of the marriage other than, and excluding, the heir who should succeed to the entailed estates. Then followed clauses appointing tutors and curators to such of the children of the marriage as might be in pupilarity or minority at their father's death, and special instructions were given for the maintenance and education of the heir of entail out of the income of the entailed estates. There was no other reference to him. The contract then proceeded—“Which provisions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them” of legitim and executry. **Held** that the provisions referred to conferred no benefit, contingent or otherwise, upon the eldest son of the granter,

and that therefore the clause declaring them to be in full of legitim did not apply to him.

Countess-Dowager of Kintore v Earl of Kintore, 1886, 13 R. (H.L.) 93; 11 App. Cas. 394; 23 S.L.R. 877.

(140)

English marriage contract—Construction.

In an action for legitim brought by the only child of a domiciled Scotsman against the executrix of his father, the defender alleged that the pursuer's claim was excluded by an antenuptial marriage contract executed by his parents when domiciled in England. The defender averred that by this deed two sums of £5000 and £6000 were conveyed by the spouses respectively in trust for behoof of the children of the marriage, and that according to the law of England the provisions made in the marriage contract in favour of the issue of the marriage operated as a full discharge of all legal and other claims which the issue so provided for could prefer against the succession of their parents, or in respect of the death of either of them, and that the pursuer had accepted these provisions, and by so doing had discharged all other claims against his father's estate. **Held** that the defender's averments in regard to the terms of the marriage contract and its effect by the law of England were not relevant averments of such a deed as by the law of Scotland would exclude a claim for legitim.

Trevelyan v Trevelyan, 1873, 11 M. 516; 45 J. 330; 10 S.L.R. 328.

(141)

Mother's estate—Marriage contract dated in 1848—Bairns' part of gear—Married Women's Property Act, 1881, secs. 7 and 8.

An antenuptial marriage contract, executed in 1848, declared that the provisions therein made for the child or children of the marriage should be in full satisfaction "of all bairns' part of gear, executry, and everything else which they could respectively claim or demand by and through the decease of" their mother. The mother having died in 1899, a son, who had taken his provision under the marriage contract, claimed also, under the Married Women's Property Act, 1881, legitim from such part of his mother's moveable estate as did not fall under the marriage contract, and which she had disposed of by will. **Held** that the son's claim to legitim from his mother's estate was excluded by the above clause in the marriage contract.

Dunbar Dunbar v Dunbar Dunbar, 1905, 7 F. (H.L.) 92; 42 S.L.R. 553; 13 S.L.T. 28.

(142)

—Liferent of whole estate to surviving spouse — Married Women's Property Act, 1881, secs. 7 and 8.

By antenuptial marriage contract, dated in 1856, the wife disposed her whole estate to the spouses in conjunct liferent, for their liferent use allenarly, and to herself and her heirs and assignees in fee. The wife died in

1896, survived by her husband and by two children. **Held** that the husband's right of liferent was not affected by a child's right to legitim from his mother's moveable estate arising under the Married Women's Property Act of 1881, and that the executor could not be called upon to pay away any part of the wife's moveable estate until the right of liferent was satisfied.

Bell v Bell, 1897, 25 R. 310; 35 S.L.R. 242; 5 S.L.T. 237.

(143)

—Marriage contract—Conveyance of whole estate — Married Women's Property Act, 1881, sec. 8.

By antenuptial marriage contract a wife had conveyed her whole estate to her husband. **Held** that a claim to legitim out of the wife's estate by one of the children of the marriage was excluded by sec. 8 of the Married Women's Property Act, 1881, in respect that the claim if successful would affect the marriage contract.

Ramsay v Ramsay's Trustees, (O.H.) 1904, 12 S.L.T. 654.

(144)

Conveyance of whole estate by antenuptial contract—Rights of second family.

Allan's Trustees v Allan's Trustees, (O.H.) 1907, 15 S.L.T. 73, No. 87, *supra*.

(ii) Discharge of Right to Legitim.

(145)

Onerous or gratuitous.

A bankrupt executed a deed of discharge whereby, on the narrative that he had received various advances of money from his father, and that it was reasonable and proper that "in respect of such advances" he should execute the discharge after written, he exonerated and discharged his father, his heirs and executors, of any legitim which he could claim through the death of his father. **Held** that the deed was not to be construed as conditional upon the father's claim for repayment of the advances being discharged, but was a gratuitous discharge of the son's right to legitim.

Obers v Paton's Trustees, 1897, 24 R. 719; 34 S.L.R. 538; 4 S.L.T. 350.

(146)

Implied discharge—Ignorance of legal rights.

Actings which were held not to bar a claim for legitim made after the lapse of a few years from the father's death where both parties were in ignorance of their legal rights.

Countess-Dowager of Kintore v Earl of Kintore, 1886, 13 R. (H.L.) 93; 11 App. Cas. 394; 23 S.L.R. 877.

(147)

—Mora.

The tenant of a small farm died intestate, survived by his wife, two sons, and a

daughter. No executor was appointed, and no claims were then made by any of the family on the estate of the deceased. The second son, who had remained in family with his parents (the eldest son having gone to reside elsewhere), became tenant of the farm and took possession of the implements thereon at the time of his father's death, and worked the farm with the assistance of his mother and sister. The mother died intestate seventeen years after her husband at the age of seventy-seven. The eldest son then brought an action of count, reckoning, and payment against his brother praying for payment of sums in name of legitim and as one of the next of kin of his father, with interest from the father's death. A proof showed that the father left estate, consisting solely of the stock and implements on the farm, of an estimated value of £165. The pursuer deposed that he did not put forward his claim on his father's estate sooner because he did not wish to disturb matters while his mother was alive. **Held** that the pursuer was not barred from claiming on his father's estate, and was entitled to sums in name of legitim and as one of his father's next of kin, but without interest. *Wick v Wick*, 1898, 1 F. 199; 36 S.L.R. 180.

(148)

Provision in son's antenuptial marriage contract.

A father in his son's antenuptial marriage contract bound himself to leave to his son's marriage contract trustees one full third part in value of the residue of his estate. The provision was not declared to be in satisfaction of the son's legitim. By his will the father directed his executor to carry out the marriage contract obligation. **Held** that the provision in the marriage contract being a debt due by the father at his death, not expressed to be in satisfaction of legitim, the son was not thereby barred from claiming legitim.

Rait v Arbuthnott, 1892, 19 R. 687; 29 S.L.R. 595.

(149)

Renunciation of "all claim in whatever effects or money my father may leave"—Construction.

A son during his father's lifetime wrote out and signed a holograph document in these terms—"Having received and had expended for me much more than my share I renounce all claim to any share in whatever effects or money my father may leave at his death." **Held** that upon a just construction of this document it constituted a discharge of the son's right to legitim.

Scott's Trustees v Scott, (O.H.) 1902, 40 S.L.R. 133; 10 S.L.T. 122.

(150)

Discharge by married woman—Jus administrationis—Married Women's Property Act, 1881, sec. 1, sub-sec. (2).

Held that neither at common law nor under the Married Women's Property Act, 1881, is a married woman entitled to dis-

charge a claim to legitim without her husband's consent.

Miller v Galbraith's Trustees, 1886, 13 R. 764; 23 S.L.R. 533.

(iii) Payments to Account of Legitim.

(151)

Advances for personal advancement.

Advances were made by a father to a son for purchase of a commission in the army and of steps of promotion. **Held** that they must be imputed in a claim by the son for legitim, although the other children entitled to legitim had since their father's death discharged their claims.

Nisbet's Trustees v Nisbet, 1868, 6 M. 567; 40 J. 293; 5 S.L.R. 369.

(152)

Advances made by a father to his child, for which no obligation of debt was taken, cannot be imputed to account of legitim, except in a question with other children entitled to legitim.

Trevelyan v Trevelyan, 1873, 11 M. 516; 45 J. 330; 10 S.L.R. 328.

(153)

A father was survived by a son and four married daughters. In the marriage contracts of his daughters he had settled considerable sums upon them in liferent, and on their children in fee. By his trust disposition and settlement he left to his son a provision in full of legitim, and directed his trustees to pay and make over the residue of his estate to the respective marriage contract trustees of his daughters, in certain proportions, for their behoof in full of legitim. The daughters acquiesced in the settlement, but the son claimed legitim. **Held** that as the daughters' claims to legitim had been abandoned, not assigned, the son could not demand that advances made to them during their father's life should be collated in fixing his share of the legitim fund.

Monteith v Monteith's Trustees, 1882, 9 R. 982; 19 S.L.R. 740.

(154)

Only one child claiming legitim.

Where only one of several children claims legitim, the rest having accepted testamentary provisions in lieu thereof, there is no room for collatio inter liberos, and the legitim fund consists of one-half or one-third, as the case may be, of the free estate, without imputation of advances made by the parent in his lifetime either to the child claiming or to any of the other children.

Coats's Trustees v Coats, 1914 S.C. 744; 51 S.L.R. 690; 1914, 2 S.L.T. 2.

(155)

Special contract between father and son.

A son, who had received advances from his father, granted a written acknowledgment which, after acknowledging receipt of certain sums, was in these terms:—"I

further acknowledge that these various sums are all payments to me on account of the share of legitim or bairn's part of gear that may become due to me by and through your decease, and which share of legitim or bairn's part of gear is now discharged by me to that extent." After the father's death the son brought an action against his father's trustees and others, in which he concluded for declarator that, in the event of his electing to claim legitim, he was not bound, in a question with the trustee, to collate the sums advanced to him, nor were the trustees entitled to set off these sums against his claim to legitim, but that these sums only fell to be collated in a question with his brothers and sisters in the event of their electing to claim legitim. The Court assailed the defenders from the above conclusion—per Lord President Dunedin and Lord Kinnear, on the ground that the father, in bargaining with the son, had bargained on account of his general estate and not on account of the legitim fund, and that consequently the trustees were entitled to set off the advances made to the son against his claim for payment of his share of legitim—per Lord Johnston, on the ground that the trustees were entitled, as in right of the children who might accept conventional provisions in lieu of legitim, to require the son receiving advances to collate.

Young v Young's Trustees, 1910 S.C. 275; 47 S.L.R. 296; 1910, 1 S.L.T. 100.

(156)

Sums advanced by a father to children on condition that they should be imputed towards legitim or other legal rights.

A father during his lifetime advanced a sum of £30,000 to his second son, who granted a receipt acknowledging that the advance was paid to, and accepted by, him on the footing that it was "to be imputed towards any legal rights" that might be claimed by him out of his father's estate on his death. By the antenuptial contract of marriage of one of his daughters the father assigned to the marriage contract trustees certain stocks declared to represent a capital value of £12,000. The marriage contract contained the following provision:—"It is hereby specially stipulated and agreed on that in the event of the (daughter) after the death of her father . . . effectually claiming from his estate legitim or other legal rights the said sum of twelve thousand pounds sterling . . . shall be held to be imputed as a payment to account of said legitim or other legal rights so effectually claimed." After his daughter's marriage the father paid a further sum of £742 10s. to the marriage contract trustees, who granted a receipt, acknowledging that the sum was to be held by them subject to the provisions and to be applied for the purposes of the contract of marriage. **Held**, in a question between the father's testamentary trustees and the son and daughter claiming legitim (1) that these sums did not fall to

be added to the father's general estate before ascertaining the amount of the legitim fund; (2) that the trustees were not entitled to deduct these sums from the claimants' respective shares of the legitim fund; but (3) that the sums must be collated by the children inter se.

Gilmour's Trustees v Gilmour, 1922 S.C. 753; 59 S.L.R. 563; 1922 S.L.T. 596.

(157)

A plea requiring collation inter liberos in answer to a claim for legitim can only be maintained by a party entitled to share in the legitim, and not by trustees representing the interests of the residuary legatee.

Collins v Collins' Trustees, (O.H.) 1898, 35 S.L.R. 641; 5 S.L.T. 256.

(d) Collation Inter Liberos.

(158)

Payments falling to be collated.

Observations (per Lord Cullen, Ordinary) on the nature of inter vivos payments falling to be collated.

Duncan v Crichton's Trustees, 1917 S.C. 728; 54 S.L.R. 460; 1917, 1 S.L.T. 303.

(159)

Gift or advances.

Large cash advances were made by a father to a son in business, and were entered in the father's books as "By gifts payable to my son James as he required it"; "By allotted for his business, free gift"; and "By given over as free gift." **Held**, in a question as to collation inter liberos that the advances were advances to account of legitim.

Douglas v Douglas, 1876, 4 R. 105; 14 S.L.R. 54.

(160)

A father, during his lifetime, transferred certain stocks, of the value of £26,442 6s. 6d., to a younger son, but took no receipt for them. By his trust disposition and settlement he bequeathed a legacy of £10,000 to the son under the declaration that "the said legacy is intended by me to be and shall be in addition to the gift recently made by me to my said son of £26,442 6s. 6d. sterling by transferring to him railway stocks representing that value; and I provide and declare further that the acceptance of the foresaid provisions in favour of my said son . . . shall be deemed and taken to be in satisfaction to him of legitim and executry and of all claims competent to him upon my decease." The amount of the net moveable estate left by the father at his death exceeded £300,000. **Held** that the £26,442 6s. 6d. was an advance to account of legitim, and, accordingly, fell to be collated by the son in the event of his claiming legitim.

Gilmour's Trustees v Gilmour, 1922 S.C. 753; 59 S.L.R. 563; 1922 S.L.T. 596.

(161)

Advances for commission in army.

Advances were made by a father to a son (without taking an obligation to repay) for

purchase of a commission in the army and of steps of promotion. **Held** that the advances were to be regarded as advances to account of legitim, not as debts.

Nisbet's Trustees v Nisbet, 1868, 6 M. 567; 40 J. 293; 5 S.L.R. 369.

(162)

—Sum settled on daughter in liferent and children in fee—Interest.

Where a father, in his daughter's marriage contract, settled a sum on her in liferent, and on her children in fee, **question** (1) whether the capital sum, or merely the daughter's liferent interest, was subject to collation; and (2) whether interest on the sum to be collated fell to be included.

Monteith v Monteith's Trustees, 1882, 9 R. 982; 19 S.L.R. 740.

(163)

Testamentary direction to pay legitim.

A testator, who was survived by two daughters, provided in his settlement "for payment to each of them of their or her respective claims or claim of legitim from my estate." One of his daughters, who had kept house for him for many years, had received certain inter vivos gifts and payments from him. In an action brought by the other daughter for declarator that her sister was bound, as a condition of sharing in the legitim fund, to collate these inter vivos gifts and payments, **held** that the settlement did not confer on the daughters a conventional bequest of sums equal to their shares of the legitim fund, but merely directed the trustees to satisfy the claims arising ex lege, and, accordingly, that these claims were subject to all their common law incidents, including collation.

Duncan v Crichton's Trustees, 1917 S.C. 728; 54 S.L.R. 460; 1917, 1 S.L.T. 303.

(164)

Interest on advances.

Where an advance by a parent to a child falls to be brought into collation by the child claiming legitim, interest on the advance from the date when it was made need not, in the absence of evidence of a contrary intention by the parent, be added to the capital sum. **Held**, accordingly, that, where a father during his lifetime made advances to younger children, some upon the express footing that they were to be imputed towards any legal rights or legitim which the child might claim after the father's death and others without any such declaration, interest did not fall to be added to the capital amount of the advances which the children were required to collate inter se when claiming legitim.

Gilmour's Trustees v Gilmour, 1922 S.C. 753; 59 S.L.R. 563; 1922 S.L.T. 596.

(165)

Proof of advance.

Observations (per Lord Gifford) on the evidence necessary to establish an advance by a father to a son subject to collation as

distinguished from the evidence necessary to prove a debt.

Welsh v Welsh's Trustees, 1878, 5 R. 542.

(166)

Advances by a father to a son pleaded in answer to a claim for legitim may be proved prout de jure.

Macphail v Macphail's Trustees, (O.H.) 1906, 13 S.L.T. 879.

3. ELECTION BETWEEN LEGAL RIGHTS AND TESTAMENTARY PROVISION.

[See XXI., infra.]

III. CAPACITY TO TEST.

1. GENERALLY.

(167)

Married woman—Deserted wife living in adultery.

A wife who has deserted her husband and is living in adultery has capacity to test.

Young v Johnson, 1880, 7 R. 760; 17 S.L.R. 545.

(168)

Minor—Sale of heritage by factor loco tutoris—Minor's power to test on proceeds of sale.

A minor pubes may dispose by will of moveable property belonging to him as a surrogatum for heritage.

Brown's Trustee v Brown, 1897, 24 R. 962; 34 S.L.R. 733; 5 S.L.T. 54.

(169)

—Subjects heritable destination.

Held that the rule that a minor cannot convey heritage does not apply to subjects which are merely heritable destinations.

Brand's Trustees v Brand's Trustees 1874, 2 R. 258; 12 S.L.R. 124. (Judgment reversed on another point, 1876, 3 R. (H.L.) 16; 1 App.Cas. 762; 13 S.L.R. 744.)

Insanity.

[See INSANITY V.]

2. DEATHBED.

STATUTE.

Act 1871—Reductions ex Capite Lecti Abolition Act—34 & 35 Vict. c. 81.

[Repealed by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 39).]

Park's Curator v Black, 1868, 6 M. (H.L.) 147; L.R., 1 H.L. Sc. 392; 40 J. 642; 5 S.L.R. 726.

Hay Newton v Hay Newton, 1870, 8 M. (H.L.) 66; L.R., 2 H.L. Sc. 13; 42 J. 404; 7 S.L.R. 467.

Gray v Gray, 1872, 10 M. 854; 44 J. 554; 9 S.L.R. 544.

Greig v Greig, 1872, 11 M. 20; 45 J. 12; 10 S.L.R. 10.

- Stewart v Stewart's Trustees*, 1874, 12 S.L.R. 27.
Wyllie v M'Bride, 1890, 18 R. 218; 28 S.L.R. 174.
Hay v Coutts' Trustees, 1890, 18 R. 244; 28 S.L.R. 205.
Thain v Thain, 1891, 18 R. 1196; 28 S.L.R. 902.
Fenwick v Hannah's Trustees, 1893, 20 R. 848; 30 S.L.R. 760; 1 S.L.T. 88.

IV. CONSTITUTION AND VALIDITY OF TESTAMENTS.

1. NUNCUPATIVE WILLS.

(170)

A donation mortis causa to be administered for behoof of others according to verbal directions, was **held** to be a nuncupative will, and therefore invalid both as a donation and as a will.

Thomson, &c. v Dunlop, 1884, 11 R. 453; 21 S.L.R. 277.

(171)

Direction to divide residue according to oral instructions—Nuncupative legacies.

A testatrix directed her trustees to divide the residue of her estate according to her wishes as expressed orally to A. In an action of multiplepounding raised by the trustees A averred that the testatrix had told her that she wished £100 to be given to the poor of Inveraray parish and A to take the rest. **Held** that it was incompetent to prove these instructions by parole or by the oath of A, that the residue had fallen into intestacy, but that A and the inspector of poor of Inveraray were entitled to prove by parole legacies in their favour of £8 6s. 8d.

Turner's Trustees v M'Fadyen, (O.H.) 1906, 43 S.L.R. 712; 14 S.L.T. 57.

(172)

Parole agreement between two persons to divide funds destined by statute to survivor—Proof of authority to agents to conclude such an agreement—Writ or oath.

Certain funds were by a private Act of Parliament destined to A in liferent and to the survivor of himself and his nephew B in fee. After the death of A his representatives brought an action against B, the survivor, concluding for declarator that it had been agreed between A and B that on the death of either the funds in question should be divided equally between the survivor and the representatives of the predeceaser, and for payment of one-half of the funds. The pursuers averred that a final agreement to this effect had been concluded by parole between the agents of the parties, acting upon their express instructions, and that a deed giving effect to the agreement had been revised and approved in draft and extended, but that A had died before the deed was signed by either party. They further averred that it was agreed that there should be no suspension of the agreement pending

the execution of the formal deed. **Held** that the alleged agreement could only be proved by writ or oath, on the ground that the contract averred was of an unusual and innominate character.

(Per Lord M'Laren)—“A right of succession constituted by writing can only be transferred by writing.”

M'Murich's Trustees v M'Murich's Trustees, 1903, 6 F. 121; 41 S.L.R. 81; 11 S.L.T. 469.

2. FORMALITIES OF EXECUTION.

[See WRIT II.]

3. DOCUMENTS WRITTEN IN PENCIL.

(173)

A testamentary deed is not invalid because it is written in pencil.

Simson v Simson, 1883, 10 R. 1247; 20 S.L.R. 831.

(174)

Pencil codicil.

Held that a codicil written in pencil is effectual if it be clear that it is a testamentary writing, and not merely a jotting.

Muir's Trustees, 1869, 8 M. 53; 42 J. 25; 7 S.L.R. 24.

(175)

Pencil alterations on will written in ink.

Unsigned pencil alterations made by a testator on a testament written in ink are presumed to be deliberative merely, but if there is evidence, parole or otherwise, to show that they were intended to be final they will receive effect.

Lamont v Magistrates of Glasgow, 1887, 14 R. 603; 24 S.L.R. 426.

(176)

Will revoked by birth of child—Alterations subsequent to child's birth.

Munro's Executors v Munro, 1890, 18 R. 122; 28 S.L.R. 104, No. 396, *infra*.

(177)

Pencil alterations on holograph will.

Held that unauthenticated holograph pencil alterations on a holograph will written in ink had no effect.

Currie's Trustees v Currie, 1904, 7 F. 364; 42 S.L.R. 297; 12 S.L.T. 613.

(178)

Holograph pencil memorandum containing list of legacies.

Tait's Trustees v Chiene, 1911 S.C. 743; 48 S.L.R. 609; 1911, 1 S.L.T. 360, No. 188, *infra*.

4. CONVEYANCE OF HERITAGE.

Titles to Land Consolidation (Scotland) Act, 1868—31 & 32 Vict. c. 101, sec. 20.

(179)

Conveyance in English will.

Held that an English will containing a conveyance of Scottish heritage was a valid conveyance thereof under the Titles to Land

Consolidation Act, 1868, sec. 20, the deed having been duly executed as a testamentary writing, although prior to the Act it would not have been received as a probative deed by the law of Scotland.

Connell's Trustees v Connell, 1872, 10 M. 627; 44 J. 352; 9 S.L.R. 394.

(180)

Omission of word "dispone" in deed prior to 1868.

Held that a mortis causa conveyance of heritage executed by a person who died prior to the Titles to Land Consolidation Act, 1868, was invalid, in respect that the word "dispone" was not used.

Kirkpatrick's Trustees v Kirkpatrick, 1874, 1 R. (H.L.) 37; L.R., 2 H.L. Sc. 397; 11 S.L.R. 717.

(181)

No words of direct conveyance.

Held that under sec. 20 of the Titles to Land (Consolidation) Act, 1868, a mortis causa deed in which the testator appointed trustees, empowered them to "realise all his heritable and moveable property," and directed them as to the disposal thereof, but which contained no words of direct conveyance or gift, was sufficient to carry the testator's heritable as well as his moveable estate. **Observed** that the statute puts heritage precisely in the same position as moveables when dealt with in a testamentary writing.

M'Leod's Trustees v M'Leod, 1875, 2 R. 481; 12 S.L.R. 349.

(182)

Writing insufficient per se to carry heritage—Clause in general disposition declaring informal memoranda binding on donee.

The proprietrix of a landed estate disposed of her whole property by a mortis causa disposition and settlement, which contained a declaration that any memorandum signed by her, however informal, expressive of her will should be equally binding upon her donee "as if forming part of these presents." She afterwards, by a holograph writing which of itself was insufficient as a conveyance of heritage, bequeathed to third parties during their lives the income arising from the minerals on her estate. **Held** that the memorandum and the settlement must be read together, so that the donee taking under the settlement was subject to the burden of the liferent.

Bannatine's Trustees v Cunninghame, 1869, 7 M. 993; 41 J. 555; 6 S.L.R. 641.

(183)

Fee in pendente.

A testator, by a holograph will, left a heritable estate by direct destination to his two sisters equally between them and to the survivor; and he provided that, should neither of them have children, the destination of the estate should be to them in liferent only, and to a charitable institution in fee; but that, should either of them have a

child, the liferent destination should lapse, and the estate should vest in his said sisters or sister in fee. **Held** that, as the proviso involved a feudal impossibility, viz., a suspended fee of heritage, it was of no effect, and could not qualify the original gift of fee to the sisters; and accordingly that the estate vested in them in fee a morte testatoris. **Observations** (per Lord Johnston) on the application of the doctrine of vesting subject to defeasance to destinations of heritage.

Young's Executrix v Gray's Hospital, 1917 S.C. 707; 54 S.L.R. 554; 1917, 2 S.L.T. 91.

(184)

Direct disposition to A in liferent only and "after his death" to trustees.

A executed a disposition of the lands of K to B his son in liferent, for his liferent use only, and "after his death" to "the Provost of Aberdeen" and the holders of certain other offices, "all for the time being, and their successors in their respective offices," and X, as trustees. The granter recorded this deed in the Books of Council and Session. A died, survived by his son B, who was his heir at law. B brought an action against the trustees for declarator that he was entitled to the fee of the lands of K as heir at law of his father, on the ground that the disposition of the fee to the trustees did not take effect until after his death. **Held** that the lands of K had been effectually disposed to B in liferent and to the trustees in fee.

Edmond v Lord Provost of Aberdeen, 1898, 1 F. 154; 35 S.L.R. 193; 5 S.L.T. 230.

(185)

English entail of Scottish heritage—Titles to Land Consolidation Act, 1868, secs. 19 and 20—Conveyancing Act, 1874, sec. 46.

An Englishman left a will in the English form by which, inter alia, he devised all such of his lands, &c., situate in the counties of Devon, of Inverness in Scotland, &c., as consisted of "freehold of inheritance," "to the use of my elder son, E F S, and his assigns, for his life, without impeachment of waste, and after the death of the said E F S to the use of the first and every other son of the said E F S successively, according to their respective seniorities, in tail male, with remainder to the use of," &c. It was admitted that this was a valid settlement "in tail male" of the English estates, according to the law of England. The testator left an estate in Inverness-shire held of a subject-superior. It was admitted that according to the law of England, the Inverness-shire estate would have been a "freehold of inheritance" had it been situated in England. **Held** (1) that under the Titles to Land Consolidation Act, 1868, sec. 20, the testator's will must receive effect according to its true import and effect with reference to the Inverness-shire estate, and (2) that that import could receive effect substantially, without inconsistency with the practice or with the policy of the law of Scotland, by

giving the pursuer a liferent allenerly, and the heir-male of his body in fee.

Studd v Cook, 1883, 10 R. (H.L.) 53; 8 App.Cas. 577; 20 S.L.R. 566.

(186)

Title—Character of interest conveyed—Titles to Land Consolidation (Scotland) Act, 1868, sec. 20.

Observed (per Lord Watson)—“In enacting that the words of the deed or writing shall be equivalent to a general disposition the legislature obviously did not intend to define the character of the rights and interests conferred upon the persons favoured by such deed or writing, but to indicate the means by which these persons were to obtain a complete feudal title. The only possible mode of ascertaining the precise character of these rights and interests is by an examination of the language of the deed or writing; and that language must be read and construed for the purpose of ascertaining the intention of the settlor, just as if the settlement had been of moveables, and not of heritable. When the intention of the settlor has been so ascertained the law of Scotland must give effect to it, in so far as is practicable consistently with the principles which govern the tenure of heritable estate in Scotland.”

Studd v Cook, 1883, 10 R. (H.L.) 53; 8 App.Cas. 577; 20 S.L.R. 566.

5. INFORMAL OR INCOMPLETE WRITINGS.

(187)

Holograph writing headed “Notes of intended settlement.”

In the repositories of a person who died leaving no other testamentary writing, the following holograph document was found bearing a date seven years before his death—“Bankhead, 19th June, 1873.—Notes of intended settlement by Walter Whyte of Bankhead. First, I liferent my wife, Mrs. Margaret Pollok or Whyte, in my whole estate both heritable and moveable, burdened with an annuity of £300 stg., three hundred pounds sterling, a year to,” &c. After various bequests expressed in the same full and careful manner, the writer's signature was appended. In an action of declarator that the writing was testamentary (in which a proof was led without throwing any additional light on the question), **held** that the document was testamentary.

Hamilton v White, 1882, 9 R. (H.L.) 53; 7 App.Cas. 400; 19 S.L.R. 688.

(188)

Holograph pencil memorandum containing list of legacies.

Circumstances where **held** that a holograph pencil memorandum headed “Legacies,” and containing a list of names with sums of money appended to each, which was found tied up with a testator's will, was a valid testamentary document.

Tait's Trustees v Chiene, 1911 S.C. 743; 48 S.L.R. 609; 1911, 1 S.L.T. 360.

(189)

Holograph writing — “I desire to bequeath.”

A testator left a holograph testament containing a nomination of executors and a disposal of his whole means among certain legatees, along with another signed holograph writing of subsequent date, commencing “I desire to bequeath as follows,” and containing bequests and annuities to nearly the same parties as were mentioned in the first writing. It concluded, “balance left for further disposal,” but no other deed was discovered. Both writings were found in the testator's travelling bag. **Held** that the second writing was a testamentary writing.

Low's Executors, 1873, 11 M. 744; 45 J. 452; 10 S.L.R. 505.

(190)

Documents of debt pinned together with holograph writing importing legatum liberatims.

In the repositories of a deceased four I O U's and a letter from the borrower, acknowledging the sum for which one of them had been granted, were found pinned together and folded so that the back of the letter was outermost; and on the back of the letter there was a holograph note signed by the trustor, “I don't want this money paid up.” **Held** that the writing constituted a valid bequest in cancellation of the debts contained in the I O U's.

Mitchell's Trustees v Pride, 1912 S.C. 600; 49 S.L.R. 452; 1912, 1 S.L.T. 302.

(191)

Completed deed or jotting.

Terms of a document dictated upon death-bed, and duly tested, **held** sufficiently complete to give it the character of a testamentary deed.

Simson v Simson, 1883, 10 R. 1247; 20 S.L.R. 831.

(192)

Letter to a beneficiary.

A letter addressed and sent to a beneficiary was **held** to be a writing of a testamentary nature, and to be read along with a will and codicils found in the testator's repositories.

Ritchie v Whish, 1880, 8 R. 101; 18 S.L.R. 81.

(193)

A lady died leaving a trust disposition and settlement, in terms of which her sister took the fee of her whole estate. The testatrix, some years after the execution of the will, handed to a friend a signed and dated letter in these terms—“I leave my railway papers in your hands. I wish my sister to have the interest in her lifetime, but at her death I want you, Harriet, Willie's wife, to have each one hundred, but you must not claim them in my sister's time, or you will loose them, you must know nothing about them.” The testatrix's sister, on the death of the testatrix, was confirmed her executrix. Some years later, on the death of the sister, the friend produced the letter, and claimed £100

from the sister's representative. **Held** that the letter was in effect a codicil to the will.

Richardson v Macdonald's Executor,
(O.H.) 1899, 7 S.L.T. 14.

(194)

"Sketch of provisions"—Words of gift.

A law agent sent to a lady client a paper entitled "Sketch of provisions of proposed will." The lady not merely filled in blanks in the "sketch," but wrote words, which were capable of being read by themselves without aid from the context, and which imported de presenti gifts of a testamentary character, and she dated and signed the document. **Held** that the document was a valid and effectual will.

Murdoch's Judicial Factor v Thomson,
(O.H.) 1896, 4 S.L.T. 155.

(195)

Docquet—"A from her father."

A man died survived by sons and daughters. When the deceased's repositories were opened there were found (1) a holograph testamentary writing undated and unsigned, and (2) a sealed envelope with the following holograph inscription on the front of it—"Beatrice Burn Roberts, from her father John Burn." This was found to contain a deposit receipt for £170 in favour of the deceased, but which was not indorsed by the deceased. **Held** that there was a valid bequest of the deposit receipt in favour of Beatrice Burn Roberts.

Roberts v Burn's Executor, (O.H.) 1914,
1 S.L.T. 509.

(196)

Holograph signed memorandum of bequests and legates—Unintelligible without extrinsic evidence.

A holograph pencil writing, headed "will," consisting of a column of figures and a column of proper and descriptive names (most of which were unintelligible without extrinsic evidence) opposite the figures, and signed by the writer at the side, was found after his death in a locked trunk along with his business papers and letters. **Held** that this writing could not receive effect as a testamentary document.

Observed (per Lord President Inglis) that it is not essential to the validity of a testamentary writing that it contain words of gift, or be expressed in the form of a completed sentence, provided it implies a clear testamentary purpose on the part of the deceased, and its meaning is intelligible.

Colvin v Hutchison, 1885, 12 R. 947; 22 S.L.R. 632.

(197)

Holograph writing—No words of gift.

Terms of two holograph writings found in the repositories of a deceased person who left a formal settlement, which were **held** not to be testamentary.

Waddell's Trustees v Waddell, 1896, 24 R. 189; 34 S.L.R. 142; 4 S.L.T. 176.

(198)

Holograph writing pinned to deposit re-

ceipt—£150 to Mrs. A—Bequest or inter vivos gift.

In the repositories of a testatrix, who had executed a formal trust disposition and settlement, there were found two deposit receipts, for £450 and £300 respectively. The receipts were in her name, and had been indorsed by her. To the receipt for £450 there was attached by a pin a slip of paper, on which was written in the testatrix's handwriting the words, "£150 to Mrs. Mackenzie, Dunkeld. £150 to Mrs. H. Croll, Stockel. £150 to Mrs. Thomson, Ancrum."—followed by the testatrix's signature. To the deposit receipt for £300 there was attached by a pin a slip of paper, on which was written in the testatrix's handwriting, the words, "John Cameron for annuity," followed by her signature. **Held** that these writings did not constitute valid testamentary bequests of the sums contained in the deposit receipts.

Cameron's Trustees v Mackenzie, 1915 S.C. 313; 52 S.L.R. 307; 1915, 1 S.L.T. 78.

(199)

Holograph signed document headed "draft of codicil."

After the death of a person whose settlement, with two codicils thereto, had been prepared by law agents and formally executed, there was found in an open drawer, where no important papers were kept, a writing of later date, holograph of and signed by the deceased, headed "draft of codicil," containing a new disposition of his property in favour of his children, but with a blank in the ultimate destination of the estate failing children and their issue. He survived the date of this document for several months, and there was nothing to show that it had been signed subsequent to the date it bore. **Held** that the writing was a mere draft, and inoperative as a testamentary writing.

Forsyth's Trustees v Forsyth, 1872, 10 M. 616; 44 J. 353; 9 S.L.R. 367.

(200)

Holograph writing headed "Rough."

A testator died on 19th March, 1907, leaving in the hands of his law agent a trust disposition and settlement, dated 4th January, 1905, and five codicils annexed thereto, dated respectively 6th March, 1905, 1st October, 8th November, and 18th December, 1906, and 7th March, 1907. In the deceased's repositories was found a sealed envelope addressed to his law agent containing a holograph testamentary writing headed "Rough," signed by him, and dated 5th February, 1905. The settlement dated 4th January, 1905, left the residue to the testator's eldest son. The holograph writing of 5th February, 1905, left the residue to the testator's widow and her children. The codicil of 6th March, 1905, left to the widow and her children £2000 as an addition to the provision in the settlement. Circumstances in which **held** that the deceased did not intend the holograph writing to receive testamentary effect.

Sprot's Trustees v Sprot, 1909 S.C. 272; 46 S.L.R. 161; 16 S.L.T. 497.

(201)

Letter to landlord's factor—Lease.

On the day of his death, a farmer wrote a letter to his landlord's factor in these terms—

"Dear Sir,—I beg to intimate that it is my wish that my nephew, Mr. James Beattie, residing at Powneed, should, after my decease, succeed me in the farm of Powneed." Circumstances in which held that the document was not testamentary.

Beattie v Bain's Trustees, (O.H.) 1899, 6 S.L.T. 277.

(202)

Memorandum to law agent found in repositories.

Held that a memorandum found in the repositories of a testatrix in these terms—"Mem. To let Mr. Tod" (her law agent) "know that I wish the bequest and the name of Cunningham to be erased from my settlement, and I do hereby desire it to be done. (Signed) Mary Murray"—was not a testamentary writing, and did not recall a legacy left to three ladies of the name of Cunningham by the deceased's trust settlement.

Cunningham v Murray's Trustees, 1871, 9 M. 713; 43 J. 362.

(203)

Letter expressing intention—Instructions to solicitor.

Terms of letters written by a lady who had instructed her solicitor to prepare a conveyance of a heritable property by way of donation to his cousin, but who had died before the conveyance was executed, which were held not to operate a valid bequest of the property in favour of the cousin.

Allison v Anderson, (O.H.) 1907, 15 S.L.T. 529.

(204)

Declaration of intention to execute a will.

The will of a testator domiciled in Canada after stating that he desired to carry out the wishes of his first wife with reference to certain heritage in Scotland which came to him under her will, further bore—"To carry out the wishes of the said" wife "I do hereby declare that I intend to execute a will in accordance with the law of Scotland devising said real estate in Scotland to F P, his heirs and assigns." The will contained a residuary bequest. The testator never executed a will in accordance with Scots law devising the heritage to F P, although a *mortis causa* disposition doing so had been sent to him for execution five years before his death. Held that the heritable property was not carried to F P by the will, but fell under the residue clause.

Ferrier's Trustees v Ferrier, 1899, 1 F. 610; 36 S.L.R. 445; 6 S.L.T. 339.

(205)

Holograph memorandum on envelope containing old will—Whether effectual to revive old will.

Brander's Trustees v Anderson, 1883, 10 R. 1258; 20 S.L.R. 834, No. 352, *infra*.

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6. CLAUSE VALIDATING INFORMAL WRITINGS.

(206)

"Writing under my hand"—Informal writing signed by testatrix.

A testatrix, by a formal trust disposition and settlement, dated 12th July, 1893, directed her trustees "to pay any legacies and to carry out any instructions I may give by any writing under my hand clearly expressive of my wishes, although the same may not be formal." An informal writing bearing the date 2nd August, 1893, neither holograph nor tested, but admittedly bearing the signature of the testatrix, and containing certain bequests, was found in her repositories. Held that the informal writing was a testamentary writing of the nature contemplated by the trust disposition, and must receive effect.

Fraser v Forbes' Trustees, 1899, 1 F. 513; 36 S.L.R. 469; 6 S.L.T. 310.

(207)

Unsigned holograph writing.

A testator by his settlement directed payment and fulfilment of all legacies and bequests left and bequeathed by, *inter alia*, "any writing under my hand (however informally executed or defective) showing my wishes or intentions." He left an unsigned and undated holograph memorandum apporportioning certain articles of furniture among certain persons. This memorandum he had handed to his law agents to be put up with his settlement. Held that the memorandum was not an operative testamentary writing.

Hamilton's Trustees v Hamilton, 1901, 4 F. 266; 39 S.L.R. 159.

(208)

Whether applicable to informal writing of earlier date than will.

Bertram's Trustees v Matheson's Trustee, 1883, 15 R. 572; 25 S.L.R. 385, No. 358, *infra*.

Rutherford's Trustees v Dickie, 1907 S.C. 1280; 44 S.L.R. 960; 15 S.L.T. 296, No. 357, *infra*.

Hannay's Trustees v Keith, 1913 S.C. 482; 50 S.L.R. 386; 1913, 1 S.L.T. 95, No. 370, *infra*.

(209)

"Memorandum signed by me however informal"—Informal conveyance of heritage.

The proprietrix of a landed estate disposed of her whole property by a *mortis causa* disposition and settlement, containing a declaration that any memorandum signed by her, however informal, expressive of her will, should be equally binding upon her disponees "as if forming part of these presents." She afterwards, by a holograph writing, which of itself was insufficient as a conveyance of heritage, bequeathed to third parties during their lives the income arising from the minerals on her estate. Held that this writing and the settlement must be read together, so that the disponee taking under

the settlement was subject to the burden of the life rent.

Bannatine's Trustees v Cunninghame, 1869, 7 M. 993; 41 J. 555; 6 S.L.R. 641.

7. NECESSITY FOR BENEFICIAL DISPOSAL OF ESTATE.

(210)

Directions to erect statues.

A testator by a holograph settlement appointed trustees, and directed that the revenue of his heritable property should be used for the purpose of erecting (1) monuments and statues of himself, his brothers, his sisters, and his father and mother; and (2) artistic towers to be built at prominent points on his estates. The making of the statues was to be given to Scottish sculptors. The testator declared that his wish was to encourage young and rising artists, and that for that purpose prizes were to be given for the best plans of the proposed statues, towers, &c., before building them. He also declared his wish to be that the trust should be perpetual. **Held** that by these purposes no beneficial interest was conferred upon any person, or class of persons, and that, consequently, they were not effectual to divest the heir at law.

M'Caig v University of Glasgow, 1907 S.C. 231; 44 S.L.R. 198; 14 S.L.T. 600.

(211)

Bequest for rebuilding bridge when necessary.

A testator provided by his will that after the death of certain liferenters his estate should be given to the provost and town council of Ayr in trust, "in order that they or their successors in office may use the whole therefore in rebuilding the old bridge of Ayr when such a thing may be required." **Held** that the bequest was not void on the ground of remoteness.

Magistrates of Ayr v Shaw, (O.H.) 1904, 12 S.L.T. 126.

Fee in pendente.

[See VESTING X.]

8. REQUESTS CONTRARY TO PUBLIC POLICY.

(212)

Per Lord Kyllachy—"I consider that if it is not unlawful, it ought to be unlawful, to dedicate by testamentary disposition, for all time, or for a length of time, the whole income of a large estate—real and personal—to objects of no utility, private or public, objects which benefit nobody and which have no other purpose or use than that of perpetuating at great cost, and in an absurd manner, the idiosyncrasies of an eccentric testator. I doubt much whether a bequest of that character is a lawful exercise of the testamentary factio. Indeed, I suppose it would be hardly contended to be so if . . . the trustees

were, for instance, directed to lay the trustor's estate waste, and keep it so; or to turn the income of the estate into money and throw the money yearly into the sea; or to expend the income in annual or monthly funeral services in the testator's memory; or to expend it in discharging from prominent points upon the estate salvoes of artillery upon the birthdays of the testator and his brothers and sisters. Such purposes would hardly, I think, be alleged to be consistent with public policy."

M'Caig v University of Glasgow, 1907 S.C. 231; 44 S.L.R. 198; 14 S.L.T. 600.

(213)

Directions irrational and wasteful, and conferring no benefit on any object—Public policy.

A testatrix (who was the last survivor of her family, and had no known heir at law) by a codicil directed her testamentary trustees to convert a large circular tower, built by her deceased brother on an eminence near Oban, into a private enclosure, and to erect therein bronze statues of her parents and their nine children, including one who died in infancy. There was no provision in the codicil as to the cost of each statue, except that it was not to be less than £1000, and this cost and the upkeep of the tower and the statues were made a first charge on the revenue of the trust estate. The trustees were directed to retain the statues and tower, and to maintain the same in all time coming. **Held**, in a question with postponed beneficiaries, that, in respect of their unreasonable, extravagant, and useless character, the directions were invalid, and could not receive effect. **Opinions** that the directions were contrary to public policy.

M'Caig's Trustees v Kirk Session of United Free Church of Lismore, 1915 S.C. 426; 52 S.L.R. 347; 1915, 1 S.L.T. 152.

(214)

Encouragement of free thought.

Hardie v Morison, (O.H.) 1899, 7 S.L.T. 42, No. 243, *infra*.

Conditions contrary to public policy.

[See XVII. 1, *infra*.]

(215)

Mutual settlement by persons living in adultery.

A man and a married woman, who had been living in adultery for ten years, executed a mutual settlement in favour of the survivor, the woman leaving to her niece her clothes and jewels, which she had acquired after she had deserted her husband. **Held** that as there was nothing to show that continuance of the cohabitation was the inducing cause at least quoad the bequest to the niece, the deed to that extent was effectual.

Young v Johnson, 1880, 7 R. 760; 17 S.L.R. 545.

9. FALSA CAUSA.

(216)

Testamentary directions given under erroneous belief in fact.

A testator left a will appointing executors to deal with his general estate, and also a separate trust disposition conveying to trustees the heritable estate of Chesthill, of which he was proprietor. Prior to his death he had been in negotiation with the proprietor of a neighbouring estate for the purchase from him of certain fishing rights for the benefit of Chesthill, and the sale to him of certain farms on the Chesthill estate. He believed that the transaction had been finally arranged, but in point of fact no agreement binding in law upon the parties had been concluded at the date of his death. By a codicil to his will he directed the executors of his general estate to pay for the fishing rights, "which I have agreed to purchase," and authorised them to receive for his general estate "the amount arranged to be paid" for the farms. After his death, the Chesthill trustees, having obtained the authority of the Court, carried through the transaction with the neighbouring proprietor on the terms which the testator had been in process of arranging, and purchased from him the fishings for £2000, and sold to him the farms for £12,000, leaving a balance in their hands of £10,000. **Held** that the sum of £10,000 fell to be retained by the trustees for the purposes of their trust, in respect that the directions in the codicil, given with reference to an agreement which did not exist and under an erroneous belief in its existence, had no application to the transaction which had been voluntarily carried through as an act of administration by the Chesthill trustees.

Currie's Executors v Currie's Trustees, 1911 S.C. 999; 48 S.L.R. 354; 1911, 2 S.L.T. 35.

(217)

Misdescription of event in which testator to succeed to settled fund.

A testator, on the narrative that under his father's trust disposition and settlement the interest of his sister in the residue of his father's estate was restricted to a life-rent, and that in the event of her deceasing without leaving issue, "the residue . . . will fall and belong to me or to my children as . . . intestate succession of my father," in order to provide for the disposal of the residue, "in the event of my succeeding to it," disposed to trustees "the whole residue of said estate . . . to which I shall succeed in the event of my being pre-deceased by" his sister without leaving issue. The sister survived her brother, but died without leaving issue, and the residue of the father's estate was **held** to have passed to the brother as intestate succession. **Held** that he had effectually disposed of it, notwithstanding the misdescription of the event

on the occurrence of which his settlement was to take effect.

Young's Trustees v Young, 1901, 3 F. 616; 38 S.L.R. 434; 8 S.L.T. 463.

(218)

Tailzied destination — Misstatement as to relationship of person named as heir.

By deed of entail lands were entailed on A and his heirs-male, whom failing on "the nearest legitimate male issue of my ancestor Hugh, Lord Fraser of Lovat, namely, T. A. Fraser." It was disputed that T. A. Fraser was nearest legitimate male issue of Lord Fraser. **Held** that even if he was not, the destination was good in his favour, the error in the cause of granting being immaterial.

Lord Lovat v Fraser, 1884, 11 R. 1119; 21 S.L.R. 759.

10. UNCERTAINTY.

(1) GENERALLY.

(219)

Conveyance to trustees with power of disposal "in such manner as they shall deem proper."

The residuary clause of a trust disposition and settlement by which the truster's whole means and estate were conveyed to trustees for certain purposes was as follows:—"In the last place, with regard to the residue of my means and estate hereby conveyed, and after satisfying the legacies and bequests before mentioned, together with the legacy and other duties and expenses of discharges connected with my whole estate, I leave and bequeath the same to be disposed of by my said trustees in such manner as they may think proper, subject to such instructions and directions as I may hereafter make." **Held** that the clause was ineffectual to convey the residue.

Sutherland's Trustees v Sutherland's Trustees, 1893, 20 R. 925; 30 S.L.R. 809; 1 S.L.T. 139.

(220)

Gift to relations or other persons to be selected by trustees.

A testatrix conferred power on her trustees to allocate and apply the residue of her estate and pay the free proceeds to "such of my relations or other persons who, in the option of my trustees, may be entitled to participate therein, including in this bequest such legatees as are herein named by myself, and that according to the sole direction of my trustees, who shall alone be the judges." **Held** that the bequest was void, as it left the disposal of the residue absolutely in the discretion of the trustees.

Playfair's Trustees v Playfair, 1900, 2 F. 686; 37 S.L.R. 543; 7 S.L.T. 444.

(221)

Estate to be dealt with "as my trustees shall deem best" failing direction.

A testator conveyed his whole estate to

trustees "only in trust." In a clause dealing with residue he directed them "to hold, apply and convey on such conditions and under such restrictions as I may direct by any writing under my hand, and failing any such writing, then the same shall be dealt with and disposed of by my said trustees in such way or ways as my trustees shall deem best, my wish being that, failing such instruction, my trustees shall have full power and liberty to dispose of such residue in any manner that may approve itself to them." The testator left no further testamentary instructions. **Held** that the bequest was void from uncertainty.

Shaw's Trustees, (O.H.) 1893, 1 S.L.T. 308.

(222)

By his trust disposition and settlement a testator directed, *inter alia*, "that after payment of the above legacies the residue of my estate, if any, shall be disposed at the discretion of my said trustees." **Held** that this direction was void from uncertainty.

M'Gregor's Trustees v Bosomworth, (O.H.) 1896, 33 S.L.R. 364; 3 S.L.T. 231.

(223)

Residue to be distributed "as my trustees deem wise and prudent."

A testator provided, *inter alia*, for "the distribution of the residue of my estate in such way and manner as my trustees and executors and their foresaids deem wise and prudent." **Held** that the bequest was void from uncertainty.

Wilson's Trustees v Wilson's Trustees, (O.H.) 1894, 1 S.L.T. 548.

(224)

Request to those who, to the knowledge of the trustee, respected the testatrix.

A testatrix begged her trustee to give the residue of her estate "to those whom you know respects me." **Held** that the destination was not void from uncertainty, as it was a direction to the trustee to give the residue to those who he knew respected (i.e., were kind to) the testatrix, but that a simple request to the trustee to "give to those who respected me" would have been bad, as there would have been no workable definition nor would any means have been provided for ascertaining who were meant.

Warrender v Anderson, (O.H.) 1893, 1 S.L.T. 304.

(225)

Gift to servants, old friends, employees, "or others whom my trustees shall consider that I would wish to remember" — Memorandum of gifts.

Held that a direction to trustees to pay a specified portion of residue "to my domestic servants, old personal friends, in need, employees not otherwise included in any provision by me, or others whom my trustees shall consider that I would wish to remember," taken along with a holograph memorandum suggesting the proportions in

which allocation should be made, was not void from uncertainty.

Smellie's Trustees v Glasgow Royal Infirmary, (O.H.) 1905, 13 S.L.T. 450.

(226)

Direction to trustees to make payment to such of testator's children and children's children as they might think "most deserving."

A testator in his trust disposition and settlement, after providing for the disposal of the greater part of his estate among his children in the form of legacies, directed his trustees "from time to time, as they think proper, to make such special payments out of the free residue and remainder of my estate to such of my children and children's children as they may think most deserving, with special instructions to relieve any of them who may appear to be in want, provided always that they have not brought themselves into such circumstances by their own misconduct. My great desire is to assist merit and thrift, and not to acknowledge indolence or folly." The trust disposition contained no further directions as to the disposal of the residue. **Held** that the word "deserving" meant deserving of pecuniary assistance, and accordingly that the clause committed an intelligible and workable discretion to the trustees, and was not void from uncertainty. **Question**, whether the trust as to the residue was "charitable."

Mitchell's Trustees v Fraser, 1915 S.C. 350; 52 S.L.R. 293; 1915, 1 S.L.T. 97.

(227)

Money placed in daughters' names for behoof of A—Unrestricted power to dispose of unpaid balance.

A father placed money on deposit receipt in the names of his two daughters and on the same date delivered to them a memorandum for their guidance in administering the money for behoof of his son Archibald. He directed them to pay the sums to or for behoof of Archibald as they or the survivor might think proper. "Should the whole not be disposed of in the lifetime of Archibald, my said daughters may dispose of the balance in any way they should think proper." The son died when the daughters had paid one-half of the fund to him or for his behoof. **Held** that the direction to the daughters to dispose of the fund as they might think proper conferred no beneficial right on them, and did not constitute them trustees for behoof of Archibald, and that it was void from uncertainty.

Anderson v Smoke, 1898, 25 R. 493; 35 S.L.R. 396; 5 S.L.T. 309.

(228)

Power to dispose to charities or to "any person."

A father bequeathed to the survivor of his children a share of the residue of his estate in *liferent*, with full power by *mortis causa* deed "to dispose of the same and direct the succession thereto in favour either of

religious or charitable institutions one or more conducted according to Protestant principles or of any person or persons whom such survivor may appoint or partly in favour of such institution or institutions and partly in favour of such persons or person all in such terms and subject to such conditions as such survivor may think proper." The survivor exercised this power by a deed of directions in which he bequeathed this share of residue absolutely to his wife. **Held** that the power was valid and had been validly exercised.

Bannerman's Trustees v Bannerman, 1915 S.C. 398; 52 S.L.R. 315; 1915, 1 S.L.T. 143.

(229)

Gift to heirs and assignees through mother.

Held that a gift in favour of "my nearest heirs and assignees whomsoever in and through . . . my mother" was not void for uncertainty.

Mitchell's Trustees v Waddell, 1872, 11 M. 206; 45 J. 150; 10 S.L.R. 149.

(230)

"Those mentioned in my will"—Direction to accumulate—Uncertainty as to persons intended to be benefited.

Edward's Trustees v Edward, 1891, 18 R. 535; 28 S.L.R. 360, No. 1415, *infra*.

(231)

Payment of salaries of native missionaries to preach gospel among heathen.

Renouf's Trustees v Haining, 1919 S.C. 497; 56 S.L.R. 440; 1919, 2 S.L.T. 15, No. 246, *infra*.

(232)

Direction to trustees to divide among institutions in limited locality.

Edgar's Trustees v Cassells, 1922 S.C. 395; 59 S.L.R. 304; 1922 S.L.T. 281, No. 252, *infra*.

Turnbull's Trustees v Lord Advocate, 1918 S.C. (H.L.) 88; [1918] A.C. 337; 55 S.L.R. 208; 1918, 1 S.L.T. 112, No. 251, *infra*.

(233)

Direction to carry on testator's house.

A testator by his trust disposition and settlement dated in 1877 left the residue of his estate to his daughters in liferent and their children in fee. In a holograph letter by the testator to his trustees the following passage occurred:—"In the event of my dying before Mrs. G S, my very dear sister-in-law, I solemnly request that you, my trustees, will see that my house at Row is carried on as in my lifetime." **Held** that this direction was too vague to receive effect.

Hamilton's Trustees v Hamilton, 1901, 4 F. 266; 39 S.L.R. 159.

(234)

Guaranteed shares—Preference stock.

By his trust disposition and settlement a testator directed his trustees "to transfer to the A C Curling Club two 5 per cent. guaranteed shares of £100 each" of the G railway company. No part of the capital

of the railway company consisted of guaranteed shares of £100, but the testator held £460 ordinary stock, £310 preference consolidated stock, and £70 perpetual guaranteed stock, the two latter stocks bearing interest at 5 per cent. **Held** that the expression "guaranteed" as used by the testator meant other than ordinary and included preference stock, and that the bequest was not void for uncertainty.

Barr's Trustees v Ardrossan Castle Curling Club, 1901, 3 F. 903; 38 S.L.R. 658; 9 S.L.T. 84.

(235)

"Rent of my houses."

Mackenzie's Trustee v Mackenzie, 1899, 2 F. 330; 37 S.L.R. 254, No. 496, *infra*.

(2) CHARITABLE BEQUESTS.

(236)

Whether bequest for charitable purpose—"Practical interest in the pursuits of science."

A testator by his trust disposition and settlement directed his trustees to employ the residue of his estate "in instituting and carrying on a scheme for the relief of indigent bachelors and widowers, of whatever religious denomination or belief they may be, who have shown practical sympathy, either as amateurs or professionals, in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality, and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose." **Held** (1) that the bequest was "charitable," and therefore entitled to a benignant construction; and (2) that so construed it was not void from uncertainty.

Weir v Crum Brown, 1908 S.C. (H.L.) 3; [1908] A.C. 162; 45 S.L.R. 335; 15 S.L.T. 857.

(237)

—Bequest for promotion of phrenology.

A testator by his trust disposition and settlement directed that the residue of his estate should "be applied by my said trustees in whatever manner they may judge best for the advancement and diffusion of the science of phrenology, and the practical application thereof in particular, giving hereby and committing to my said trustees the most full and unlimited power to manage and dispose of the said residue in whatever manner shall appear to them best suited to promote the ends in view." Certain well-known phrenologists were nominated trustees with powers to assume new trustees for the general management of the funds, and with directions to assume as special trustees for the application of the residue "enlightened phrenologists" with powers to appoint like-minded successors ad perpetuum. **Held** that this bequest was not void from uncertainty.

M'Lean v Henderson's Trustees, 1880, 7 R. 601; 17 S.L.R. 457.

(238)

Deserving working people.

Held that a bequest "to the deserving working people in the parish of Annan, five hundred pounds, which sum I desire my brothers to divide amongst them according to their good judgment and discretion," was not void from uncertainty.

Laurie v Brown, (O.H.) 1911, 1 S.L.T. 84.

(239)

Direction to trustees to make payment to such of testator's children and children's children as they might think "most deserving."

A testator in his trust disposition and settlement, after providing for the disposal of the greater part of his estate among his children in the form of legacies, directed his trustees "from time to time, as they think proper, to make such special payments out of the free residue and remainder of my estate to such of my children or children's children as they may think most deserving, with special instructions to relieve any of them who may appear to be in want, provided always that they have not brought themselves into such circumstances by their own misconduct. My great desire is to assist merit and thrift, and not to acknowledge indolence or folly." The trust disposition contained no further directions as to the disposal of the residue. Held that the word "deserving" meant deserving of pecuniary assistance, and accordingly that the clause committed an intelligible and workable discretion to the trustees, and was not void from uncertainty. Question, whether the trust as to the residue was "charitable."

Mitchell's Trustees v Fraser, 1915 S.C. 350; 52 S.L.R. 293; 1915, 1 S.L.T. 97.

(240)

"Educational scheme for the poor."

Held that a bequest for an "educational scheme for the poor" was a charitable bequest; and, accordingly, that a direction to trustees to apply funds for such "charitable purpose or educational scheme for the poor as they may deem fit and proper" was not void from uncertainty.

Chalmers' Trustees v Turriff School Board, 1917 S.C. 676; 54 S.L.R. 546; 1917, 2 S.L.T. 62.

(241)

Bursary for Gaelic-speaking persons—Biblical instruction—Lodgings.

A testatrix by a codicil to her trust settlement left a bequest to be administered by her trustees "as they see fit, if possible" (first) for a bursary "open to Gaelic-speaking students, whether attending school or college," and (second) for instruction for "Gaelic-speaking persons or children in biblical knowledge." By a subsequent codicil she gave the trustees powers "to use the bulk of my estates as they shall see best for Gaelic-speaking people either in helping the Russell Street Gaelic church, bursary, schools, or lodgings for Gaelic-speaking

students." Held that the bequests were not void from uncertainty.

Macdonell's Trustees v Macdonell's Trustees, (O.H.) 1911, 2 S.L.T. 170.

(242)

Bequest to "bursary fund of university."

By his will a testator left the residue of his estate "to the bursary fund of the Aberdeen University to help in the education of poor and struggling youths of merit," and "in order to carry out and give effect to my wishes" he appointed two persons as executors. The various bursary endowments of the University were not merged in one general bursary fund, but each endowment was kept separate and devoted to the special purpose for which it was founded. By the Universities (Scotland) Act, 1889, the University Court were given power to administer funds mortified for bursaries. Held (1) that the bequest was valid and not void from uncertainty, and (2) that the University Court were entitled to receive and discharge the residue, on condition of submitting to the Court and obtaining approval of a scheme for the administration thereof as a bursary fund.

Milne's Executors v Aberdeen University Court, 1905, 7 F. 642; 42 S.L.R. 533; 13 S.L.T. 45.

(243)

Bequest for promotion of free thought.

A testator directed his trustees "to apply the whole residue of my means and estate for the purchasing of premises in the city of Edinburgh, to be used as a shop in which one of the objects is the sale of books dealing with the subject of free thought. Held that it was void from uncertainty.

Hardie v Morison, (O.H.) 1899, 7 S.L.T. 42.

(244)

Christian and benevolent purposes.

A trust settlement contained the following bequest:—"I direct that the whole residue of my estate shall be distributed as follows, viz.:—One-tenth thereof for Christian and benevolent purposes, chiefly in Aberdeen or Deeside district, at the discretion of my trustees." Held that the bequest was not void from uncertainty.

Smith's Trustees v Smith's Trustees, (O.H.) 1910, 2 S.L.T. 74.

(245)

Foreign missions—Executor having power to select.

A Scottish testator, by his holograph general settlement, provided—"The residue of my property I give and bequeath for the benefit of foreign missions in India, China, Africa, and South America, or any other in the foreign field suitable. I appoint the Rev. W. Watson, Kiltarn, as my executor, at a remuneration of £20 sterling." Held that the bequest was a bequest for charitable purposes, and was not

void from uncertainty, the bequest being to a definite class, coupled with the appointment of a person (the executor) having power to select the objects falling within the class on whom the benefit of the bequest was to be conferred.

Allan's Executor v Allan, 1908 S.C. 807; 45 S.L.R. 579; 15 S.L.T. 1061.

(246)

—Payment of salaries of native missionaries to preach gospel among heathen.

A testator by his holograph trust disposition and settlement provided that his trustees were to pay out of the income of his estate "the salaries of two native missionaries chosen of them, for preaching the gospel of Jesus Christ my Lord among the heathen," and that, on the winding up of his estate, they were to make provision "for these salaries to be continued to the societies they represent." In later clauses he referred to the missionaries as "christian native preachers," and to his scheme as one for "preaching the gospel of Jesus Christ as already named for foreign lands." No mention was made of the amount of the salaries to be paid. **Held** that the bequest—even on the assumption that it was not a charitable bequest—was not void from uncertainty; its objects, the method of its execution, the persons to be benefited, and the sphere of its operation, being all sufficiently defined by the testator.

Renouf's Trustees v Haining, 1919 S.C. 497; 56 S.L.R. 440; 1919, 2 S.L.T. 15.

(247)

—"Home missions."

Circumstances in which **held**, after proof, that a bequest to "home missions" was not void from uncertainty, but that the words were used to denote the home missions of the Free Church of Scotland.

Miller's Trustees v Kirkcaldy, (O.H.) 1905, 13 S.L.T. 454.

(248)

—Missionary purposes.

Held that a direction to trustees to apply residue "for such missionary purposes as they in their sole discretion may determine, keeping in view specially missions in Africa," was not void from uncertainty.

Adam's Trustees v Adam, (O.H.) 1908, 16 S.L.T. 144.

(249)

—Charitable or benevolent purposes—Missionary associations.

A testator directed his trustees to devote the residue of his estate to such charitable or benevolent purposes as they should think fit. By a subsequent testamentary writing he recommended that a part of the residue should be applied to missionary associations, the London City Mission being named as one of them. **Held** that this reference to missionary associations did not render the bequest, otherwise admittedly valid, too uncertain to receive effect.

Miln's Trustees v Drachenbauer, (O.H.) 1921, 1 S.L.T. 152.

(250)

Whether purposes of bequest wholly charitable—"Such charitable or public purposes as my trustee thinks proper."

A testatrix by a holograph codicil to her trust disposition and settlement directed that (in the events which happened) one-half of the residue of her estate "shall be applied for such charitable or public purposes as my trustee thinks proper." **Held** that the direction was void from uncertainty, in respect that the words "charitable or public" were used disjunctively, and that a bequest for such public purposes as a trustee might select was void, as it did not designate a particular class of objects from which the trustee might make a selection.

Blair v Duncan, 1901, 4 F. (H.L.) 1; [1902] A.C. 37; 39 S.L.R. 212; 9 S.L.T. 390.

(251)

—Public, benevolent, or charitable purposes in connection with the parish of L or the neighbourhood.

A testatrix directed her trustees to apply the residue of her estate "for such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood in such sums and under such conditions as they in their discretion shall think proper." **Held** (1) that the clause was to be read as if it had been expressed "for public purposes, or benevolent purposes, or charitable purposes"; (2) that the phrase "public purposes," even with the local limitation, was too indefinite to receive effect; and, accordingly, that the whole bequest was void from uncertainty.

Turnbull's Trustees v Lord Advocate, 1918 S.C. (H.L.) 88; [1918] A.C. 337; 55 S.L.R. 208; 1918, 1 S.L.T. 112.

(252)

—"Benevolent, charitable, and religious institutions in Glasgow and Greenock"—Limited locality.

A testatrix directed her trustees to pay legacies to certain hospitals in Glasgow and Greenock, and a legacy to the missions connected with the Independent or Congregational Churches in Scotland to be distributed by the treasurer of Elgin Place Congregational Church, Glasgow. She then directed her trustees to divide the residue of her estate among "such of the other benevolent, charitable, and religious institutions in Glasgow and Greenock as they in their sole discretion may think proper." **Held** (1) that the residuary bequest was in favour of benevolent institutions, charitable institutions, or religious institutions, and was not limited to institutions possessing, each in itself, all these three characteristics; and (2) that the bequest of residue was not void from uncertainty, as the trustees were confined in their choice to a division among existing institutions in a limited locality.

Edgar's Trustees v Cassells, 1922 S.C. 395; 59 S.L.R. 304; 1922 S.L.T. 281.

(253)
“Educational, charitable, and religious purposes.”

A testator directed his trustee to divide the residue of his estate “amongst such educational, charitable, and religious purposes within the city of Aberdeen as he shall select to be the recipients thereof.” Held that the bequest was to be construed as a bequest for any one or more of the three purposes named as the trustee should select, and that as the description “religious” was indefinite the bequest was void from uncertainty.

M’Conochie’s Trustees v M’Conochie, 1909 S.C. 1046; 46 S.L.R. 707; 1909, 1 S.L.T. 489.

(254)
“Charitable, benevolent, or religious objects or purposes within the city of A.”

A testatrix by her trust disposition and settlement directed that the residue of her estate should be applied by her trustees “at their discretion from time to time towards such charitable, benevolent, or religious objects or purposes within the city of Aberdeen as they themselves shall institute or select.” Held that this direction was void from uncertainty.

Shaw’s Trustees v Esson’s Trustees, 1905, 8 F. 52; 43 S.L.R. 21; 13 S.L.T. 449.

(255)
—Social or ethical amelioration of people of K.

A testator by his trust settlement left his estate to the kirk session of the parish of Kilsyth in trust for “the promotion, furtherance, assistance, or support of any local scheme of the Church of Scotland in Kilsyth, of any local plan for the social or ethical amelioration of the Kilsyth congregation in particular, or of the people of Kilsyth in general, that may approve or commend itself to the common sense, loyal feeling, and discretion of the kirk session. The annual proceeds need not be all spent in the one year, but may be expended when and as the kirk session shall see fit.” Held that the bequest was not void from uncertainty.

Lord Advocate v Anton, (O.H.) 1909, 2 S.L.T. 326.

(256)
—Religious or charitable purposes in connection with R.

Held that a direction to trustees to apply a sum of money “for religious or charitable purposes in connection with Rio Janeiro as to my said trustees may seem best” was void from uncertainty.

M’Grouther’s Trustees v Lord Advocate, (O.H.) 1907, 15 S.L.T. 652.

(257)
“Charitable institutions, persons, or objects.”

A testatrix left the residue of her estate to her trustees “with power to them to distribute the same amongst such charitable institutions, persons, or objects, as they may think desirable.” Held that the bequest was not void from uncertainty, the words “chari-

table persons” falling to be construed as meaning persons in need of charity.

Cameron’s Trustees v Mackenzie, 1915 S.C. 313; 52 S.L.R. 307; 1915, 1 S.L.T. 78.

(258)
—Direction to apply income, or so much thereof as trustees may deem expedient, to charitable purposes.

A testatrix by her trust disposition and settlement provided—“As regards the residue of my estate . . . I appoint my trustees . . . to apply the interest or annual proceeds thereof, or so much of said interest or annual proceeds thereof as they may deem expedient, towards such charitable purposes within the city or county of Aberdeen as my trustees shall think fit . . .” Held that the existence of an uncertainty as to the amount of the annual proceeds or interest which the trustees might in fact apply to the charitable purposes did not render the bequest void from uncertainty, there being no uncertainty as regarded the purposes or objects of the testatrix’s bounty.

Macduff v Spence’s Trustees, 1909 S.C. 178; 46 S.L.R. 135; 16 S.L.T. 503.

(259)
Bequest to charitable institutions — “Charitable and benevolent institutions in Glasgow and Paisley.”

A testator directed his trustees to divide the residue of his estate among “such charitable and benevolent institutions in Glasgow and Paisley and in such sums not exceeding the sum of three hundred pounds sterling to any institution as in their discretion may seem best.” Held that the bequest was not void from uncertainty.

Caldwell’s Trustees v Caldwell, 1921 S.C. (H.L.) 82; 58 S.L.R. 602; 1921, 2 S.L.T. 187.

(260)
—“Local or Scottish charitable institutions and schemes.”

A testator disposed his whole estate to certain trustees, and directed them to realise the whole residue of his estate at such time as they might think proper, and “at any time or times, or from time to time, as and when the said residue or any part thereof becomes available, as they may deem proper, to pay over or divide the said residue, or any part or parts thereof, to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted . . . as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, or in such proportions, all as they in their absolute discretion may deem proper.” The testator further provided that his trustees should have “the fullest powers of and in regard to realisation, investment, administration, management, and division, as if they were beneficial owners”; that “the time, manner, and propriety of selling and disposing” of his estate, heritable and moveable, should be entirely at the discretion of his trustees; and that his trustees

might, should they in their discretion see fit, retain the investments of which the estate consisted at the time of his death, "and that for such time or times as they might think fit or indefinitely." **Held** that the bequest was not void from uncertainty.

Dick v Audsley, 1908 S.C. (H.L.) 27; [1908] A.C. 347; 45 S.L.R. 683; 16 S.L.T. 95.

(261)
 "Societies or institutions of a benevolent or charitable nature."

A testatrix directed her trustee or trustees to apportion and pay over the proceeds of the residue of her estate "amongst such societies or institutions of a benevolent or charitable nature in such proportions as he or they shall in their own discretion think proper, but to the exclusion of Roman Catholic institutions." **Held** that the bequest was to be construed as a bequest in favour of charitable societies and institutions, and was not void from uncertainty.

Hay's Trustees v Baillie, 1908 S.C. 1224; 45 S.L.R. 908; 16 S.L.T. 294.

(262)
 "Charities or benevolent or beneficent institutions."

A testatrix directed her trustees to divide the residue of her estate "among such charities or benevolent or beneficent institutions" as they in their sole discretion should think proper. **Held** that the bequest was to be construed as a bequest in favour of charitable institutions, and was not void from uncertainty.

Paterson's Trustees v Paterson, 1909 S.C. 485; 46 S.L.R. 406; 1909, 1 S.L.T. 212.

(263)
 "Charitable or philanthropic institutions."

A testator directed that the residue of his estate should be paid "to such charitable or philanthropic institutions, one or more, in Glasgow or the west of Scotland, as my trustees may select as in their opinion the most deserving." **Held** that the bequest was to be construed as a bequest in favour of charitable institutions, and was not void from uncertainty.

Mackinnon's Trustees v Mackinnon, 1909 S.C. 1041; 46 S.L.R. 792; 1909, 2 S.L.T. 28.

(264)
 "Charitable institutions connected with the county of L."

A testator directed his trustees to divide and apportion the residue of his estate in such proportions as they might consider proper "amongst such charitable institutions connected with the county of Lanark as they may consider expedient." **Held** that the bequest was not void from uncertainty.

Cleland's Trustees v Cleland, 1907 S.C. 591; 44 S.L.R. 412; 14 S.L.T. 806.

(265)
 "Charitable institutions for the benefit of women and children — No express power of selection."

A testator directed his trustees "to pay

over the balance or residue of my estates to and for behoof of such charitable purposes as I may think proper to name in any writing, however informal, which I may leave; but failing my leaving such writings, then to such charitable institutions or societies which exist for the benefit of women and children requiring aid or assistance of whatever nature, but said institutions and societies to be under the management of Protestants." The testator died without leaving any such writing. **Held** that the bequest of residue was not void from uncertainty, in respect that its object was charitable, and that the description of the beneficiaries was sufficiently definite to enable the trustees to exercise a power of selection which must be held to have been impliedly conferred upon them.

Wordie's Trustees v Wordie, 1916 S.C. (H.L.) 126; 53 S.L.R. 291; 1916, 1 S.L.T. 246.

(266)
 "Useful, benevolent, and charitable institutions."

Held that a direction to trustees to pay and apply the residue of the testator's estate "to such useful, benevolent, and charitable institutions" as the trustees in their discretion might think proper, was not void from uncertainty.

Cobb v Cobb's Trustees, 1894, 21 R. 638; 31 S.L.R. 506; 1 S.L.T. 578.

(267)
 "Public charities—List of examples—Other "benevolent and religious societies in Glasgow and west of Scotland"—"Other societies in Glasgow and west of Scotland."

Held that a direction to trustees to pay a specified portion of residue "to public charities, such as the Glasgow Royal, Western and Victoria Infirmaries, the Incorporated Glasgow Old Man's Friend Society and Old Women's Home, Glasgow Blind Asylum, Glasgow Deaf and Dumb Institution, Homes for the Poor, Sabbath schools, the two churches (town and country) with which I may be connected at time of my decease, and other benevolent and religious societies, Societies for the Prevention of Cruelty to Children and to the lower animals, and to such other societies in Glasgow and the West of Scotland which my trustees may select," was not void from uncertainty.

Smellie's Trustees v Glasgow Royal Infirmary, (O.H.) 1905, 13 S.L.T. 450.

(268)
 "Bequest to charitable or other institutions—Charitable or other deserving institutions in connection with the city of Glasgow."

A testator directed his trustees, in the event of there being any residue of his estate, "to apply the same for behoof of such charitable or other deserving institutions in connection with the city of Glasgow as my said trustees shall think fit." **Held** that the trustees were directed to apply the residue alternatively to charitable institutions or to deserving institutions which were

not charitable, and that, as the latter description was too vague to receive effect, the bequest was void from uncertainty.

Campbell's Trustees v Campbell, 1921 S.C. (H.L.) 12; 58 S.L.R. 69; 1921, 1 S.L.T. 50.

(269)

—“Charitable institutions or deserving agencies in Aberdeen and Stonehaven.”

A testator directed his trustees to divide the residue of his estate among “such charitable institutions or deserving agencies in Aberdeen and Stonehaven as they may select.” Held that the bequest was void from uncertainty, in respect that the description “deserving agencies” fell to be read separately from “charitable institutions,” and was too vague to receive effect.

Symmers's Trustees v Symmers, 1918 S.C. 337; 55 S.L.R. 280; 1918, 1 S.L.T. 185.

(270)

—“Charitable or other institutions or societies.”

Held that a bequest to and in favour of such “charitable or other institutions or societies in such shares and proportions as they may think proper as to all which they shall be the sole and exclusive judges,” was void from uncertainty.

Jaffrey's Trustees v Lord Advocate, (O.H.) 1903, 11 S.L.T. 119.

(271)

—“Charitable or religious institutions and societies.”

A testator by his trust disposition and settlement directed his trustees to divide a portion of the residue of his estate “to and among such charitable or religious institutions and societies as my trustees or the survivors or survivor of them may select, and in such proportions to each or any as they may fix.” Held that the bequest was void from uncertainty.

Macintyre v Grimond's Trustees, 1905, 7 F. (H.L.) 90; [1905] A.C. 124; 42 S.L.R. 466; 12 S.L.T. 760.

(272)

Held that a power to trustees to donate the residue of the testator's estate “to and among such charitable, religious, educational, and public institutions, and in such proportions as they shall think proper,” was not void from uncertainty.

Brown's Trustees v Young, (O.H.) 1898, 6 S.L.T. 32.

(273)

—“Religious and charitable institutions in Glasgow and neighbourhood.”

A testator directed his trustees to “pay and divide” a sum of £250 “among such religious and charitable institutions in Glasgow and neighbourhood as they may select, and in such proportions as they may think proper.” Held that the bequest was not void from uncertainty.

M'Phee's Trustees v M'Phee, 1912 S.C. 75; 49 S.L.R. 33; 1911, 2 S.L.T. 358.

(274)

—Religious, charitable, or educational institutions in Edinburgh, Glasgow, or Ayrshire—Deserving individuals of good character.

Held that a direction to pay residue “to such of the religious, charitable, or educational institutions in Edinburgh, Glasgow, and Ayrshire as” my trustees “may deem to be most deserving of support or in assisting deserving individuals of good character in such way as my trustees may think best,” was void from uncertainty.

Brown's Trustees v M'Intosh, (O.H.) 1905, 13 S.L.T. 72.

(275)

—“Religious or charitable institutions conducted according to Protestant principles.”

A father bequeathed to the survivor of his children a share of the residue of his estate in *lifereit*, with full power by *mortis causa* deed “to dispose of the same and direct the succession thereto in favour either of religious or charitable institutions one or more conducted according to Protestant principles or of any person or persons whom such survivor may appoint or partly in favour of such institution or institutions and partly in favour of such persons or person all in such terms and subject to such conditions as such survivor may think proper.” Opinions that the power of disposal in favour of “religious or charitable institutions conducted according to Protestant principles” was not void from uncertainty.

Bannerman's Trustees v Bannerman, 1915 S.C. 398; 52 S.L.R. 315; 1915, 1 S.L.T. 143.

(276)

—Assignment of income to beneficiaries for charitable purposes.

Held that a provision by a testator of a fund to be secured “as a permanent source of charity,” the annual income of which was to be “at the disposal of my wife and children and their descendants,” the wife having “a vote in the disposal of it” was *prima facie* a good charitable bequest, it being equivalent to an assignment of the income to be disposed of by them for such charitable purposes as they might think proper.

Anderson's Trustees v Anderson's Factor, (O.H.) 1901, 9 S.L.T. 174.

(277)

—“Charities in Glasgow.”

Bequests to “charities in Glasgow, £1000. Do. Abdn., £1000,” were held void from uncertainty.

Low's Executors, 1873, 11 M. 744; 45 J. 452; 10 S.L.R. 505.

(278)

—Failure of person entitled to select.

A testator by his holograph will left his whole estate to his sister and two brothers equally and the survivor of them subject to the payment of certain legacies, *inter alia*,

a legacy "to the deserving working people in the parish of Annan, five hundred pounds, which sum I desire my brothers to divide amongst them according to their good judgment and discretion." The testator was survived by one of his brothers and by his sister, who were confirmed his executors. Thereafter the sister died and the surviving brother, having paid away part of the legacy, himself also died. **Held** that the trust for the deserving working people lapsed on the death of the surviving brother, because the duty of selection imposed by the testator could not be carried out by anybody except the testator's brothers.

Laurie v Brown, (O.H.) 1911, 1 S.L.T. 84.

(279)

A legacy was left to A with a direction that he was "to divide the money between foreign and home missions." A died without dividing the fund, though he had frequently expressed his intention as to how the money would be divided. **Held** that the legacy lapsed.

Landale's Trustee v Nicol, (O.H.) 1918, 2 S.L.T. 10.

11. ACCUMULATION.

[See XX., *infra*.]

12. LIFERENTS TO PERSONS BORN AFTER TESTATOR'S DEATH.

[See FEE AND LIFERENT V.]

V. MUTUAL SETTLEMENTS.

1. GENERALLY.

(280)

Observations on the construction of mutual settlements.

United Free Church of Scotland v Black, 1909 S.C. 25; 46 S.L.R. 87; 16 S.L.T. 528.

(281)

Validity—Signature of one granter not witnessed—Validity *quoad* estate of the other.

A husband and a wife caused a mutual settlement to be prepared which contained a conveyance by the husband of his whole estate in favour of the wife in *liferent* only and his children in fee, and a corresponding conveyance by the wife of her estate in favour of the husband and children. The deed was signed by the husband before witnesses, and by the wife, but not before witnesses. **Held** that it was effectual as a testamentary settlement of the husband's estate.

Millar v Birrell, 1876, 4 R. 87; 14 S.L.R. 58.

(282)

—Incapacity of one granter—Effect *quoad* estate of the other.

A brother and sister executed a settlement

conveying their whole property to each other and to the survivor, and thereafter to trustees for purposes specified, reserving to themselves or either of them and to the survivor the absolute use and disposal of the property and full power to alter or cancel the deed at any time. After the death of the brother, who survived the sister, an action was raised to reduce the settlement, on the ground of her mental incapacity, and it was found by the verdict of a jury not to be her deed. **Held**, in applying the verdict, that the deed remained effectual *quoad* the brother's estate.

Græme v Græme's Trustees, 1869, 7 M. 1062; 41 J. 599; 6 S.L.R. 684.

(283)

Subjects conveyed by mutual settlement—Conveyance of fee of whole estate to survivor—Accumulations made by survivor.

By mutual disposition and settlement a husband and wife conveyed, each to the other, the whole estate then belonging, or which should belong, to each at the time of his or her death, with a destination over in the event of the testators or the survivor having made no other distribution, and a declaration that the survivor should have absolute power of disposal upon the joint estate. The wife survived her husband for about forty years, during which time the value of the estate was largely increased by accumulations. She left no separate testamentary writing. **Held** that, as after the husband's death the whole joint estates belonged absolutely to the widow, there was no room for distinguishing between one part of her estate and another, and that the whole estate, including increase of value and accumulations of income made by the surviving spouse, fell to be distributed in terms of the mutual will.

Berwick's Executor, 1885, 12 R. 565; 22 S.L.R. 357.

(284)

—Conveyance of estate belonging to granters "respectively" at "our death"—Gift of *liferent* to survivor—Whether accumulations from *liferent* carried by survivor's settlement.

Two spouses executed jointly a trust disposition and settlement, conveying to trustees "all and sundry the whole means and estate, heritable and moveable, real and personal, of whatever nature and description, and wheresoever situated, now due or belonging to us respectively, or that may pertain and belong or be addebted and resting-owing to us respectively at the time of our death, nothing excepted or reserved," for certain purposes, *inter alia*, "for the *liferent* use and enjoyment of the survivor of us." The survivor of the spouses, after the death of her husband, saved from her *liferent* of the estate a large sum of money, and tested upon it. **Held** that she was not barred from so doing by the terms of the mutual trust deed.

Morris v Anderson, 1882, 9 R. 952; 19 S.L.R. 716.

(285)

Power to survivor to encroach on capital.
Reddie's Trustees v Lindsay, 1890, 17 R.
 558; 27 S.L.R. 514, No. 1283, *infra*.

(286)

**Power to survivor to consume capital—
 Gift over of capital unconsumed.**

Denholm's Trustees v Denholm's Trustees,
 1908 S.C. 255; 45 S.L.R. 154; 15 S.L.T.
 589, No. 1389, *infra*.

(287)

**Power to alter trust purposes — Mutual
 settlement for charitable purposes — Altera-
 tion of purposes by survivor under power.**

A brother and sister executed a mutual trust disposition and settlement, which was declared to be irrevocable by the survivor, except to the extent specified in a deed of instructions, in which the purpose of the trust was stated. This was the formation of a fund to be called "The Anderson Bequest," to be managed by a board, the testators stating that it was their intention and wish "that the same may give great relief to parties residing in the town and parish of Borrowstounness from their poor rates, and also to assist respectable young people with a small sum of money on their setting out in the world." Detailed directions followed, according to which one-half of the income of the fund was to be laid out in pensions to various classes of persons specified, and the other half was to be expended in effecting two classes of insurances on the lives of young persons, one class to provide a sum on the assured reaching twenty-five years of age, and the other class to provide a sum on the death of the assured. A power was given to the survivor "to alter or enlarge the instructions and powers to said board, but that only so as the principal design or object of said bequest shall not be interfered with or any way altered." After his sister's death the brother executed a codicil directing his trustees to maintain a school which he was erecting in B, and to pay salaries to a teacher and assistant. A question having arisen whether this was within the survivor's power, held that the general objects of the mutual deed being the diminution of pauperism in B and the setting out of young persons in the world, the direction to maintain a school was well calculated to promote these ends, and fell fairly within the reserved powers given to the survivor.

Whyte v Paul, 1879, 7 R. 321; 17 S.L.R. 201.

(288)

Effect of revocation by survivor.

Two sisters, who lived in family together and held their estates jointly, each being owner of a pro indiviso half thereof, executed a mutual trust disposition and settlement whereby they conveyed to trustees the whole estates belonging to them at their respective deaths. By the trust disposition the survivor was to have a liferent of her predeceasing sister's estate, and, on the death

of the survivor, the trustees were to pay legacies to certain charities, amounting in all to £6000, and were to divide the residue among such other charities as they should think proper. The trusters further reserved their liferents of their respective estates, with full power to them or either of them, at any time during their respective lives "to alter, innovate, or revoke these presents in whole or in part as we may respectively think proper, which power each of us reserves entire, and may avail ourselves of, without the consent or concurrence of the other." On the death of the predeceasing sister the joint estate amounted to £8000. Held (1) that each sister had a power to revoke the settlement as regarded her own estate, but not as regarded her sister's; and (2) that the surviving sister by exercising this power did not forfeit her liferent of her sister's estate.

Lang's Trustees v Lang, 1885, 12 R. 1265;
 22 S.L.R. 866.

(289)

**—Mutual settlement between husband
 and wife—Effect of secret revocation by
 wife—Meliorations by husband—Recompense.**

A wife possessed certain heritable property, which in a mutual settlement executed by her and her husband after marriage she conveyed to him after her death. This mutual deed contained a power of revocation by either of the spouses, and the wife exercised the power by settling the property on her children by a former marriage, to the exclusion of her husband. The husband was ignorant of this change until after her death, and in the meantime had expended a considerable sum in improving the property. The money so expended was, however, principally obtained from the wife or her property, and fell to the husband in virtue of the *jus mariti*. Held that the secret revocation of the mutual settlement by the wife having disappointed the husband's reasonable expectations, he was entitled to recompense for his expenditure so far as beneficial to the property.

Reedie v Yeaman, (O.H.) 1875, 12 S.L.R. 625.

2. POWER OF SURVIVOR TO REVOKE.

(290)

**Mutual settlement between spouses — Fee
 to survivor—Substitution in favour of wife's
 daughter—Revocation by surviving wife.**

A mutual testament, executed by a husband and wife, provided (1) that the survivor should possess and inherit all the property that might belong to them at the death of the predeceaser; and (2) that on the death of the survivor the residue of all that was left by the deceased should go equally to A and B, the daughter and grand-daughter of the wife by a former marriage. A and B survived the husband but predeceased his widow. Held that the provision in their favour was a mere substitution, which was

effectually defeated by a testament executed by the widow.

Davidson, 1870, 8 M. 807; 42 J. 458; 7 S.L.R. 498.

(291)

—Fee to survivor—Substitution in favour of relatives of both spouses—Power of survivor to revoke.

A husband and wife executed a mutual settlement whereby they conveyed their whole means and estate to the survivor. They subsequently executed a codicil by which they directed "that on the death of the survivor of us without leaving lawful issue, the whole means and estate, heritable and moveable, belonging to the said survivor shall be divided equally between" a nephew of the husband and a nephew of the wife. The codicil also nominated two trustees, one a nephew of the husband and the other a nephew of the wife, for the purpose of carrying out the provisions with respect to the estate of the survivor. The husband survived his wife and uplifted her estate. Subsequently he executed a will whereby he left his whole estate to persons other than those named in the codicil to the mutual settlement. Held that the mutual codicil was not in its nature contractual, and accordingly that the husband was entitled to revoke it, and had revoked it, by his will.

Garioch's Trustees v Garioch's Executors, 1917 S.C. 404; 54 S.L.R. 304; 1917, 1 S.L.T. 197.

(292)

—Onerous settlement—Joint codicil.

A husband and wife by a codicil to a mutual settlement which was onerous and contractual made certain provisions from the wife's estate in favour of the husband's relatives, payable in the event of his survival. After the husband's death the wife revoked the codicil. Held that the codicil was revocable as a donation inter virum et uxorem. Opinion (per Lord Guthrie) that apart from the relationship of husband and wife the codicil was revocable.

Mackie's Trustees v Mackie, 1914, 51 S.L.R. 345; 1914, 1 S.L.T. 203.

(293)

—Liferent to survivor with fee to children—Right of survivor to revoke quoad his own estate.

A husband and wife who had no ante-nuptial marriage contract executed a mutual settlement whereby they conveyed to trustees the whole property, heritable and moveable, belonging to either of them, or which might belong to them at the date of their decease, to be held for the survivor of the spouses in liferent, and for the children of the marriage in fee. The liferent of the surviving spouse was to cease in the case of a second marriage. The whole funds and estate of the spouses were derived from the husband with exception of £400 belonging to the wife (as to which sum the husband's *jus mariti* had been excluded), the sole in-

terest in which was conferred on the children. The wife predeceased her husband, who, shortly after her death, executed a deed of revocation of the mutual settlement, except in so far as it dealt with the wife's £400. Held that in so far as the provisions by the husband in the mutual settlement were to be regarded as provisions in favour of the wife, being gratuitous, they were (except the liferent, which was in the circumstances a reasonable provision) revocable as donations inter virum et uxorem, and that as regarded the provisions to children, they were merely testamentary, and that the deed of revocation was effectual.

Melville v Melville's Trustees, 1879, 6 R. 1286; 16 S.L.R. 742.

(294)

—Right of predeceaser to revoke quoad own estate.

In a mutual settlement by a husband and wife, where the whole means and estate, consisting of heritage valued at £45 a year, and £300 of moveable estate, were the property of the husband, it was provided that if the wife survived her husband she should get the residue of the moveable estate absolutely and the liferent of the heritage—the fee of the heritage being destined to persons named. The husband predeceased, leaving a trust deed by which he revoked all former deeds, and while slightly altering the provisions to his wife he also made a change in the destination of the fee of the heritage. Held (1) that as the provision to the widow in the mutual settlement was not excessive, it was not revocable as a donation inter virum et uxorem; and (2) that in the circumstances the change in the destination of the heritage must receive effect.

Gibson's Trustees v Gibson, 1877, 4 R. 867.

(295)

—Uncertainty.

Question whether a mutual settlement in favour not of a specific class of persons, but of a vague philanthropic object could bind the surviving testator so as to prevent him dealing with his own fortune.

Whyte v Paul, 1879, 7 R. 321; 17 S.L.R. 201.

(296)

—Reservation of power to revoke—Fee to survivor—Substitution in favour of relatives of predeceaser.

A husband and wife executed a mutual trust disposition and settlement whereby they conveyed to the survivor of them the whole means and estate "which shall belong and be owing to us respectively at the time of our death, . . . and on the death of the longest liver of us we dispose . . . all and sundry the whole means and estate of which we may die possessed" to trustees in trust to divide the capital between two grandnieces of the wife. The deed contained the following clause:—"We reserve our respective liferents of the means and estate above conveyed, with power to

alter, innovate, or revoke these presents at pleasure." **Held** that after the wife's death the husband was entitled to revoke the mutual trust disposition and settlement and to dispose by will of the whole estate, including the wife's estate which was made over to him on her death.

Observations on the construction of mutual settlements.

United Free Church of Scotland v Black, 1909 S.C. 25; 46 S.L.R. 87; 16 S.L.T. 528.

(297)

Liferent to survivor—Fee to charitable purposes.

Two sisters who lived in family together and held their estates jointly, executed a mutual settlement whereby they conveyed their whole estates to trustees for the survivor in liferent, the fee to be devoted to charitable purposes. The granters reserved "full power and liberty to us, or either of us, at any time during our respective lives, to alter, innovate, or revoke these presents, in whole or in part, as we may respectively think proper, which power each of us reserves entire, and may avail ourselves of, without the consent or concurrence of the other." **Held** that the survivor was entitled to revoke the mutual settlement quoad her own estate, but not quoad the estate of the predeceaser.

Lang's Trustees v Lang, 1885, 12 R. 1265; 22 S.L.R. 866.

(298)

Power of survivor to revoke bequest of property of predeceaser.

By mutual settlement two spouses conveyed to trustees the whole property belonging to them or to either of them at their respective deaths, for certain purposes, reserving "our respective liferents of the premises with power to us or the survivor of us to alter, innovate, or revoke these presents at pleasure." **Held** that under this clause the surviving spouse had no power to revoke bequests in the settlement of subjects which were the property of the predeceasing spouse, or bequests which were the joint gifts of both spouses.

Kay's Trustee v Stalker, 1892, 19 R. 1071.

(299)

Power of survivor to revoke joint bequest.

Two sisters executed a mutual settlement reserving power to each and the survivor to revoke so far as regards her own estate. They made a joint bequest. The survivor revoked the settlement. **Held** that one-half of the joint bequest remained payable to the beneficiary, and that the survivor had power to revoke the other half.

Scott's Trustees v Scott, (O.H.) 1919, 1 S.L.T. 78.

(300)

Right of survivor to appoint new trustees.

A mutual settlement, executed by a husband and wife, nominated certain persons as trustees. The husband then conveyed to

them his whole estate, giving a liferent to his widow during her widowhood, and the fee to the children of the marriage, and failing them to certain persons, his own relations. The wife made similar provisions in favour of her husband and children, and certain persons, her own relations. Both spouses then accepted the liferent provisions as in full of their legal claims; and they reserved power "during our joint lives, or to the longest liver of us, even on deathbed, to alter, innovate, or revoke these presents in whole or in part, as we or either of us may see cause." **Held** that the widow was not entitled under this clause of reservation to recall the nomination of trustees contained in the mutual deed and appoint new trustees on her husband's estate.

Welsh's Trustees v Welsh, 1871, 10 M. 15; 44 J. 15; 9 S.L.R. 14.

(301)

Reservation of power to granters of mutual consent to revoke during joint lives—Power reserved to survivor to dispose of estate acquired during survivorship—Survivor's heritage destined to her own relations.

A husband and wife executed a mutual settlement in which each bequeathed to the other, on survivorship, the whole of his or her estate for that other's liferent use, and subject to certain burdens and directions which were identical in each case. In addition, the wife conveyed a heritable property to the husband in liferent and to certain of her own blood relations in fee. The settlement contained a clause reserving power of revocation by mutual consent during the joint lifetimes of the spouses, and declaring its finality unless so revoked, but reserving to the survivor a power of disposal over "all his or her own means and estate to be made and acquired after the decease of the first of us." **Held** that the provisions of the mutual settlement with regard to the wife's heritable property were contractual, and that she was not, after the death of her husband, entitled to revoke the destination thereof.

Lawrie's Executor v Haig, 1913 S.C. 1159; 50 S.L.R. 898; 1913, 2 S.L.T. 183.

(302)

Bequests to granters' relatives—Express power to survivor to revoke bequests to his own relatives—Donation inter virum et uxorem.

A husband and wife executed a mutual settlement whereby they disposed the estate of the predeceaser to the survivor, and on the death of the survivor they disposed the whole estate of the survivor to trustees, who were directed to pay one-half to named relatives of the husband, and the other half to named relatives of the wife. Power was reserved to revoke or alter the settlement during the joint lives of the spouses by mutual consent, and it was provided that the survivor should have power to alter or revoke quoad the half destined to his or her relatives. The wife,

who had no separate estate, predeceased. **Held** that the stipulations as to alteration and revocation were pactional between the spouses, and that the husband had not power to alter or revoke the destination in favour of the wife's relatives.

Corrance's Trustees v Glen, 1903, 5 F. 777; 40 S.L.R. 526; 10 S.L.T. 774.

(303)

———**Right of survivor to revoke.**

By an antenuptial marriage contract intending spouses conveyed each to the other in case of survivance, and to the heirs of the survivor their whole estates. They subsequently executed a mutual settlement, whereby they severally conveyed the whole estate which should belong to them respectively at their death to trustees, with directions to pay to the survivor the income of the estate of the predeceaser, and on the survivor's death, after paying legacies, to divide and pay the residue to four persons named "with power to us by any joint writing under our hands to revoke or alter these presents, but declaring that in so far as not altered or revoked as aforesaid the same shall remain effectual." The marriage was dissolved (without issue) by the death of the wife. The husband died leaving a settlement in which he conveyed his whole estate to trustees and revoked all testamentary deeds previously executed by him. **Held** that the provisions of the mutual will were onerous and were matter of contract between the spouses, and that therefore the will was not revocable by one of the spouses after the death of the other.

Croll's Trustees v Alexander, 1895, 22 R. 677; 32 S.L.R. 535; 3 S.L.T. 34.

(304)

———**Revocability by survivor—Husband and wife—Gift by each spouse to other of liferent of estate on survivance—Gift of residue to children.**

A husband and wife who had no antenuptial marriage contract made a mutual settlement by which each spouse gave to the other in the event of survivance the liferent of his or her estate, and declared that on the death of the survivor the whole residue of their estates should be divided among their children. The settlement reserved power to the spouses to alter or revoke during their joint lives. The wife survived the husband, and left a settlement which bore to revoke all previous mortis causa deeds made by her. **Held** that the mutual settlement was contractual and so had not been revoked by the wife's subsequent settlement.

Johnstone's Trustees v Johnstone's Trustees, 1907, 45 S.L.R. 1; 15 S.L.T. 382.

(305)

———**Power to revoke exercisable only by granters jointly—Gift of fee to survivors of granters.**

B and C, two sisters, and A, the husband of B, by a mutual trust settlement, containing a clause of absolute warrandice, conveyed their whole estates at their death to

trustees, and nominated the survivor of them, the granters, and on the survivor's death the trustees, to be their executors. The main purpose of the trust was for division of the estate among the children of A and B. The deed contained the following clause:—"Reserving always, and giving and granting to us and each of us and the survivor of us the whole estate hereby disposed by us, and also reserving to us full power during our lives, or even on deathbed, to burden, as also to alter, to innovate, or revoke these presents." A was the first deceiver of the granters and C the second. **Held** (1) that the power to revoke could only be exercised by the granters collectively; (2) that the clause of reservation conferred on the surviving granter power to enjoy and dispose of the estate by inter vivos deeds; but (3) that the ultimate destination having been presumably the inductive cause on the part of the husband, the survivors after his death could not defeat it by any gratuitous testamentary writing.

Craich's Trustees v Mackie, 1870, 8 M. 898; 42 J. 597; 7 S.L.R. 571.

(306)

———**Joint or several power.**

A husband and wife executed a mutual will, which contained a power "to us at any time during our joint lives to alter, innovate, or revoke, as we may see proper." **Held** that this imported a joint and not a several power.

Wood's Trustees v Findlay, (O.H.) 1909, 1 S.L.T. 156.

(307)

———**Conveyance of whole estate belonging to granters at death of predeceaser—Liferent of one-half to survivor with fee to relations of predeceaser—Right of survivor to revoke.**

By mutual trust disposition and settlement a husband and wife, who had no antenuptial marriage contract, disposed to trustees the whole property, heritable and moveable, which should belong to them or either of them at the death of the first deceiver, with directions that upon that event the trustees should take an inventory of the whole estate, and should hold one-half thereof, subject to the liferent of the survivor, for behoof of the relatives of the first deceiver. The spouses reserved full power to alter the deed during their joint lives, and the wife declared the provisions in her favour to be in full of her legal claims. **Held** that the trust deed was not revocable by the surviving husband, and that the right of the relatives of the wife vested in them at her death.

Kerr v Ure, 1873, 11 M. 780; 45 J. 512.

(308)

———**Revocation by survivor prohibited—Liferent to survivor—Fee of both estates to granter's children.**

By mutual settlement a husband and wife conveyed to trustees the whole estates which

might belong to them at their respective deaths. The trust purposes were (1) a liferent of the predeceaser's estate to the surviving spouse, and (2) the fee of the whole estates of both spouses to be divided equally among the children of the marriage. The spouses reserved power "jointly but not otherwise" to revoke the settlement, and it was specially declared that if the settlement should stand unrevoked at the death of the first de-ceaser, "it shall not be competent to the survivor of us to alter or recall" the settle-ment "in any way." The wife prede-ceased survived by children and leaving £10,000, of which the husband enjoyed the liferent until his death fifteen years later. At his death the husband was possessed of £24,000. **Held** that the mutual settlement was onerous and contractual and could not be revoked by the husband after the wife's death, even quoad his own property.

Robertson's Trustees v Bond's Trustees, 1900, 2 F. 1097; 37 S.L.R. 833; 8 S.L.T. 129.

(309)

Settlement declared irrevocable on death of predeceaser—Conveyance of estate as at predeceaser's death—Liferent to survivor—Fee to relations of spouses.

A husband and wife, who had married without an antenuptial contract, executed a mutual settlement, by which they con-veyed the whole estate presently belong-ing or which should belong to the spouses, jointly or individually at the death of the predeceaser, to trustees, who were directed to allow the survivor the liferent of the estate, and upon the death of the survivor to realise and pay over the same in equal halves to relations of the husband and wife respectively. It was specially declared that upon the death of the predeceaser the deed should become absolute and irrevocable, and delivery was dispensed with. The husband was possessed of about £3000, of which a considerable part was heritage, and the wife was possessed of two heritable bonds, together amounting to £460. Upon the death of the wife, who was the predeceaser, the trustees entered into possession of the estate. **Held** that the mutual settlement was revocable by the husband in so far as it disposed of his own estate, on the con-dition undertaken by him in a minute lodged in process, that he should renounce all benefit from his wife's settlement.

Mitchell v Mitchell's Trustees, 1877, 4 R. 800; 14 S.L.R. 515.

(310)

Settlement declared to be irrevoc-able—Power to revoke—Reasonable pro- vision for wife—Conjugal Rights Amendment Act, 1861, sec. 16.

Mudie v Clough, 1896, 23 R. 1074; 33 S.L.R. 775; 4 S.L.T. 28. **MARRIAGE CONTRACT, No. 211.**

(311)

Contractual settlement—Revocation by

survivor — Substitution of adequate pro- visions.

A husband and wife executed a mutual will. Thereafter the husband made another will revoking it. **Held** that the mutual will was contractual, but in respect that the second will made adequate provision for the wife the revocation contained in it was valid.

Wood's Trustees v Findlay, (O.H.) 1909, 1 S.L.T. 156.

(312)

Power to revoke reserved to spouses jointly —Gift to children—Mutual disposition under burden of legacies and gifts by either spouse —Power of survivor to revoke quoad her own estate.

By mutual disposition and settlement a husband and wife gave and disposed to their children their whole estate presently belong- ing or which should belong to them or either of them at the time of their death, but "always with and under the burden of our lawful debts and deeds, payment of our funeral expenses, and of such gifts or legacies as we, or either of us, may think proper to leave by any deed to be executed by us or either of us at any time of our lives." Power was reserved to the spouses, with mutual advice and consent, to revoke or alter the mutual disposition and settlement. **Held**, upon a consideration of the terms of the deed, and especially having regard to the clause above quoted, that the settlement was revocable by the survivor of the spouses so far as his or her own estate was con- cerned.

Main v Lamb, 1880, 7 R. 688.

(313)

Fee to survivor—Power of survivor to revoke.

A mother and daughter executed a mutual trust settlement by which each made the other her universal legatary. The deed further provided for the distribution of the estate on the death of the survivor, and concluded with these words—"Reserving always our respective lifetimes of the whole premises, and full power, with mutual con- sent only, to alter, innovate, or revoke these presents, in whole or in part, as we may think proper." **Held** that there was nothing in the terms of the deed to displace the presumption that the clause referred only to the primary dispositions by which each party conveyed to the survivor the estate which she might leave at her death, and did not forbid the survivor from deal- ing as she pleased with the whole estate belonging to her either inter vivos or mortis causa.

Boath's Trustees v Machardy, (O.H.) 1902, 10 S.L.T. 446.

(314)

Power of survivor to dispose of own estate.

A husband and wife executed a mutual trust disposition and settlement, whereby the former disposed his whole property, herit-

able and moveable, of which he might die possessed, "to and in favour of S M, my wife, and on her decease to the heirs and successors of me." The wife's disposition was "to and in favour of" her husband "and his heirs and assignees whomsoever." There was a clause of reservation in the following terms:—"Reserving always to us, and each of us, our respective liferents of the means and estates above conveyed, with full power to us at any time during our joint lives to alter, innovate, or revoke these presents, in whole or in part, as we may see proper; but declaring always that the same, in so far as not altered, innovated, or revoked as aforesaid, shall be effectual though found lying by either of us at the time of his or her decease, or in the custody of any other person for our behoof, with the delivery whereof we have dispensed and hereby dispense for ever." The wife survived her husband. **Held** that she had right to dispose at will of her own estate, but had only a liferent of her husband's estate.

Milne v Milne, 1876, 13 S.L.R. 223.

(315)

Wife surviving and making donations—Validity of donations.

A husband and wife by mutual will each bequeathed to the other, if survivor, the whole moveable estate of which the predeceaser might die possessed, and further, they jointly and severally bequeathed the whole moveable property of which the longest liver might die possessed to certain relatives of the husband. A power of revocation was reserved to the spouses jointly and to the husband if survivor. The wife survived the husband for over twenty years. She had no separate estate, but she saved considerable sums from the income of the husband's estate. With a view to defeating the rights of the husband's relatives under the mutual will, she put these savings on deposit receipt in the name of various persons to whom she wished to make donations. After the death of the wife, the executor under the mutual will called upon these persons to account for these sums. **Held** that the mutual will was merely the testament of the surviving spouse, and was revocable by her, and that, therefore, the donations made by her, whether inter vivos or mortis causa, were effectual.

Nicoll's Executors v Hill, 1887, 14 R. 384; 24 S.L.R. 271.

(316)

Power of survivor to revoke quoad his own estate.

A person having purchased certain subjects took the disposition to himself and his wife in conjunct fee and liferent, for her liferent use allanarly, and to himself and his heirs and assignees in fee. Thereafter the husband and wife executed a mortis causa disposition containing the following clause:—"Reserving always to us during our joint lives our own liferent right and use of the premises, with full power to us at any period during our joint lives to alter,

innovate, or revoke these presents in whole or in part." **Held** that the husband being absolute fiar under the first deed, was entitled to revoke the mutual disposition after his wife's death.

Stiven v Brown's Trustees, 1873, 11 M. 262; 45 J. 193; 10 S.L.R. 169.

(317)

By mutual settlement each of two sisters conveyed her estates, heritable and moveable, to the other in liferent in case she should survive, and to a nephew in fee, reserving "full power to us at any time during our joint lives to alter, innovate, or revoke these presents in whole or in part as we may see proper." **Held** that the mutual deed was simply testamentary, and could be altered by the surviving sister in so far as regarded her own estate.

Traquair v Martin, 1872, 11 M. 22; 45 J. 28; 10 S.L.R. 36.

(318)

Power to change destination.

A and B, sisters, executed a trust deed directing their trustees to give a liferent of their estate to the survivor, with certain provisions as to residue. By a codicil they directed their trustees to carry out the instructions of the survivor as to any change of destination of one-half of the estate, and to pay the survivor absolutely such part of one-half as she might demand. In two other codicils variations and additions were made on the bequests, and all existing provisions with regard to residue were recalled and a new bequest of residue was made. A died and was survived by B, who executed a deed of directions in which she reduced the annuities of two of her relatives and disposed of one-half of the estate to parties not named under the original trust disposition and codicils. **Held** that the deed of directions was a valid exercise of her right under the first codicil, and that she was therefore entitled to revoke to the extent of one-half the annuities and the bequest of residue.

Coats, 1881, 13 S.L.R. 567.

VI. OTHER FORMS OF GIFT MORTIS CAUSA.

1. DONATIONS MORTIS CAUSA.

[See DONATION III.]

2. TESTAMENTARY PROVISIONS IN MARRIAGE CONTRACTS.

[See MARRIAGE CONTRACT I. 10, 11; II. 1 (3).]

3. DESTINATIONS IN WRITINGS NOT PRIMARILY TESTAMENTARY.

(319)

Moveable bond.

B invested money belonging partly to himself and partly to A in a moveable bond

payable to A and B and the survivor. A authorised the investment in these terms. A predeceased B. **Held** that the destination operated as a bequest by A in favour of B.

Paterson's Judicial Factor v Paterson's Trustees, 1897, 24 R. 499; 34 S.L.R. 376; 4 S.L.T. 313.

(320)

A husband lent £500 to harbour trustees on the security of the harbour, and took an assignment in favour of himself and his wife "equally between them and to the survivor," and to the heirs of the survivor. The money advanced belonged to the husband, and the assignment was not delivered to the wife. **Held** that the husband had not been divested of the sum contained in the assignation, and that that sum was in bonis of him at his death, but that the destination was effectual and that under it the widow was entitled to the sum of £500.

Walker's Executor v Walker, 1878, 5 R. 965; 15 S.L.R. 636.

(321)

Security of local rates.

Milne v Scott, 1880, 8 R. 83; 18 S.L.R. 72, No. 840, infra.

(322)

Inscribed stock.

Circumstances in which **held** that "inscribed stock" registered in the books of a bank in the joint names of a mother and a son, who survived her, formed part of the mother's estate.

Buckle v Buckle's Curator, (O.H.) 1907, 15 S.L.T. 98.

(323)

A and B, who were sisters, bought bank shares and took the certificate in favour of themselves and their sister C and the survivors and survivor of them. A and B both predeceased C. **Held** that the destination was effectual and carried the shares to C.

Fraser v MacKillican, (O.H.) 1905, 13 S.L.T. 81.

(324)

Stock and share certificates.

A husband and wife acquired shares in a limited company, the shares being registered and the share certificate bearing that the shares were transferred to "R L (the husband) . . . and J H or L his wife and the survivor of them." **Held** that the destination in the share certificate was a valid and effectual destination.

Ferguson v Lord Advocate, (O.H.) 1906, 13 S.L.T. 724.

(325)

Bonds.

Stock certificates, bonds, and certificates of debt issued by public companies or trustees of public works, if taken with a destination, will, on the death of the person who takes them, pass under the destination, just as a heritable subject taken with a title in similar terms would pass.

Connell's Trustees v Connell's Trustees, 1886, 13 R. 1175; 23 S.L.R. 857.

(326)

Mortgage debenture granted by railway company.

A father lent a sum of money to a railway company and took a mortgage debenture with a destination to himself and his children. **Held** that the destination was effectual to carry the mortgage to the children on the death of the father.

Buchan v Porteous, 1879, 7 R. 211; 17 S.L.R. 90.

(327)

Policy of assurance.

A special destination in a policy of assurance will be given effect to in a competition between the trustees named in the policy and the executor-dative of the assured, even although the policy was not intimated to the trustees and the assured died insolvent.

Dickie's Trustees v Dickie, 1892, 29 S.L.R. 908.

(328)

Mutual assurance association — Benefits payable to nominee of deceased member — Appointment of nominee.

The rules of an unregistered mutual assurance association provided that every member should execute a written nomination in favour of some person to whom the benefits payable on his death should be paid. A member of the association executed a nomination in favour of his sister, and on the member's death she received payment of the amount of the benefits. The member had executed a will, later in date than the nomination, disposing of his whole estate. The executor acting under the will having brought an action against the nominee to recover, as part of the deceased's estate, the sum paid to her, **held**, on a construction of the rules of the association, that the nomination merely conferred a title to collect the amount of the benefits payable on the death of the member, and that the nominee was bound to account to the executor therefor.

Young v Waterson, 1918 S.C. 9; 55 S.L.R. 24; 1917, 2 S.L.T. 141.

(329)

Deposit receipt—Promissory note.

A destination contained in a deposit receipt or a promissory note has no testamentary effect.

Watt's Trustees, 1869, 7 M. 930; 41 J. 626; 6 S.L.R. 611.

Miller v Miller, 1874, 1 R. 1107; 11 S.L.R. 621.

Crosbie's Trustees v Wright, 1880, 7 R. 823; 17 S.L.R. 597.

Connell's Trustees v Connell's Trustees, 1886, 13 R. 1175; 23 S.L.R. 857.

Dinwoodie's Execatrix v Carruthers' Executor, 1895, 23 R. 234; 33 S.L.R. 184; 3 S.L.T. 188.

(330)

A deposit receipt was taken by a husband payable to himself or his wife and the survivor. **Held** in the absence of proof of intention on the part of the husband to make a donation mortis causa to the wife, that the

deposit receipt belonged to the husband's representatives.

Connell's Trustees v Connell's Trustees, 1886, 13 R. 1175; 23 S.L.R. 857.

(331)

Certain sums of money belonging to A and B were placed on deposit receipt, the receipts being taken in favour of A, B, and C, repayable to them or to the survivor or survivors of them, or to any of them. B, A, and C having died in that order, **held** that the destination in the deposit receipt had no testamentary effect, and that, there being no intention of making a donation mortis causa in favour of any one, the sums in the deposit receipts must be **held** to be in bonis of A and B.

Fraser v MacKillican, (O.H.) 1905, 13 S.L.T. 81.

(332)

—**Held** that a deposit receipt taken in favour of certain persons and the survivor of them does not import a destination having testamentary effect.

Sillars v M'Alpine, (O.H.) 1907, 15 S.L.T. 365.

(333)

Bank cheque.

A bank cheque made payable after death is not habile to constitute a legacy.

Milne v Grant's Executors, 1884, 11 R. 887; 21 S.L.R. 611.

4. OBLIGATIONS TO TEST.

(334)

Whether obligation constituted.

A mother and one of her sons executed a minute of agreement, whereby the mother, on the narrative that the son had advanced sums amounting to £800 to the mother, bound herself to execute an irrevocable settlement of her whole property in favour of her son, and he undertook to pay up or take an assignment to a bond for £150 over the mother's property, to pay the taxes and premiums of fire insurance, and to allow her to receive the full rents of her property. The mother, of the same date, executed a settlement in her son's favour, and he took over the bond and paid the taxes and the premiums. The mother died leaving a later settlement, by which she revoked the earlier, and disposed of her property otherwise. In an action by the son, **held** that the agreement was onerous and was binding on the mother, and that the later settlement, being in contravention of the agreement, fell to be reduced.

Paterson v Paterson, 1893, 20 R. 484; 30 S.L.R. 646.

(335)

—**Whether inter vivos deeds struck at by obligation.**

A testator in his settlement made certain *liferent* provisions for his wife, and left her a legacy of £5000, declaring that "by acceptance hereof she binds herself to execute a settlement of her own affairs so as that my own relatives shall have at least the two-thirds of what may be at her disposal," and

in a codicil he stated—"It is to be distinctly understood that at my wife's death, or previously, she is to leave all means at her disposal two-thirds to my sister's family." After his death his widow accepted the provisions in her favour. **Held** that the widow was bound to leave to relatives of her husband two-thirds of the funds at her disposal at the date of her death, but that her right to dispose of her funds onerously or gratuitously by deeds *inter vivos* was not limited.

Murray v Macfarlane's Trustees, 1895, 22 R. 927; 32 S.L.R. 715; 3 S.L.T. 63.

(336)

—**Precatory trust.**
A testator bequeathed his moveable estate to his widow, expressing in his testament an "anxious desire" and in a subsequent writing, "a hope" that she should make a testament bequeathing one-half of the means which might belong to her at her death to certain of his relatives. The testator's widow having died intestate, **held** that her executor was not bound or entitled to give effect to the testator's request.

Barclay's Executor v M'Leod, 1880, 7 R. 477; 17 S.L.R. 311.

(337)

Deeds in fraudem of obligation.

A widow, who was under an obligation to leave to her husband's relatives two-thirds of the funds at her disposal at the date of her death, executed two trust deeds, bearing to be irrevocable, in which she assigned £2000 and £1000 to trustees. The deeds were delivered, and the trustees got possession. In these deeds provision was made for (1) payment to her during her life of annuities of £70 and £35; (2) increase of her annuities if in the trustees' opinion necessary for her maintenance and support; (3) accumulation during her life; and (4) payment of the residue after her death to certain of her relatives, and in the event of their predecease to her heirs and assignees. She also executed a disposition of her household furniture to a friend, with full power to demand delivery at any time. The deed contained a consent to registration for preservation and execution, and was registered in the Books of Council and Session during her life. The widow remained in possession of the furniture till her death. **Held** that the widow was divested of the subjects conveyed during her life, and that there was no breach of the obligation.

Murray v Macfarlane's Trustees, 1895, 22 R. 927; 32 S.L.R. 715; 3 S.L.T. 63.

VII. REVOCATION.

1. POWER TO REVOKE.

Mutual settlements.

[See V. 2, *supra*.]

(338)

—**Agreement for disentail—Settlement of price of expectancy.**

By minute of agreement a father under-

took to pay, and a son to accept as the price of the son's consent to disentail a property, a sum of £4000 absolutely, and a "further sum of £3000" to be held by trustees for the son's use and behoof. The father reserved a right to limit the son's power over the £3000 as he thought proper, "and, in particular," to restrict his interest to a liferent, the fee to go to his issue, whom failing, to his nearest heirs and assignees. The father executed a bond in favour of the trustees, which was declared to be subject to purposes expressed in a deed of declaration of trusts of even date therewith. By this declaration of trusts the son's interest was restricted to an alimentary liferent, and failing his issue the fee was destined to his aunt and cousins. The son, who was unmarried at this time, signed both the bond and the declaration of trusts in token of his acquiescence and concurrence. The bond was delivered to the trustees, and they paid the income to the son. The son, having survived his father, revoked the declarator of trusts and bequeathed the £3000 to his widow. **Held** that the destination to the aunt and cousins was purely testamentary, and as such revocable by the son.

Wightman v Costine, 1879, 6 R. (H.L.) 13; 4 App.Cas. 228; 16 S.L.R. 496.

(339)

Destination in inter vivos deed—Disposition in liferent to parents and survivors—Fee to children—Subjects acquired with wife's funds—Delivery.

A husband and wife purchased heritable property with the wife's funds and took the disposition to themselves and the longest liver of them in liferent, for their liferent use allanarly and to their lawful children, whom failing, to the wife's heirs whomsoever in fee. They took infertment in the liferent in terms of the disposition, but no infertment was taken in the fee. Children were afterwards born of the marriage. **Held** that the infertment did not operate as delivery for behoof of the children, and that the spouses were entitled to revoke the destination in their favour.

Stewart v Rae, 1883, 10 R. 463; 20 S.L.R. 308.

(340)

Disposition of heritage in consideration of price paid "on behalf of" wife—Destination to wife in liferent allanarly and children in fee—Infertment only in liferent—Delivery—Revocation by wife—Jus quæsitum tertio.

In 1839 the proprietor of certain heritable subjects in consideration of the sum of £100 paid to him by Robert Bruce "on behalf of Mrs. Isabella Wood or Bruce, his spouse," disposed the subjects to Mrs. Bruce "in liferent for her liferent use allanarly (the said Robert Bruce her husband's jus mariti, right of courtesy, or other right or title whatsoever, being hereby excluded), and to the children procreated or to be procreated betwixt them" in fee. Mrs. Bruce took infertment in liferent, but no infertment was

taken in the fee. Children were born of the marriage. **Held** (1) that on a sound construction of the deed it was to be inferred that Mr. Bruce had no interest in the purchase price, but that it was paid with money belonging to Mrs. Bruce; and (2) that the infertment in liferent did not operate as delivery for behoof of the children, and that Mrs. Bruce was entitled to revoke the destination in their favour.

Kindness v Bruce, 1902, 4 F. 415; 39 S.L.R. 299; 9 S.L.T. 363.

(341)

Heritable property bought by spouses—Special destination in disposition.

Spouses purchased heritable property, each paying one-half of the price. The disposition was taken in favour of the spouses jointly and the survivor and the heirs of the survivor and their assignees whomsoever. **Held** that the destination could not be altered except by the joint consent of the spouses.

Perrett's Trustees v Perrett, 1909 S.C. 522; 46 S.L.R. 453; 1909, 1 S.L.T. 302.

(342)

Delivered trust disposition—Contingent interests.

Held that a testator could not revoke a duly delivered trust disposition and settlement without the consent of his grandchildren in whom the deed created an interest, although their rights under it were contingent only, and that as the grandchildren were pupils, they were incapable of giving their consent.

Foucalt v Foucart's Trustees, (O.H.) 1896, 4 S.L.T. 211.

2. CANCELLATION BY DESTRUCTION OR DELETION.

[See 3 (3), *infra*, and WRIT II. 5.]

3. REVOCATION BY LATER TESTAMENTARY DEED.

(1) EFFECT OF EXPRESS REVOCATION.

(343)

Application to mortis causa disposition of heritage.

The proprietor of an estate in Scotland by a mortis causa deed disposed it to his wife in liferent and to trustees in fee, with directions to sell the estate on the expiry of the liferent and apply the proceeds for purposes set forth in an English will of prior date, which he subsequently cancelled. By a second English will, executed on deathbed, the testator bequeathed his personal property and his whole "freehold, copyhold, and leasehold estates in England, Scotland, and elsewhere," to trustees, the income to be paid to his widow, and at her death the whole to be realised and the proceeds paid to his nephew, and he revoked "all former wills." **Held** (1) that the mortis causa disposition of heritage was not revoked by the second will, and that the conveyance of liferent in favour of the widow was effectual; but (2) that the destination of the fee had

fallen in consequence of the failure of the trust purposes through the cancellation of the first English will; and (3) that therefore the Scottish estate went to the heir at law, whose right was not affected by the direction to sell.

Thomas v Tennent's Trustees, 1868, 7 M. 114; 41 J. 59; 6 S.L.R. 113.

(344)

Application to revocable bond of annuity.

The heir in possession of an entailed estate granted in favour of his wife a bond of annuity under the Aberdeen Act providing her an annuity out of the estate "during all the days of her life after my decease, in case she shall survive me." He reserved power to revoke the bond. Subsequently he executed a trust disposition and settlement prepared by a law agent, whereby he revoked "all previous settlements and all writings of a testamentary nature, with the exception of" the bond of annuity. By a later holograph will he revoked "all previous wills or testaments." **Held** that the holograph will did not revoke the bond of annuity.

Maclean v Maclean, 1891, 18 R. 874; 28 S.L.R. 656.

(345)

Application to holograph list of legacies referring to will of even date.

In the repositories of a deceased testator there were found (1) a draft will, dated 27th October, 1909, (2) a holograph memorandum, dated 28th October, 1909, and (3) a formal will, dated 29th October, 1909. It appeared that, on 27th October, 1909, the testator adjusted with his law agent the draft will, and urged him to have it engrossed as soon as possible. At the same time he appended to the draft a signed and dated holograph docquet adopting it "as my last will." Next day the formal will was extended in terms of the draft, and sent to him for signature. The following day his law agent called on him, when he produced the formal will, which by that time he had signed, and he acknowledged the signature before witnesses. The testing clause was then completed as of that date, viz., 29th October, 1909. The formal will and the draft will were in identical terms, and each contained a clause revoking all previous testamentary writings, and a clause declaring "this along with any separate bequests by me of even date herewith, or to be hereafter executed by me, to be my last will and testament." On the testator's death the holograph memorandum was found tied up with the two wills. It was written in pencil, and was headed, "Legacies," and contained a list of names, with sums of money appended to each. It was dated 28th October, 1909, and was signed, with this note added—"In terms of my last will of even date." No will of 28th October was found. Circumstances where **held** that the pencil memorandum had not been revoked by the will of 29th October, but must be read along with that deed.

Tait's Trustees v Chiene, 1911 S.C. 743; 48 S.L.R. 609; 1911, 1 S.L.T. 360.

(346)

Application to gift of bank stock reserving power of sale.

During his life A made over certain bank stock to his sisters, but he reserved the right to draw the dividends and power to sell. By his will he revoked "all former testamentary writings executed by me." **Held** that the gift of the bank stocks was not revoked.

Hogg's Trustees, 1875, 12 S.L.R. 495.

(347)

Application to jotting on envelope.

Among the repositories of a deceased person an envelope was found which contained acknowledgments of debt by the testator's sons. On the envelope was a direction to the trustees, written in pencil, that the envelope was not to be opened, but burned. A subsequent will was made by the testator, which revoked all previous deeds of a testamentary nature executed by him. **Held** that the pencil jotting was not a deed in the sense of the will, and was not revoked thereby.

Lennie v Lennie's Trustees, (O.H.) 1914, 1 S.L.T. 258.

(348)

Application to special destinations in stock certificates.

Connell's Trustees v Connell's Trustees, 1886, 13 R. 1175; 23 S.L.R. 857, No. 996, *infra*.

(349)

Application to I O U.

After the death of a testator there were found in his repositories two I O U's, dated in 1873, in favour of two of his daughters. A will was in existence at that date, but a will of later date contained this clause, "I revoke and recall all former deeds of settlement made by me at any time heretofore." **Held** (per Lord Pearson, Ordinary) that the I O U's were of a testamentary character, but were not revoked by the later will.

McGaw's Trustees v King, (O.H.) 1902, 10 S.L.T. 83.

(350)

Codicil revoking wills recorded in Books of Council and Session—Testator's will not recorded.

A testatrix left a holograph writing which contained the following clause:—"Having made two wills when suffering from decay of memory, both of which are registered in the Books of Council and Session, Edinburgh, I do hereby cancel them, and in place of which I make the following statement of my wishes." There followed words which did not effectually dispose of her estate. **Held** that this writing did not revoke a formal settlement which was found at her death in the hands of her law agent, but was not registered in the Books of Council and Session, and which was executed when the testatrix was thirty-one years of age, and when there was no reason to suppose that she was suffering from decay of memory.

Gordon's Executor v Macqueen, 1907 S.C. 373; 44 S.L.R. 279; 14 S.L.T. 651.

(2) IMPLIED REVOCATION.

(351)

Revocation by general settlement—Bequest of shares—Money legacy.

A person who had received from his wife £140 in loan out of her separate estate, delivered to her a holograph writing bequeathing to her three shares of his bank stock "in payment of money lent," and subsequently another holograph writing bequeathing to her £500 worth of the same stock. They were afterwards judicially separated, and he died leaving a settlement directing his trustees, after payment of his debts and a special legacy, to convey the whole residue of his estate to his daughter. The deed made no reference to other testamentary writings, and contained no express revocation of prior bequests. **Held** that the holograph writings in favour of the wife had not been revoked either expressly or by implication, and must receive effect.

Kermore's Trustees, 1869, 7 M. 771; 41 J. 399; 6 S.L.R. 501.

(352)

Holograph writings — Holograph writing enclosed in envelope—Memorandum on envelope dated subsequent to settlement.

A testatrix left a universal settlement disposing of her whole estate, but containing no express revocation of prior testamentary writings, and also two holograph testamentary writings, dated respectively three and four months before the settlement. The earlier in date of these documents was contained in an envelope closed with gum, and addressed by the testatrix to her brother, with the words, "To be given him by-and-bye," and a date a month later than the date of her settlement. Shortly before her death, which did not occur until seventeen months after the execution of the settlement, she had told her brother that she had left a testamentary document in her own handwriting addressed to him. By the universal settlement she bequeathed £500 out of sums due to her from the trust estate of her father and a deceased brother, to a niece L, and with regard to the division of her jewellery referred to a memorandum to be left by her. The holograph writing earlier in date disposed of some articles of jewellery to certain persons named, and concluded—"Also £500 to my dear niece L." By the more recent holograph writing changes were made in the names of trustees she had appointed in a prior settlement afterwards cancelled, and a legacy of £500 out of funds due out of her father's estate was left to the same niece L. L having claimed all three legacies, as cumulative and not substitutional, **held** (1) that the more recent holograph writing was revoked by the universal settlement; and (2) that the address and date on the envelope containing the earlier writing, although subsequent to the execution of the universal settlement, were not sufficient to make it operative so as to affect the provisions of the universal settlement by introducing

another legacy of £500, the probable explanation being that it was intended to act as the memorandum referred to in the settlement.

Brander's Trustees v Anderson, 1883, 10 R. 1258; 20 S.L.R. 834.

(353)

Successive universal settlements—Whether earlier settlement revoked.

Held that a testamentary settlement disposing of the whole estate of the testator operated as a revocation of prior settlements of the testator, which likewise purported to dispose of his whole estate, although the subsequent settlement did not contain an express revocation of the prior settlements.

Dick's Trustees v Dick, 1907 S.C. 953; 44 S.L.R. 680; 15 S.L.T. 43.

(354)

A testator left in his repositories twenty-one deeds of a testamentary character, including four which ex facie dealt with his whole estate. **Held** that the last of the trust deeds, which dealt with the whole estate, operated as a revocation of all the previous testamentary writings, although it did not expressly revoke them.

Sibbald's Trustees v Greig, 1871, 9 M. 399; 43 J. 150; 8 S.L.R. 294.

(355)

Legacies repeated in subsequent settlement except one.

A testator who by his settlement had directed payment of a number of special legacies, repeated them all in a subsequent settlement, with the exception of a valuable legacy to his heir and a derisory bequest of one penny to a third person. **Held** that the legacy to the heir was revoked by implication.

Macleod's Trustees, 1871, 9 M. 903; 43 J. 517; 8 S.L.R. 597.

(356)

Effect of codicil.

A testatrix by her trust settlement left the residue of her estate for a certain purpose, but by a codicil she left certain specified subjects for a different purpose. The subjects specified in the codicil comprised her whole estate. **Held** that the codicil impliedly revoked the bequest of the residue contained in the settlement.

Macdonell's Trustees v Macdonell's Trustees, (O.H.) 1911, 2 S.L.T. 170.

(357)

Direction to pay legacies testator might leave by writing under his hand—Application to prior general settlement.

After the death of A in 1906, there were found in his repositories two universal trust dispositions and settlements, one dated in 1860 and the other in 1897. By that dated in 1860 A, after making certain small specific bequests, directed the residue of his estate to be

divided among his brother and certain of his sisters in certain proportions. By the trust disposition of 1897 the trustees were directed to pay any legacies "I may leave . . . by any writing under my hand," and to pay the residue of his means and estate in the manner "to be directed or appointed by any writing or writings under my hand," and in default "of my leaving any such written directions or instructions," the trustees were directed to pay the residue to the testator's heirs in mobilibus. **Held** (1) that the trust disposition and settlement of 1860 was impliedly revoked by the trust disposition and settlement of 1897; and (2) that by the words "any writing under my hand" in the settlement of 1897 the testator meant future writings only, and that they did not apply to the deed of 1860.

Rutherford's Trustees v Dickie, 1907 S.C. 1280; 44 S.L.R. 960; 15 S.L.T. 296.

(358)

Revocation of will by marriage contract.

In 1879 a lady executed a settlement by which she conveyed her whole estates to executors, directing them to divide the residue among three charitable institutions. In 1886 she entered into a second marriage, and by antenuptial contract she conveyed her whole estate to trustees, who were directed to hold the estate for her behoof in life, and to hold the capital for behoof of such persons as she should appoint by any writing under her hand, and failing such appointment for her heirs in mobilibus. On her death the lady left the settlement of 1879, but no other writing except the marriage contract. The capital of the estate had been delivered to the marriage contract trustees. **Held** that the deed of 1879 was not effectual either as an independent settlement or as an appointment under the marriage contract, but was revoked by the marriage contract, which was to be taken as a settlement of the lady's entire estate as existing at her death.

Bertram's Trustees v Matheson's Trustee, 1888, 15 R. 572; 25 S.L.R. 385.

(359)

Donatio inter virum et uxorem stante matrimonio—Testament dealing with subject of gift.

A conveyed a house to his wife, who was infert therein, the disposition proceeding upon the narrative that he had through her succeeded to money. His wife predeceased him, and after a second marriage he died, leaving a trust disposition and settlement conveying to trustees his whole means, heritable and moveable, and directing them to dispose of, inter alia, his "house, furniture, plate, &c.," and also generally to realise the residue, "whether heritable or moveable." **Held**, without deciding the question whether or not the disposition to the wife was revocable, that it had not been revoked.

Harden's Trustees, 1876, 13 S.L.R. 381.

(360)

Two codicils in similar terms—Revocation of earlier by later codicil.

Held that a holograph and informal codicil was not revoked by a subsequent codicil of the same character, bearing similar prefatory words and repeating the names of all but one of the legatees under the prior codicil, with the same sums opposite to them, and adding several others, but remained a subsisting testamentary writing; and the bequest to the person whose name was contained in the prior but omitted in the subsequent codicil, sustained.

Tennent v Dunsmore, 1878, 6 R. 150; 16 S.L.R. 87.

(361)

Bond of annuity to widow under Aberdeen Act (5 Geo. IV. c. 87)—Disentail and re-entail of estate under Entail Amendment Act, 1848—Affidavit by disentailer that no provisions to widow affected the lands.

An heir of entail executed in virtue of the Aberdeen Act a bond of annuity in favour of his wife. Subsequently he disentailed and re-entailed the estates, in the course of which proceedings he made an affidavit under the Rutherford Act that there were no provisions to widows affecting the lands. **Held** that the bond of annuity had been intentionally evacuated.

Hay Newton v Hay Newton, 1870, 8 M. (H.L.) 66; 42 J. 404; L.R., 2 H.L. Sc. 13; 7 S.L.R. 467.

Double legacies—Whether cumulative or substitutionary.

[See XI. 6, infra.]

Extent of revocation of provision of will by codicil.

[See IX. 3 (2) (b), infra.]

International law—English law—Effect of testator's marriage.

[See INTERNATIONAL LAW X. 3 (4).]

(3) REVOCATION OF INTERMEDIATE DEED—RESTORATION OF EARLIER BEQUEST.

(362)

Testator destroying will containing clause of revocation—Earlier will in existence at date of death—Action for declarator that he died intestate.

A testator, who had executed a will in 1878, executed another will in 1885 by which he revoked all previous testamentary writings. He retained the will of 1885 in his possession, and subsequently destroyed it *animo revocandi*. At the time when that will was being prepared by his law agents he sent them the will of 1878 with a note of the alterations required for the new will, and the will of 1878 was still in their possession at the time of his death. In an action at the instance of the testator's heir for declarator that the will of 1878 was not operative as a testamentary writing, the pursuer averred, inter alia, that the testator believed that that will had been destroyed,

and that, when he destroyed the later will, he believed he was annulling the only deed which regulated his succession. The pursuer also averred that the testator had stated that he was leaving no will, and that his property would devolve upon the pursuer or her son. The Court allowed a proof before answer.

Ferguson v Russell's Trustees, 1919 S.C. 80; 56 S.L.R. 57; 1918, 2 S.L.T. 279.

(363)

Letter cancelling recent will and confirming prior will.

A testator left two wills, one dated twelve years after the other. In the former he made his brother his universal legatary, and in the latter he made no mention of him at all. In his repositories there was also found an undated holograph letter addressed to his brother, who survived him, in which he mentioned the first will, and also said that "you may perhaps find another drawn as if I happened to outlive you—you can destroy it." Held that the effect of this letter was to cancel the later will and confirm the earlier one.

Blackwood, &c., 1875, 12 S.L.R. 384.

(364)

Conditio si testator sine liberis decesserit—Whether earlier will restored by implied revocation.

Elder's Trustees v Elder, 1895, 22 R. 505; 32 S.L.R. 365; 2 S.L.T. 579, No. 332, *infra*.

Nicolson v Nicolson's Tutrix, 1922 S.C. 649; 59 S.L.R. 479; 1922 S.L.T. 473, No. 383, *infra*.

(4) EFFECT OF CONFIRMATION OR RE-EXECUTION OF TESTAMENTARY WRITINGS.

(365)

Revoked general settlement set up by codicil—Implied revocation of subsequent general settlement—Whether codicil to earlier general settlement set up.

In the repositories of a person deceased there were found the following writings of a testamentary character, viz.:—(1) Trust disposition and settlement dated 21st March, 1879, containing, *inter alia*, a clause revoking all former testamentary writings, and omitting to provide expressly for the income of the heritable estate in an event which happened; (2) codicil referring to the foregoing deed, written on a separate piece of paper, and dated 3rd May, 1879; (3) trust disposition and settlement, dated 17th May, 1879, *inter alia*, revoking all former testamentary writings and directing as to the disposal of the income of the heritage in the event above referred to; (4) codicil appended to the foregoing, dated 22nd May, 1879; (5) codicil dated 30th June, 1881, and written on the same paper as the trust disposition of 21st March, 1879. This codicil bore that "I, the before designed" testator, "having reconsidered the foregoing trust disposition and deed of settlement, have re-

solved to make the following alterations and additions thereon," then followed certain alterations and additions on the trust disposition of 21st March, 1879; the codicil then concluded "and with these alterations and additions, I hereby homologate and approve of said trust disposition and deed of settlement in all other respects." Held that the effect of the codicil of 30th June, 1881, was to revive the trust disposition and settlement of 21st March, 1879, but not the codicil of 3rd May, 1879; and that the trust disposition of 17th May, 1879, and the codicil of 22nd May, 1879, were revoked absolutely.

Mellis v Mellis's Trustee, 1898, 25 R. 720; 35 S.L.R. 552; 5 S.L.T. 373.

(366)

Codicil confirming settlement except in so far as altered—Revocation of intermediate codicil.

A testatrix executed a trust disposition and settlement, which contained a revocation of all former testamentary writings and a reservation of a power of alteration or revocation by any writing however informally executed. Thereafter, on a separate sheet of paper, she executed a codicil making an important alteration on the settlement. A year later she executed a second codicil, which was written on the settlement, and bore to be a "codicil to the foregoing trust disposition and settlement." Its only provisions were with regard to certain small pecuniary legacies; and it concluded, "except in so far as hereby altered, I confirm my said trust disposition and settlement in all respects, and provide that it and this codicil shall be read and construed together as forming one document." Held, in the circumstances, that the confirmation of the trust disposition and settlement contained in the second codicil did not have the effect of revoking the provisions of the first codicil.

Scott's Trustees v Duke, 1916 S.C. 732; 53 S.L.R. 551; 1916, 1 S.L.T. 409.

(367)

Codicil confirming will and first codicil, but omitting mention of second codicil—Effect upon second codicil—Intention of testator.

A testatrix left a trust disposition and settlement and three codicils. The settlement disposed of the residue of her estate. The first codicil contained bequests of certain legacies. The second codicil contained bequests of additional legacies and further directions with regard to the vesting of the residue of the estate, and nominated an additional trustee; it also contained a clause confirming the settlement and the first codicil. The signature to the second codicil was almost illegible; and subsequently a third codicil was prepared and was executed notariaily, which repeated the provisions of the second codicil with the omission of the nomination of the additional trustee, and repeated also the clause confirming the settlement and the first codicil, but made

no mention of the (second codicil. A question having arisen as to the effect of this deed upon the second codicil, circumstances in which **held** that the omission of all mention of the second codicil from the clause in the third codicil confirming the settlement and the first codicil had not the effect of revoking the second codicil.

Stewart v MacLaren, 1920 S.C. (H.L.) 148; 57 S.L.R. 531; 1920, 2 S.L.T. 134.

(368)

Intention to restore revoked legacy.

A testator died leaving a trust disposition and settlement dated 9th December, 1898, by which he bequeathed a legacy of £5000 to Dr. B. By a codicil dated 9th September, 1901, he revoked that legacy, and bequeathed the sum of £5000 to a cousin. Both of these documents remained in the custody of the testator's agents. By a holograph codicil dated 11th November, 1907, which was found along with a number of other holograph codicils in the testator's repositories, he bequeathed the sum of £2000 to Dr. B, and provided—"This is in addition to any legacy mentioned in my Will and Codicils." There were no other bequests to Dr. B mentioned in his testamentary writings. Dr. B and the cousin both survived the testator. **Held** that the reference in the codicil of 11th November, 1907, to "any legacy mentioned" in the testator's will and codicils, did not have the effect of restoring the revoked bequest of £5000 to Dr. B.

Lothian's Trustees v Back, 1918 S.C. 401; 55 S.L.R. 410; 1918, 1 S.L.T. 306.

(369)

Implied revocation of codicil—Restoration of original bequest.

A testator died leaving a settlement, dated 8th February, 1879, by the eighth purpose of which he bequeathed £18,000 to his nephew. By his eighth codicil, dated 17th November, 1879, he reduced this legacy to £16,000. A twelfth codicil, dated 5th February, 1880, provided—"In addition to the legacy or legacies left to my nephew . . . in the eighth purpose of my trust disposition and settlement, which was executed by me in February last, I hereby leave him two thousand pounds stg. if my estate can afford it." In a question between the nephew and the residuary legatees, **held** that the twelfth codicil, in referring to the eighth purpose of the original deed, had restored the bequest there given to its original amount, and had given £2000 in addition thereto.

Best v University of Edinburgh, 1880, 8 R. 66; 18 S.L.R. 45.

(370)

Re-execution of prior will—Effect on validity of intervening codicil—Competency of extrinsic evidence.

A testatrix by her will, dated 13th January, 1904, inter alia directed her trustees to pay the income of £5000 to her daughter, and on her daughter's death to pay £500

thereof to a grand-daughter, "to pay a further sum of £1500 thereof in the manner to be afterwards directed by me in any writing or writings to be hereafter executed by me," and to pay the remainder, £3000, to certain grandchildren. The will contained a clause revoking "all previous testamentary writings." The testatrix left no writing dated after 13th January, 1904, dealing with the sum of £1500, but there was found in her repositories after her death a holograph document dated 21st December, 1903, by which she bequeathed the £1500 to certain beneficiaries. The will of 13th January, 1904, was in its main provisions the same as a previous will executed by her on 16th December, 1903, but contained certain alterations, one of them being the provision with regard to the sum of £1500, which was not contained in the previous will. Circumstances in which **held** (1) that the will of 13th January was not a mere re-execution of the will of 16th December; (2) that extrinsic evidence (consisting chiefly of correspondence between the testatrix and her law agents) was not competent for the purpose of establishing that she intended, notwithstanding the clause of revocation in the will of later date, that the document of 21st December should form part of her testamentary writings; and accordingly (3) that the document of 21st December, having been revoked by the will of 13th January, was inoperative as a testamentary writing.

Hannay's Trustees v Keith, 1913 S.C. 482; 50 S.L.R. 386; 1913, 1 S.L.T. 95.

(371)

Revocation of codicil to prior universal settlement.

A lady left (1) a trust disposition and settlement, partly signed by her and also executed notarially of date 8th March; (2) a codicil executed notarially on 14th March; and (3) a trust disposition and settlement executed on 9th April in the ordinary way, all in the year 1890. (1) and (3) were both universal settlements, and were practically identical. There was no express revocation of prior settlements in (3). The codicil bequeathed a legacy to a person to whom a legacy was bequeathed in the first trust disposition, and again in identical terms in the second trust disposition, the codicil bearing that its provision was "in addition to the provisions in my trust disposition and settlement in favour of the" legatee. In a special case brought to determine whether the codicil was or was not recalled by the second trust disposition, it was stated that the first trust disposition of the 8th of March was executed notarially, because from bodily weakness the testator had not been able to complete the execution of it in her own hand; that her man of business had explained to her that, if she recovered strength, "it might be better to have the deed re-executed and signed by herself"; that accordingly, she having recovered, it was so "re-extended and re-executed," this deed being the trust disposition of 9th April; and that the notary who

prepared and executed the codicil was not the same person who prepared the two trust dispositions and took charge of their execution. **Held** that the codicil was not recalled, the trust disposition of 9th April being merely a re-attestation of the will of 8th March.

Dalglish's Trustees v Crum, 1891, 19 R. 170; 29 S.L.R. 149.

(5) REVOKING DEED INEFFECTUAL.

(372) Disposition of heritage—Subsequent ineffectual disposition of same heritage.

In 1866 a married woman disposed her whole heritable and moveable property to herself and her husband and the survivor, whom failing to trustees for behoof of her daughters—reserving power to herself to alter or revoke with consent of her husband. In 1867 the lady executed, with consent of her husband, a trust deed “to regulate the management and distribution” of her estate after her death, in which she conveyed to the trustees her whole heritable and moveable estates for behoof of her husband in liferent, and four of her eight daughters in fee, subject to annuities of £100 in favour of each of her other daughters and her son on the death of his wife, reserving full power to herself alone to alter or revoke the deed or sell the property. There was no express clause of revocation of the previous deed. The second deed was ineffectual as a conveyance of heritage in consequence of the omission of the word “dispone.” In an action brought by the son, as his mother's heir at law, for declarator that the first deed was revoked by the second deed, **held** that, apart from the inconsistent conveyance of heritage in the second deed, which was ineffectual, there was no implied revocation of the conveyance of heritage in the first deed, and that to that extent the first deed was effectual.

Kirkpatrick's Trustees v Kirkpatrick, 1874, 1 R. (H.L.) 37; L.R., 2 H.L. Sc. 397; 11 S.L.R. 717.

(373) Erroneous belief that testamentary writing defective—Second writing invalid.

A Scottish testator duly executed a codicil to his will, and sent it to his London solicitor, who, under the erroneous impression that it was not completed according to the solemnities of Scots law, docquetted it as “Not used—incorrectly signed,” and laid it aside, at the same time informing his client of the supposed invalidity, and sending him a second codicil in precisely the same terms, with minute directions for execution. The testator received and executed this second copy of the codicil, and returned it to his solicitor, but the execution was invalid. **Held** that the second codicil, being invalid, could have no effect in revoking the first, and that the attempt to execute it afforded no indication of an intention to do so.

Stirling Stuart v Stirling Crawford's Trustees, 1885, 12 R. 610; 22 S.L.R. 391.

(374) Residuary bequest in will — Ineffectual residuary bequest in codicil — Residuary legatee under codicil predeceasing date of vesting.

A testator in his settlement gave the life-rent of his estates to his widow, and appointed her his residuary legatee. In a codicil executed some years after he expressly revoked certain legacies and confirmed “the bequests,” &c., “to my half-brothers James and Archibald, with the addition that if the said James shall survive myself and my spouse he shall be considered my residuary legatee,” and “he shall pay to his brother Archibald,” &c.; and “I further authorise my wife Helen, if she survive me, to alienate by gift, or bequeath by will, any portion or portions of my personal or moveable property of which she is to enjoy the use or income, not exceeding in all £3000 sterling.” James survived the testator, but predeceased the widow. In a question between the widow and other beneficiaries on the one part, and one of the testator's next of kin on the other, **held** that the residuary bequest in favour of the widow took effect in so far as the residuary bequests in the codicil were not effectual, and that there was no intestacy.

Ogilvie's Trustees, 1870, 8 M. 427; 42 J. 204; 7 S.L.R. 253.

(375) Holograph paper containing a number of legacies — Subsequent general conveyance — Gift of residue void.

In 1882 A wrote to a friend B, “I mean to write out a kind of will or assignation and I would sign it, and I would give you the names of the parties I have in view. . . . I want this to be a separate thing from my general will.” Two months afterwards he sent B a holograph letter of instructions, naming a number of legacies, amounting to £1150, which he wished to be paid, “these payments to be made by you after my death.” He reserved power to himself to withdraw any part of the £1150, which he at the same time paid over to B. He died in 1892, leaving a trust disposition and settlement dated 20th April, 1891, in which he conveyed his whole estate, heritable and moveable, to trustees for certain purposes, but did not effectually dispose of the residue. The trust disposition did not expressly revoke the letter of instructions, and the £1150 if carried by the trust disposition would have fallen into residue. **Held** that the letter of instructions was not impliedly revoked by the general conveyance to the trustees.

Sutherland's Trustees v Sutherland's Trustee, 1893, 20 R. 925; 30 S.L.R. 809; 1 S.L.T. 139.

(376) Purpose of subsequent deed exhausted.

A husband and wife executed a mutual settlement whereby each disposed of his estate in favour of the survivor. There was no clause revoking previous settlements. The wife survived the husband and died. **Held**

that a deed executed prior to her marriage was effective.

Sim v Sim, (O.H.) 1915, 2 S.L.T. 201.

4. EVACUATION OF SPECIAL DESTINATION BY GENERAL DISPOSITION.

[See XIII. 7, *infra*.]

5. CONDITIO SI TESTATOR SINE LIBERIS DECESSERIT.

(1) GENERALLY.

(377)

Nature of doctrine.

Per Lord Watson—"According to the law of Scotland, the question whether the testament of a parent is revoked by the subsequent birth of a child is one wholly dependent upon the circumstances of the case."

Hughes v Edwardes, 1892, 19 R. (H.L.) 33; [1892] A.C. 583; 29 S.L.R. 911.

(378)

The question whether a testament executed when the testator has no children is revoked by the subsequent birth of a child is one wholly dependent on the circumstances of the case.

Millar's Trustee v Millar, 1893, 20 R. 1040; 30 S.L.R. 865; 1 S.L.T. 172.

(379)

Right to plead.

The right to challenge a will on the ground that a child has been born to the testator subsequent to the date of the will is personal to the child so born, and if the child dies without making a claim, no right to make it passes to his personal representatives.

Smith's Trustees v Grant, (O.H.) 1897, 35 S.L.R. 129; 5 S.L.T. 190.

(380)

Total or partial revocation.

Where a will was revoked by the operation of the *conditio*, held that the revocation was not limited to the provisions of the will disposing of the testator's estate in favour of beneficiaries but extended to the whole will, including the clauses appointing trustees and executors, and tutors and curators to the testator's children.

Knox's Trustees v Knox, 1907 S.C. 1123; 44 S.L.R. 838; 15 S.L.T. 282.

(381)

Total or partial restoration.

Held that although a will which has become inoperative owing to the subsequent birth of a child may be validated in toto by proof of circumstances showing the testator's intention that it should receive effect notwithstanding the birth, it cannot be validated in part in any circumstances.

Crow v Cathro, 1903, 5 F. 950; 40 S.L.R. 687; 11 S.L.T. 143.

(382)

Revival of earlier testamentary writings.

While the law presumes that a will which makes no provision for children *nascituri* is revoked on the subsequent birth of a child, there is no presumption that a prior will which has been expressly revoked by the later will is restored, although it contains provisions for children *nascituri*.

Per Lord McLaren—"I should be disposed to hold that whenever a last will is cut down by the operation of the rule or presumption that we are now considering, all previous testamentary settlements must fall along with it except such as are obligatory and matter of contract."

Elder's Trustees v Elder, 1895, 22 R. 505; 32 S.L.R. 365; 2 S.L.T. 579.

(383)

A testator died on 16th February, 1922, survived by a widow and by two daughters, who were born on 23rd January, 1915, and 6th April, 1918, respectively. After the birth of the elder daughter, but before the birth of the younger daughter, he executed two testamentary writings. The first was a trust disposition and settlement, dated 13th February, 1917, which contained provisions in favour of children *nascituri*. The second was a holograph settlement, dated 31st July, 1917, which was universal in its terms, but contained no express revocation of earlier testamentary writings. By it he bequeathed his whole estate to his widow absolutely. Held (1) that, although the elder daughter was alive at its date, the second deed was revoked by the subsequent birth of the younger daughter; (2) that the deceased's succession fell to be regulated by the first deed, which provided for children *nascituri*, in respect that the revocation of it by the second deed was merely an implied revocation, and had been rendered ineffective by the revocation of that deed.

Nicolson v Nicolson's Tutor, 1922 S.C. 649; 59 S.L.R. 479; 1922 S.L.T. 473.

(2) APPLICATION OF CONDITIO.

(384)

Whether will provides for children *nascituri*—Whether marriage contract to be read with will.

A lady by antenuptial contract settled certain specific funds on any children who might be born of the marriage, reserving to herself a power of bequeathing the trust estate by will in the event of there being no child of the marriage who should attain twenty-one years of age (or, if a daughter, should marry). Ten days after the marriage she executed a settlement "pursuant to the power reserved" in the marriage contract, bequeathing the residue of her property equally between her husband and sister. Two years after the marriage she succeeded to certain heritable estate from a brother. Shortly thereafter she gave birth to a child, one month after whose birth she died. The legatees contended that the marriage con-

tract and the will were to be read together as one settlement, and that as express provision had been made for children of the marriage the condition *si sine liberis testator decesserit* did not apply to the will. **Held** that the will was subject to the condition *si testator sine liberis decesserit*.

Dobie's Trustee v Pritchard, 1887, 15 R. 2; 25 S.L.R. 6.

(385)

Lapse of time subsequent to birth of child—Testator surviving for a period of years.

A testator died in October, 1908, leaving a trust disposition and settlement, dated 12th December, 1896, whereby he conveyed his whole estate to trustees, with directions to convey the whole moveable estate to his wife, and to pay her the rents of two heritable properties (the only heritage belonging to him at the date of the will or his death), and on her death to convey them, the one to his brother and the other to his sister. The settlement made no provision in favour of children. There was no clause disposing of residue. The settlement was left in the hands of the testator's law agent for custody, and remained there until the testator's death. At the date of the settlement the testator (who had been married in 1889) had no children, but subsequently, in November, 1898, a daughter was born, who survived her father. **Held** that the trust disposition and settlement had been revoked by the birth of the daughter. **Opinions** that mere lapse of time is not sufficient to overcome the presumption that a will is revoked by the subsequent birth of a child to the testator.

Milligan's Judicial Factor v Milligan, 1910 S.C. 58; 47 S.L.R. 75; 1909, 2 S.L.T. 338.

(386)

A, a few days before his marriage, executed a will whereby he left the residue of his estate to his wife. Two years after his marriage, on the narrative that he had made no marriage provision for his wife, and in order to make such provision, A assigned certain policies of insurance to his wife. A child was born three years after the marriage, and five years after the birth of the child A died. **Held** that the *conditio si testator sine liberis decesserit* applied, and that the will became inoperative on the birth of the child.

Rankin v Rankin's Tutor, 1902, 4 F. 979; 39 S.L.R. 753; 10 S.L.T. 181.

(387)

A testator executed a trust disposition and settlement leaving his whole estate, heritable and moveable, to his younger brother. Four years afterwards he married after executing an antenuptial marriage contract, in which, *inter alia*, he disposed a house to himself and his wife "in conjunct fee and liferent for her liferent use alienarily, and to his heirs and assignees whomsoever in fee." Three years afterwards a son was

born, and two years later the testator died. **Held** that the presumption that the will had been revoked on the birth of a child had not been displaced; and, accordingly, that the fee of the house belonged to the son as heir at law of his father.

Rankine v Rankine's Trustees, 1904, 6 F. 581; 41 S.L.R. 479; 11 S.L.T. 813.

(388)

A testator who was forty years of age and married, but had no family, executed a will whereby he left half of his estate to his wife and authorised his executors to divide the residue as they might think fit. The testator died four years later. Two children were born to him subsequent to the date of the will, and he survived the birth of the elder child by two years, and that of the younger child by four months. **Held** that the will was superseded by the operation of the *conditio si sine liberis*.

A's Executors v B, (O.H.) 1874, 11 S.L.R. 259.

(389)

Testator surviving fourteen months after birth of child—Will in favour of testator's wife.

A, sixteen months after his marriage, executed a will, by which he left his whole estate to his wife. Five years later a child was born of the marriage, and fourteen months afterwards A died. **Held** that the *conditio si testator sine liberis decesserit* applied, and that the will became inoperative on the birth of the child.

M'Kie's Tutor v M'Kie, 1897, 24 R. 526; 34 S.L.R. 399; 4 S.L.T. 308.

(390)

Children in life at date of will—Will making no provision for children nascituri.

The presumption is that a settlement which makes no provision for children nascituri is revoked on the birth of a child to the testator after the date of the settlement, although he had children at its date.

Elder's Trustees v Elder, 1894, 21 R. 704; 31 S.L.R. 594; 1 S.L.T. 592.

(391)

In 1896 a testator executed a universal trust disposition and settlement. At that time his family consisted of two children, and in the will he made provision for his widow and his two children, but made no provisions for children nascituri. In 1897, eighteen months afterwards, a third child was born. The testator died in 1905, at the age of sixty, unexpectedly, after a short illness. At his death the will of 1896 and the draft of a new will were found together in his repositories. **Held** that there was a presumption that the will of 1896 had been revoked by the subsequent birth of a child, and that there was no circumstances in the case sufficient to rebut that presumption.

Knox's Trustees v Knox, 1907 S.C. 1123; 44 S.L.R. 838; 15 S.L.T. 282.

(392)

Exclusion of conditio.

Circumstances in which it was held that the application of the *conditio si testator sine liberis decesserit* had been displaced.

Stuart-Gordon v Stuart-Gordon, 1899, 1 F. 1005; 36 S.L.R. 779; 7 S.L.T. 79.

(393)

———**Bulk of testator's estate settled by marriage contract—Testator surviving for four years after date of will.**

Circumstances in which it was held that a testament had not been revoked by the subsequent birth of a child.

Millar's Trustee v Millar, 1893, 20 R. 1040; 30 S.L.R. 865; 1 S.L.T. 172.

(394)

———**Knowledge of wife's pregnancy on part of testator—Will not general disposition.**

Held that the *conditio si testator sine liberis decesserit* did not apply to a will, in respect (1) that it was executed by the testator in the knowledge that his wife was pregnant; and (2) that it was not a general disposition disposing of the *universitas* of his estate.

Adamson's Trustees v Adamson's Executors, 1891, 18 R. 1133; 28 S.L.R. 869.

(395)

Declarations of intention.

Held that proof of declarations of intention made by the testator is not competent either to rebut or to fortify the presumption which arises from the birth of a child subsequent to the date of his father's will.

Smith's Trustees v Grant, (O.H.) 1897, 35 S.L.R. 129; 5 S.L.T. 190.

(396)

Restoration of will subsequent to birth of child—Pencil alterations on will subsequent to birth of child.

A solicitor, on 5th February, 1884, made a holograph will in favour of his parents should they survive him, and, failing them, in favour of his nephew. A year afterwards he married, executing a marriage contract in which he settled part of his estate upon his wife and children. He died in 1889, leaving a widow and children. After his death the will was found in his repositories altered in pencil in favour of his wife and daughter. The alterations were in his handwriting, but were neither initialed nor signed, and had no date attached to them. Held (1) that the will as it originally stood became inoperative by reason of the *conditio si testator sine liberis decesserit*; and (2) that the pencil alterations were to be regarded merely as converting the will into a draft for another will to be afterwards made.

Munro's Executors v Munro, 1890, 18 R. 122; 28 S.L.R. 104.

VIII. REDUCTION OF TESTAMENTARY WRITINGS.

1. TITLE TO SUE.

[See TITLE TO SUE AND TO DEFEND I. 2.]

2. GROUNDS OF REDUCTION.

[See ERROR III. 2; FRAUD I. 3.]

IX. CONSTRUCTION OF TESTAMENTARY WRITINGS.

1. EFFECT OF EXTRINSIC EVIDENCE.

[See X. 5, *infra*.]

2. PERIOD FROM WHICH A WILL SPEAKS.

(397)

Persons whom testatrix "may appoint by any writing under her hand"—Whether previously executed writing included.

A lady by antenuptial contract conveyed her whole estate to trustees directing them to hold the estate for herself in life and for such person or persons in fee "as she may appoint by any writing under her hand" and failing such appointment for behoof of her nearest heirs in *mobilibus* whomsoever. Held that a universal settlement which the lady had executed some years before the date of her marriage contract, and which was found in her repositories after her death uncanceled, was not an appointment within the meaning of her marriage contract, and that her heirs in *mobilibus* as legatees under the marriage contract had right to her entire estate.

Bertram's Trustees v Matheson's Trustee, 1888, 15 R. 572; 25 S.L.R. 385.

(398)

Legacies testator "may" leave by writing under his hand.

On the death of A in 1906 there were found in his repositories two universal trust dispositions and settlements, one dated in 1860 and the other in 1897. By the deed of 1897 the trustees were directed to pay any legacies "I may leave . . . by any writing under my hand," and to pay the residue of his estate in the manner "to be directed or appointed by any writing or writings under my hand." Held that by the words "any writing under my hand" in the deed of 1897, the testator meant future writings only, and that they did not apply to the deed of 1860.

Rutherford's Trustees v Dickie, 1907 S.C. 1280; 44 S.L.R. 960; 15 S.L.T. 296.

(399)

"Family"—Children predeceasing settlement.

Circumstances where held that the word "family" used in a bequest in a trust

settlement included children dead before the execution of the settlement.

Macdonald's Trustees v Macdonald, (O.H.) 1900, 8 S.L.T. 226.

Conditio si sine liberis decesserit—Parent not instituted—Parent dead at date of will—Conditio not applicable to surviving issue.
[See XIV. 1, *infra*.]

(400)

Exercise of power of disposal by general settlement — Power conferred subsequent to date of settlement.

M'Tavish's Trustees v Ogston's Executors, 1903, 5 F. 641; 40 S.L.R. 458; 10 S.L.T. 739, No. 1280, *infra*.

3. TESTAMENTARY WRITINGS CONSTRUED TOGETHER.

(1) SEVERAL WILLS.

[See also VII. 3 (2), *supra*.]

(401)

Holograph will following on formal will.

A testatrix left two testamentary deeds. In the first she nominated A B and C D trustees, and also appointed them her executors, and ordained them, failing a writing under her hand, after payment of debts, to divide the residue "among my next of kin who would have been entitled to succeed to my moveable estate had I died intestate." In the second deed, which was addressed to "my executrix A B, also C D," she left certain legacies, and bequeathed the residue "to my next of kin." The first deed was prepared by her man of business, the second was holograph of herself. Both were found in one envelope in the hands of her man of business at her death. **Held** that the later deed was not intended to supersede the former, but that the two deeds must be read together, and that the bequest of residue was to be construed as a bequest to her heirs in mobilibus.

Tronson v Tronson, 1884, 12 R. 155; 22 S.L.R. 125.

(402)

Holograph testament containing residuary bequest—Subsequent holograph writing containing clause "balance left for further disposal."

A testator left a holograph testament disposing of his whole estate and containing a residuary bequest. He also left a holograph writing of subsequent date containing bequests and annuities in favour of nearly the same parties as were mentioned in the previous writing. It concluded "balance left for further disposal," but no other deed was discovered. Both writings were found in the testator's travelling bag. **Held** that the second writing did not revoke the first writing, but that both must be read as one writing.

Low's Executors, 1873, 11 M. 744; 45 J. 452; 10 S.L.R. 505.

(403)

Conveyance of whole estate to executors—Subsequent conveyance of moveable estate for different purposes—Abatement of legacies.

A person by disposition and settlement conveyed his whole property, heritable and moveable, to executors for payment of his debts and of a number of legacies amounting to £1000, and for payment of the residue to J H. The testator subsequently executed a last will and testament conveying his moveable estate to different executors for payment of debts and of legacies to the amount of £600. The residue was directed to be paid to J H. At the testator's death his heritable estate proved insufficient to meet the legacies left by the first deed, but the heritable and moveable property together were more than sufficient to pay all the legacies under both deeds. **Held** that the legacies bequeathed by the first deed were not chargeable on the moveable estate, but only on the heritage, and must suffer a proportionate abatement.

Hood's Executors, 1869, 7 M. 774; 41 J. 402; 6 S.L.R. 503.

(2) WILL AND CODICIL.

(a) Generally.

(404)

Condition adjoined to legacy — Whether applicable to legacy payable along therewith — Direction to trustees to pay on event happening which did not take place.

By codicil to his will a testator left a legacy of £500, "which is to be handed over along with or at such time as legacies mentioned in clause D of this will are paid or handed over." The legacies in clause D were contingent on the testator surviving his mother, an event which did not occur. **Held** that the terms in which the direction was expressed did not import a condition into the legacy, and that the legatee was therefore entitled to payment.

Grant v Cowe, 1887, 15 R. 81; 25 S.L.R. 80.

(405)

Condition adjoined to bequest in will — Whether applicable to substituted bequest in codicil.

A testator by his will left the residue of his estate to his next of kin, the issue of any next of kin predeceasing the testator to take their parents' share. One of his brothers predeceased the date of the will, leaving three children, one of whom was a son R. By a codicil the testator provided that if R should succeed to the estate of G his share of residue should be one-half of what it would otherwise have been. By a second codicil the testator provided that R should be one of his residuary legatees, and this bequest was held to supersede the bequest of residue in favour of R contained in the will. **Held** the residuary bequest to R contained in the second codicil was not subject to the condition that R's share

should be reduced to one-half if he succeeded to the estate of G.

Coxe v Cox, 1874, 2 R. 41; 12 S.L.R. 15.

(406)

Direction as to payment of legacies in settlement—Legacies in codicil.

A testatrix by a codicil left certain legacies to the minor children of a person who was domiciled in New Zealand. By her settlement she had directed that in the event of any of her legatees thereunder being under twenty-one years of age her trustees should be sufficiently discharged by paying the legacy to the parents of such minor legatees. **Held** that this direction applied to legacies under a codicil as well as to legacies under the settlement.

Lumsden's Trustees v Lumsden, (O.H.) 1921, 1 S.L.T. 155.

(407)

Direction in settlement that codicils be taken as "part and parcel of these presents" — Provision in codicil that foregoing bequests be paid free of Government duty—Whether applicable to later codicils.

A testator, by trust disposition and settlement dated in 1865, directed his trustees to make payment of a number of legacies, and to divide the residue of his estate among certain persons named, and further directed his trustees, *inter alia*, "to pay out of my said estate all such legacies gifts or provisions and implement all such instructions as shall be contained in any codicil or any memorandum or writing by me clearly expressive of my will though not formally executed declaring that the same whether formal or informal shall be held and taken to be part and parcel of these presents." By two codicils, dated in 1894 and in 1897 respectively, the testator made certain further bequests. The second codicil contained this provision—"I provide and declare that the foregoing bequests and also those contained in the foregoing trust disposition and settlement and codicil are to be satisfied and paid free of all Government duty." Thereafter by two codicils, dated in 1898, the testator made certain further bequests. Neither of these codicils contained any reference to Government duty. **Held** that the provision in the second codicil as to freedom from Government duty applied only to bequests already made, and did not apply to the bequests in the third and fourth codicils.

Brown's Trustees v Gow, 1902, 5 F. 127; 40 S.L.R. 62; 10 S.L.T. 379.

(408)

Legacy of corporeal moveables in will free of duty — Codicil bequeathing subjects to other persons—Clause confirming will subject to alterations.

A testator in her settlement directed her trustees "to pay over and deliver" certain legacies bequeathed by her "without any deduction or abatement whatever for legacy or succession duty, or otherwise." Among the legacies was one of all her silver-plate,

furniture, &c. This legacy she recalled by a codicil, in which she bequeathed these articles to other legatees. The codicil contained this clause—"And I hereby declare that these presents shall in no way infer a revocation of my said deed of settlement before written, but that the same shall stand in full force, with this alteration thereon." **Held** that the clause of relief of legacy duty applied to the altered bequest contained in the codicil.

M'Alpine, &c., 1883, 10 R. 837; 20 S.L.R. 551.

(409)

Will declaring provision to be in satisfaction of legitim—Declaration applicable to provision made by codicil.

Wingate v Wingate's Trustees, 1921 S.C. 857; 58 S.L.R. 604; 1921, 2 S.L.T. 163, No. 1505, *infra*.

(410)

Gift of liferent to persons named and survivors — Revocation of bequest to one liferenter—Revoked share given to another person — Right of new legatee to share under survivorship clause.

In her trust settlement a testator appointed her trustees to pay over the yearly interest of the residue of her estate to her three brothers, Charles, George, and Stuart, equally among them, and to the survivors and survivor of them, and at the death of the survivor to divide the residue among three of her nieces. In a codicil, upon the narrative that George, one of the brothers, had died since the date of the settlement, she provided:—"I hereby recall the bequest made by me therein to George of a share of the residue of my estate, being one-third thereof, and ordain my trustees to pay over the said share which would have fallen to him had he not so predeceased me to his widow." The testatrix died in 1890, and her brother Stuart died in 1893. In an action raised by George's widow against the trustees, **held** (assuming that by share of residue the testator meant share of income of residue) that the pursuer was entitled not only to the third share of income, but also to one-half of Stuart's share to which under the settlement her husband would have been entitled.

Burnett v Burnett's Trustees, 1894, 21 R. 1040; 31 S.L.R. 810; 2 S.L.T. 148.

(411)

Residuary bequest in will—Nomination of additional residuary legatees in codicil.

By his will a testator nominated his next of kin to be his residuary legatees. At the date of the will his next of kin were three brothers and a sister. By a codicil the testator provided that R, his nephew, "shall be one of my residuary legatees along with" the testator's wife and three nieces. He further left legacies to his brother, James, and his sister, who were the sole survivors of those who were his next of kin as at the date of the will. James and the sister survived the testator and were his next of kin at his death. **Held** that the nomination of residuary legatees in the codicil was

a nomination of additional residuary legatees, and did not revoke the residuary bequest in the will, and that the residue fell to be equally divided among the testator's sister and brother, James, and the five persons mentioned in the codicil.

Coxe v Cox, 1874, 2 R. 41; 12 S.L.R. 15.

(412)

Revocation of bequest of "share" and gift of "share" of former legatee to another person—Right of new legatee to take jure accrescendi.

M'Culloch's Trustees, 1892, 19 R. 777; 29 S.L.R. 645, No. 1141, *infra*.

(413)

Residue left to "beneficiaries already named"—Alteration of beneficiaries by codicil.

A testatrix by her will bequeathed certain legacies, and directed her trustees to divide the residue of her estate among "the beneficiaries already named." By a codicil one of the legacies was revoked, two legacies to new legatees were added, and the will was otherwise confirmed. In a special case, **held** that the will and codicil must be read together, and that in the division of the residue the person whose legacy had been revoked fell to be excluded, and the two new legatees included.

Taylor's Trustee v Robinson, 1911 S.C. 334; 48 S.L.R. 270; 1910, 2 S.L.T. 415.

(414)

Codicil executed for a specific purpose.

Where a codicil to a trust disposition and settlement had been executed for a specific and declared purpose unconnected with the general destination of the residue set forth in the trust disposition, **held** that the codicil could not be taken as modifying the construction of the clause disposing of the fee of the residue.

Cordiner v Cordiner's Factor, 1910, 47 S.L.R. 260; 1910, 1 S.L.T. 39.

(415)

Specialia derogant generalibus.

A wife who had paid a sum to her marriage contract trustees for the purpose of paying the income to the spouses and the survivor, and the fee to any children who should survive the longest liver of the spouses, whom failing, to her own assignees, executors, or next of kin, died leaving a will bequeathing her "whole means and estate" to one of three children of the marriage. All the children predeceased the husband. A holograph memorandum was appended to her will and signed by her in these terms—"The property will be found in possession of" her agent. She then enumerated certain investments, being her whole property except the marriage contract fund. **Held** that there was nothing to indicate a testamentary intention to exclude

the fund from the universitas bequeathed to her child.

Montgomery's Trustees v Montgomery, 1895, 22 R. 824; 32 S.L.R. 628; 3 S.L.T. 62.

(416)

Legacy reduced in amount—Whether life-ferent converted into fee.

In a mutual trust settlement two spouses directed the trustees, *inter alia*, to apply four shares of the trust estate for the use of the testators' daughter, J, in life-ferent till she attained thirty-five years of age or was married, and on her attaining said age without being married for payment of the principal to her, or in the event of her previous marriage for settlement of the principal on herself in life-ferent and her children in fee, whom failing, the same to form part of the estate for division. By a codicil the surviving spouse, in exercise of a power of alteration, recalled this direction, and "in lieu and in place of the provision or share of the estate thereby declared to be paid" to her daughter J, she directed, appointed, and declared "that only two and a half shares shall be paid to her." J was married before she was thirty-five years of age. **Held** that the codicil only changed the amount of the shares which were to be applied for behoof of J, and that J's right was a right of life-ferent only.

Chalmers' Judicial Factor v Chalmers, 1903, 5 F. 1154; 40 S.L.R. 814; 11 S.L.T. 236.

(417)

Revocation of destination over—Effect on vesting.

A share of residue was left to A subject to a destination over which suspended vesting. By codicil the testator revoked the destination over. **Held** that A's interest vested a morte testatoris.

Johnston's Trustees v Johnston, 1891, 18 R. 823; 28 S.L.R. 634.

(418)

Bequest to children of A with postponed vesting—Bequest in codicil to sons of A nominatim—Term of payment not specified.

By the mutual trust disposition of a husband and wife the residue of the husband's estate was disposed of in favour of his sister's children in such terms as to postpone vesting until the death of the wife who had the life-ferent of the estate and who was the survivor of the spouses. In virtue of a reserved power to alter without prejudice to the widow's life-ferent, the husband, by a codicil, directed five bank shares to be transferred to the five sons of the same sister nominatim, one to each. **Held** that the legacy in the codicil vested a morte testatoris.

Sanderson v Wardrop, 1873, 1 R. 96; 11 S.L.R. 14.

(419)

Vesting under settlement a morte testatoris—Term of payment altered by codicil—Power to trustees to withhold payment.

By trust disposition and settlement a

testator directed her trustees, *inter alia*, to pay one-third share of the residue of her estates to each of her daughters at the first term occurring six months after her death. There was a destination over to survivors in the event of any of the children predeceasing the period of payment. By a codicil the testator directed her trustees to hold, *inter alia*, the proceeds thereof and also the shares of the residue appointed to the daughters in their own hands, for the benefit and alimentary use of the daughters equally, and to pay the daughters the capital and interest, or only the interest in such manner and in such proportions as to the trustees should seem proper. The provisions were declared to be alimentary. **Held** that as under the trust disposition by itself the provisions to the daughters vested a *morte testatoris*, and as the purpose in question was not revoked by the codicil, the codicil was not to be construed as altering the period of vesting.

Wilkie's Trustees v Wight's Trustees, 1893, 21 R. 199; 31 S.L.R. 135; 1 S.L.T. 335.

(420)

Appointment of tutors and curators to beneficiary by will—Bequest in will revoked—Application of appointment to share taken as heir in *mobilibus* under codicil.

A testator directed her trustees to hold half of the residue of her estate for her nephew A until he attained the age of twenty-five, giving them power, if they should think proper, to make certain advances for his behoof before that date, "but which discretion will lie wholly with my said trustees whom I hereby appoint to be tutors and curators to him until he attain said age." She bequeathed the other half of the residue to B. By a codicil she recalled the bequest to B, adding "in the event of my death before executing a new settlement, such residue will be disposed of among those of (*sic*) my relatives according to their legal rights." A became entitled to part of this share of residue as one of her heirs in *mobilibus*. **Held** that B's share of residue had become intestate succession, and therefore that the powers conferred on the trustees and their appointment as tutors and curators to A did not apply to it.

Opinion that even if the share of residue in question had been testate succession under the codicil, the powers of trustees as tutors and curators did not extend to it.

Johnston v Johnston's Trustees, 1892, 20 R. 46; 30 S.L.R. 97.

(b) Extent of Revocation of Provisions of Will.

(421)

Revocation by codicil of bequest in will.

A testator conveyed his unentailed lands and property, heritable and moveable, to trustees, and directed them, in the third place, to invest and accumulate the whole free rents and proceeds of the trust estate,

and to employ the funds so invested in the purchase of lands for the period of twenty years after his death. In the fifth place, he directed the trustees at the termination of the twenty years to settle the estates conveyed by the trust deed, and the lands purchased by them, in strict entail upon the truster's son and his heirs-male. In a codicil the truster directed that the trustees, "instead of investing the free rents of my unentailed estate in manner before mentioned, shall annually pay over the whole free proceeds of the same to my two daughters, equally between them, while both shall be in life, and to the survivor, and shall continue to do the same as long as both or either of them shall be alive." **Held** that the codicil superseded the fifth purpose of the settlement and that the daughters were entitled to the rents of the unentailed lands during their lives and not only for a period of twenty years after the testator's death.

Marquis of Breadalbane's Trustees v Jamieson, 1873, 11 M. 912; 45 J. 556; 10 S.L.R. 647.

(422)

Direction to divide subject among heirs in *mobilibus*—Original legatee one of the heirs in *mobilibus*.

Held that where a testator recalled by a codicil all provisions made in favour of a particular person, and directed her trustees to dispose of the estate so set free among her relatives "according to their legal rights," the person originally favoured was not thereby prevented from taking a share of the latter bequest as one of the heirs in *mobilibus*.

Johnston's Trustees v Johnston, 1891, 18 R. 823; 28 S.L.R. 634.

(423)

Bequest of business in will—Revocation by codicil.

A testator, in his trust disposition and settlement, directed his trustees to convey the property in which he had carried on business, with the furniture, machinery, and goodwill, to W. Terms of codicil on a consideration of which **held** that the testator had by implication revoked the bequest of the property and business made to W.

Jamieson's Trustees v Jamieson, 1899, 2 F. 258; 37 S.L.R. 194; 7 S.L.T. 279.

(424)

Residuary bequest—Construction—Ejusdem generis.

Terms of a holograph writing disposing of specific articles of jewellery, and other corporeal moveables, and constituting "my daughter J my residuary legatee," which were **held** not to revoke the residuary bequest contained in a prior general trust disposition and settlement, but to carry only corporeal articles *ejusdem generis* with those enumerated in the context.

Gore Booth's Trustee v Gore Booth, 1898, 25 R. 803; 35 S.L.R. 606; 5 S.L.T. 381.

(425)

Holograph writing modifying settlement—Subsequent codicil.

A testatrix, by general disposition and settlement, conveyed to her niece her whole heritable and moveable estate, under burden of debts and legacies, on the condition that her niece should pay any other legacies which the testatrix might think proper to leave by any writing under her hand, clearly indicative of her intention, although not formally executed. She appointed her niece her executrix. By a codicil to this will she revoked the conveyance of her moveable estate, and conveyed the same to other executors, directing them to fulfil any testamentary instructions left for them under her hand, and providing that any surplus of the moveable estate, after meeting debts and bequests, should be paid to her niece, but that any deficiency thereof should form a burden on her heritable estate. By a holograph document, addressed to her niece of date intermediate between the settlement and codicil, she directed that her heritable property should be sold, and that the price thereof, together with any surplus after payment of expenses, should be deposited in bank for behoof of her niece in liferent, and certain others in fee. **Held** that the holograph writing was inconsistent with, and therefore impliedly revoked by the codicil, which was of later date.

Storrar v Smal, 1838, 26 S.L.R. 43.

(426)

Revocation in codicil to English will—Ap-plication to Scots settlement.

A testator, who died possessed of heritable and moveable property in both England and Scotland, executed, in 1870, a trust disposition and settlement in Scottish form, in which he appointed seven trustees, and directed them to entail his Scottish estates on his second son and a series of substitute heirs. Thereafter, in 1877, he executed a "last will and testament" in English form, in which he appointed three of the former trustees his trustees and executors, and conveyed to them his whole English personal and real estate, the latter to be settled on his issue in tail-male. In 1880 he executed a holograph codicil, which commenced—"This is a codicil to the last will and testament of me," and in which he expressly confirmed his last will and testament of 1877, except in so far as he revoked all legacies and rights of succession in favour of the second son named as institute in the Scottish trust deed, "who, being a confirmed drunkard, is unfit to inherit any of my properties in England or Scotland," and to a granddaughter, who took nothing except under the Scottish deed. No mention of the Scottish deed was made in the codicil. **Held** that the terms of the codicil showed that the testator intended it to apply to both deeds—the Scottish as well as the English—and extinguished the interest therein of the persons named.

Bankes v Bankes' Trustees, 1882, 9 R. 1046; 19 S.L.R. 785.

(427)

Partial revocation of destination—Effect.

An heir of entail in possession obtained a judgment declaring that the entail was ineffectual to prevent gratuitous alienation. He died in 1845, leaving (1) a mortis causa settlement whereby he disposed the estates to his brother A in liferent allanarly and the heirs of his body in fee, whom failing to his brother B in liferent allanarly and the heirs of his body in fee, whom failing to the heirs of the body of his deceased sister, whom failing to his sister D and the heirs of her body, whom failing to his "nearest heirs and assignees whomsoever"; and (2) a deed of restriction of subsequent date, whereby he revoked "the said destination and order of succession in so far as regards the persons called and appointed to succeed after my brothers therein named"; declaring it to be his intention "that the destination and order of succession in the said trust disposition and settlement shall not take effect beyond my said brothers and the heirs of their bodies, and that the person or persons further called to the succession shall have no claim to the same, but shall be entirely excluded therefrom, and are hereby excluded accordingly." He reserved a right to name a new series of heirs, and declared that his trust settlement, in so far as not restricted, should remain in full force and effect. After the death of A and B, both of whom survived the truster but left no issue, **held** (1) that the terms of the deed of restriction did not revoke the destination in the trust settlement to the truster's "heirs and assignees whomsoever"; and (2) that B's right as heir whomsoever was not prejudiced by the fact that a liferent allanarly had been conferred upon him by the same deed. **Opinions** that if the deed of restriction had had the effect of revoking the destination to the granter's heirs and assignees whomsoever, the trust settlement failing (in consequence of the death of A and B without issue) to convey the fee, the fee would have passed on the truster's death under the unevacuated destination in the entail to the next heir of investiture, and through him to B and to his disponees.

Mackenzie v Sharpe's Trustees, 1877, 4 R. 641; 14 S.L.R. 405.

(428)

Legacy to B revoked and given to A—B's legacy renewed — Whether A's additional legacy revoked.

A testator, who left £57,000, by his settlement bequeathed to certain nephews, including A and B, legacies of £1000 each. Thereafter he executed a codicil to this effect—"I recall the legacy of £1000 to my nephew B . . . and I give said sum to my nephew A . . . to be paid to him at the same time with the like legacy of £1000 already given to him." Two days later he executed this other codicil—"I . . . renew the legacy of £1000 to my nephew B, to be paid to him as at the time of the original legacy . . ." **Held** that the addi-

tional legacy of £1000 to A had not been revoked.

Wright's Trustees v Wright, 1889, 16 R. 677; 26 S.L.R. 514.

(429)

Legacy to A in will—Conditional institution of A's children—Codicil revoking legacy to A—Legacy to conditional institutes in second codicil.

A lady in her settlement directed her trustee "to invest . . . £200 sterling for behoof of" her brother J L, "and out of the sum so invested to pay" to him £3 per month, and "to divide whatever balance is over of the sum so invested equally among his children, and in the event of his predeceasing," "instead of investing the said £200, to divide the same equally among" his children. A codicil, written by her own hand after her brother's death, bore—"October, 1879.—I hereby cancel and annul the legacy bequeathed to . . . J L, now deceased, but in all other respects hereby ratify and confirm the foregoing settlement." Then followed another codicil, without date, bearing—"I hereby bequeath to G, C, and S L, my late brother's daughters, the sum of £20." Held that the codicils cancelled the contingent legacy in the settlement in favour of J L's children.

Macfarlane, 1885, 12 R. 936; 22 S.L.R. 614.

(c) Effect of Inaccuracy in Codicil.

(430)

Codicil containing incorrect recital of terms of will.

By his will a testator directed his trustees to pay one-half of the residue of his estate to his son, and to hold the other half for his widow in life and his daughter in fee. By a holograph codicil, after erroneously narrating that, "As expressed in my last will and testament that, should my wife survive me she is to be life tenant in whatever means I may be possessed of, and at her death the same to be divided between my son . . . and my daughter . . ." the testator continued, "I wish that to be carried out, but I hereby specially desire, that at the death of my son, should he die without issue, his portion shall pass to my daughter." In a special case held, on a construction of the will and codicil in the light of the circumstances of the case, that the inaccurate recital in the codicil did not have the effect of altering the provisions of the will by increasing the widow's life interest or revoking the gift to the son.

Campbell's Trustees v Kinsey-Morgan's Trustees, 1915 S.C. 298; 52 S.L.R. 289; 1915, 1 S.L.T. 89.

(431)

A testator bequeathed a legacy of £300 to A. There was no other legacy to A in the will. By a subsequent codicil, the testator recalled "the legacy of £200" to A. In an action at the instance of A

against the testamentary trustees for payment of the legacy, held that A's legacy of £300 had been revoked by the codicil.

Stewart v Campbell's Trustees, (O.H.) 1917, 2 S.L.T. 259.

(432)

Residue—Misstatement of share.

A testatrix by her trust settlement bequeathed a half of the residue of her estate subject to a life interest to her daughter. The life interest predeceased the testatrix, who thereupon executed a codicil dealing with the lapsed life interest, but in the codicil she referred to her daughter's share of the residue as one-third instead of one-half. Held, after a proof of circumstances, that the bequest to the daughter of one-half of the residue of the estate was not revoked, the reference in the codicil to the daughter's share as one-third thereof being falsa demonstratio.

Russell's Trustees v Palmer, (O.H.) 1901, 9 S.L.T. 321.

(433)

Revocation—Misdescription of legacy.

An old lady executed a settlement with five codicils, all on one sheet of paper. She disposed of a property she had to a niece, whom she named her executrix and residuary legatee. By the first of the codicils she bequeathed, inter alia, "to Edward Whish, son of my cousin Margaret Whish, wife of Colonel Whish, five hundred pounds." The last codicil bore—"I revoke the legacy of five hundred pounds to my cousin Mrs. Whish" (there being no such legacy), "wife of Colonel Whish, and bequeath to her in place thereof the sum of £400, and I bequeath the £100 to T H," her husband's nephew. Two other papers were found in the testatrix's repositories giving directions to her executrix, and they showed that she knew how much she possessed, and only meant to bequeath that amount, while if legacies were given to Edward Whish, Mrs. Whish, and to T H, the amount bequeathed would exceed by £500 the amount of the executrix estate. A letter of a subsequent date written by the testatrix to Mrs. Whish was produced, in which she stated that Edward Whish was still to be her chief legatee, "but not for so large a sum as I intended," and then went on to bequeath her gold watch to him, and certain jewellery, &c., to other relations. Held that the testatrix's intention was to revoke the legacy of £500 only to the extent of the £100 bequeathed to T H, her husband's nephew.

Ritchie v Whish, 1880, 8 R. 101; 18 S.L.R. 81.

(434)

A testator by his trust disposition and settlement directed his trustees to pay or make over to each of three of his daughters one-fifth share of the residue and remainder of his "means and estate," the said shares to be at the absolute disposal of his said daughters respectively. By codicil he "revoked and altered" his settlement "to this extent, that in place of the absolute power therein given to" his

three daughters, "I restrict that absolute power in each case to one-half of their respective shares of my heritable estate, and in respect of the other half," he gave directions intended to limit the power of the daughters during their lifetime. The testator's moveable estate amounted to £175,000 and his heritable estate to £8000. **Held** that the words "shares of my heritable estate" in the codicil applied to the testator's whole estate, whether heritable or moveable.

Clouston's Trustees v Bulloch, 1889, 16 R. 937; 26 S.L.R. 644.

(435)

Effect of later codicil upon earlier.

By a codicil a testator directed the residue of his estate to be divided among his daughters in equal shares, and declared that the share of one of the daughters should suffer a deduction of £500, which sum was to be paid to one of her children. In a later codicil the testator dealt with this daughter's share, ignoring the deduction, and directing his trustees to hold, apply, or pay the share in question to or for behoof of the daughter and her children or any of them. **Held**, on the terms of the documents, that the bequest of £500 to the daughter's child contained in the earlier codicil was not revoked by the later codicil.

Potter's Trustees v Allan, 1918 S.C. 173; 55 S.L.R. 229; 1918, 1 S.L.T. 72.

(3) WILL AND OTHER TESTAMENTARY DEEDS.

(436)

Effect of marriage contract—Wife sole legatee—Deed (1) making provisions for wife, and (2) disposing of residue on her death.

By will dated 17th February, 1886, a husband bequeathed his whole estate to his wife, and appointed her his sole executrix. By deed of trust and agreement, dated 17th May, 1886, which embodied a postnuptial contract, he conveyed his whole means to trustees, and directed them, *inter alia* (2) to pay to his wife a free annual allowance out of the trust funds for her alimentary use and for her separate maintenance while the spouses lived separately; and (6) failing issue of the marriage to pay the trust funds or the residue thereof upon his own and his wife's deaths to his nearest heirs, executors, and assignees whomsoever. **Held**, on the death of the husband, that the will was not revoked by the trust deed, which did not dispose of the capital of the trust funds, and (2) that the trustees were bound to retain a sum sufficient to provide for payment to the wife of her annual allowance provided by the trust deed.

Park's Trustees v Park, 1890, 27 S.L.R. 528.

(437)

Will not providing for children nascituri—Whether marriage contract to be read with will—*Conditio si sine liberis*.

Dobie's Trustee v Pritchard, 1887, 15 R. 2; 25 S.L.R. 6, No. 384, *supra*.

(438)

Conveyance of testator's whole estate to wife—Wife in right of alimentary liferent under marriage contract—Discharge of alimentary condition.

By antenuptial contract of marriage the husband on his part conveyed his whole means and estate to trustees for payment, to himself during his life, and after his death to his wife, should she survive him, of the free annual income thereof, "for the liferent and alimentary use *allenarly* of them and the survivor of them, declaring that the same shall not be affectable by the debts or deeds of either of them, or the diligence of their creditors." Then followed provisions to the effect that in the event of there being no children of the marriage the fee of the husband's estate should be reconveyed to him, or made over to his heirs and assignees on the death of the wife. The marriage was dissolved, without issue, by the death of the husband, who left a will, by which he bequeathed "all my real and personal estate, including any property over which I have power of appointment, to my dear wife absolutely." **Held** that, on a sound construction of the husband's will, it was not his intention to discharge his estate of the alimentary liferent in his widow's favour, and consequently that the trustee was not entitled to denude of the trust estate.

Elliott's Trustee v Elliott, 1894, 21 R. 975; 31 S.L.R. 850; 2 S.L.T. 164.

(439)

Antenuptial marriage contract on occasion of second marriage providing for division of estate at death — *Inter vivos* disposition of heritage to third wife — Whether marriage contract and disposition formed universal settlement.

Leslie's Trustees v Leslie, 1921 S.C. 940; 58 S.L.R. 592; 1921, 2 S.L.T. 192, No. 1453, *infra*.

(440)

Investments subject to special destinations—Whether part of general settlement.

By his trust disposition a testator left the whole residue of his estate to his children. His estate included various sums invested in bonds with destinations in favour of the testator and his wife or the survivor, which were not revoked by the trust disposition. **Held** that the trust disposition and the destinations in the bonds fell to be read together as constituting one general settlement of the testator's whole estate, and that the testator's children could make no claim to legitimize without forfeiting their testamentary rights.

Farmer's Trustees v Taylor, 1917 S.C. 366; 54 S.L.R. 323; 1917, 1 S.L.T. 166.

(441)

Surrogatum for marriage contract provisions.

A husband contracted to pay his wife, if she survived him, an annuity of £200 sterling, and, on his death, to pay a sum of £2000 to trustees, to secure this obligation.

pro tanto. The husband died, having by will assigned all his means to his wife. These amounted to £1780. This sum the wife assigned to the marriage contract trustees, and a further sum of £220 was paid to them by the husband's brother. The wife accepted interest on the fund during her life. **Held** that her representatives were entitled to receive the £2000, as the wife was entitled to the fee of her husband's estate in terms of his will, and as the sum paid by the brother must be considered as a gift.

Kelso's Trustee v Allison, (O.H.) 1916, 2 S.L.T. 40.

4. CONFLICTING PROVISIONS.

(442)

Dispositive differing from inductive clause.

The inductive clause of a *mortis causa* disposition declared it to be the desire of the granters that a certain tenement should after their decease belong to C, their niece, for her life, and at her decease to her daughters D and E nominatim in fee, but by the dispositive clause the subjects were disposed "to C, D, and E, or the survivors or survivor of them." D predeceased the longest liver of the granters, leaving a daughter; C and E survived the granters. **Held** (1) that the dispositive clause could not be controlled by reference to the inductive; (2) that on the death of the last of the granters the fee vested in equal pro indiviso shares in C and E as the survivors at that date of the three disponees; and (3) that the daughter of D was not entitled under the *conditio si sine liberis* to any share of the subjects conveyed.

Chancellor v Mosman, 1872, 10 M. 995; 44 J. 557; 9 S.L.R. 646.

(443)

Annuity—Declared to be a real burden—Not mentioned in dispositive clause of settlement.

By his trust disposition and settlement, which was a universal settlement, a testator left an annuity to his widow, and declared it to be a real burden on the heritage, but it was not so declared in the dispositive clause of the deed. **Held** that the annuity had not been validly constituted a real burden on the heritage.

Scott v Scott's Trustees, (O.H.) 1898, 6 S.L.T. 119.

(444)

Specialia generalibus derogant.

A testator directed that the funds constituting a succession which had opened to him at the time of his death, but of which he had not up to the time of his death become entitled to the possession, should be paid over to R, whom he nominated his executor, and to whom he "bequeathed, assigned, and conveyed" the same. By another purpose of his will he bequeathed to N the whole stock belonging to him at his death in two railway companies named. The only railway stock he had was part of the succession conveyed to R.

Held that the special conveyance of the stock to N derogated from the general conveyance of the funds constituting the succession bequeathed to R, and that R, as executor of the deceased, was bound to convey the stock to N.

Nixon v Rogerson's Executor, 1882, 20 S.L.R. 10.

5. IMPLICATION.

(445)

Supplying by inference words omitted.

On the same day each of two sisters, X and Y, executed a similar trust settlement, in which each sister directed her trustees to invest four sums of £1000 for behoof of her brothers, A and B, her sister C, and her sister D's children as aftermentioned. With regard to A—(a) To give him and his children liferents of £1000; (b) on the death of the last surviving child, to divide the £1000 among A's grandchildren; and (c) failing grandchildren or their issue, to divide the £1000 among the other three legatees. With regard to B and D's children similar directions were given. With regard to C the direction was also similar, with the exception that the clause giving the grandchildren a fee was omitted. In a special case, **held** that the clause giving a fee to the grandchildren which did not appear in C's case could not be supplied by inference.

Crawford's Trustees v Fleck, 1910 S.C. 998; 47 S.L.R. 755; 1910, 2 S.L.T. 78.

(446)

Object of bequest not named—Bequest "for the love I have for A."

A testatrix left a holograph will which bore—"I, . . . for the love I have for my husband, J.M., bequeath and leave everything which belongs to me, or may belong to me at some future time." Certain specific bequests to individuals named followed. **Held** that this will did not contain a bequest in favour of her husband, J.M.

Murdoch v Brass, 1904, 6 F. 841; 41 S.L.R. 666; 12 S.L.T. 208.

(447)

Supplying prefatory words by implication—Marriage contract.

A testator directed his trustees to hold a share of his residue for his daughter upon the same terms as those contained in her marriage contract. By the marriage contract it was provided that the wife should have the liferent of a settled fund, and "in the third place, upon the death of the" wife, in the event of there being children and of the husband surviving, that the husband should have a liferent, and that the fee should be paid to the children; "and, lastly, in the event of there being no child or children" and of the husband surviving, that he should have a liferent, "and upon the death of the" husband that the fund should revert and belong to the wife's father, whom failing to certain other beneficiaries. There were no children of the marriage, and no provision with regard to the fee was made

for the event, which happened, of the wife being the survivor of the spouses. **Held** that in order to give effect to the intention of the testator it was necessary to imply as introducing the last purpose of the marriage contract the prefatory words of the third purpose "upon the death of the" wife; so that the direction for the distribution of the fee should read as if it were "upon the death of the wife and upon the death of the husband"—that is to say, upon the death of the survivor of the spouses.

Scott's Trustees v Bruce, 1912 S.C. 105; 49 S.L.R. 81; 1911, 2 S.L.T. 426.

(448)

Request by implication—Erroneous recital of legacy.

A testatrix was predeceased by her brother, Archibald Gray, and by his son, also named Archibald Gray. The latter left a son, also named Archibald Gray, who survived the testatrix, and to whom she, by her trust disposition and settlement, bequeathed a legacy of £500 "and that in addition to and over and above the share of the legacy of one thousand pounds sterling hereinafter bequeathed to the children of his deceased father, Archibald Gray." The settlement contained no bequest of £1000 to the children of the legatee's father, the testatrix's nephew, Archibald Gray; but it did contain a legacy of £1000 to the children of the legatee's grandfather, the testatrix's brother, Archibald Gray. **Held** that no right to a legacy of £1000 was conferred by implication on the children of the testatrix's nephew, the general scheme of the settlement being inconsistent with such a bequest, and the erroneous reference to a legacy of that amount to these children being reasonably attributable to confusion in the mind of the testatrix owing to the identity of the names of her brother and her nephew.

Law's Trustees v Gray, 1921 S.C. 455; 58 S.L.R. 392; 1921, 1 S.L.T. 303.

(449)

Survivorship clause — Implied destination over to issue.

A testator directed his trustees to pay the liferent of the residue of his estate to his daughter and her husband, and at the first term of Whitsunday or Martinmas after the death of the survivor to divide and pay the residue, equally, share and share alike, among their children and the survivors and survivor of them. There was a destination over "in the event of its happening that all of my said grandchildren predeceased the terms of payment of their respective provisions without leaving lawful issue," and the term of payment was declared to be the term of vesting. The testator was survived by his daughter, her husband, and six grandchildren. The husband survived his wife and four of the children, and was survived by two children. One of the surviving children, Mrs. N, predeceased the term of vesting, leaving issue. **Held** that a conditional institution of issue was to be implied from the

terms of the deed, and that the issue were entitled to succeed to one-half (not merely one-sixth) of the residue.

Neville v Shepherd, 1895, 23 R. 351; 33 S.L.R. 248; 3 S.L.T. 226.

(450)

Implication from recital—Codicil containing incorrect recital of terms of will.

Campbell's Trustees v Kinsey-Morgan's Trustees, 1915 S.C. 298; 52 S.L.R. 289; 1915, 1 S.L.T. 89, No. 700, *infra*.

(451)

Overstatement of marriage contract provision—Debt or bequest.

In an antenuptial contract of marriage, dated 6th June, 1860, the husband bound himself to make payment to his wife, if she should survive him, "of a free yearly annuity of £100 sterling." By his will, dated 12th February, 1887, he conveyed his whole estate to trustees for certain purposes, and, *inter alia*, "for payment to my said wife of the free yearly annuity provided to her under our marriage contract, dated 6th June, 1860, of £150 sterling." **Held** that his widow was entitled to an annuity of £150, as the will showed that this was the testator's intention.

Forbes' Trustees v Forbes, 1893, 20 R. 248; 30 S.L.R. 250.

(452)

Implied gift of liferent—Gift to heirs of A on A's death.

Opinion, that the English rule which implies a liferent to A from the gift of the fee by a testator to his heir at law or next of kin on the death of A would be adopted by the Court in Scotland in circumstances appropriate for its application.

Bate's Trustees v Bate, 1906, 8 F. 861; 43 S.L.R. 660; 14 S.L.T. 95.

(453)

Gift of fee to issue of marriage, payable at death of husband.

By an assignation in trust made in contemplation of marriage, the wife conveyed her estate to trustees in trust (1) for behoof of herself in liferent; (2) after her death, if there were no issue of the marriage, for behoof of the husband in liferent so long as he remained unmarried; (3) for behoof of the issue, if any, of the marriage "then" surviving, and the issue per stirpes of predeceasers, payable at majority or marriage, whichever of these events should first happen, after the decease of the longer liver of the spouses, if the wife should be the survivor, "but after the decease or second marriage of" the husband "if he shall be the longer liver"; but declaring that if the husband entered into a second marriage "the foresaid liferent provision created in his favour in the event before mentioned" should, *ipso facto*, cease and determine. The wife died intestate, survived by the husband and by two children of the marriage, who were both major. **Held** that in view of the express gift of liferent to the husband in the event

of there being no issue, a gift of a life interest to him was not to be implied from the postponement of payment to the children until his decease.

Bate's Trustees v Bate, 1906, 8 F. 861; 43 S.L.R. 660; 14 S.L.T. 95.

(454)

——— **Gift of fee to issue of children payable at death of longer liver of children.**

A testator directed the annual produce of two-thirds of his estate to be paid to A and B "and in the event of either A or B dying without leaving lawful issue to hold and pay the share of the income which would have fallen to the deceasing child for behoof of and to the survivor of them." The fee did not vest till the death of the survivor of A and B. A predeceased B. Held that during the life of B the issue of A were entitled to the interest of A's share.

Gibson v Gibson's Trustees, (O.H.) 1893, 1 S.L.T. 61.

(455)

——— **Gift to heirs of the body of B on death of A—Income not expressly disposed of.**

Gollan's Trustees v Dallas, (O.H.) 1905, 13 S.L.T. 720, No. 1397, *infra*.

(456)

——— **Life interest to widow reducible to half in event of re-marriage—Fee to A—Implied life interest to A after re-marriage of widow.**

A testator by his trust settlement left the whole income of the residue of his estate to his widow under the declaration that in the event of her marrying again she should only be entitled to one-half of the said income as and from the date of such second marriage. The fee of the residue was given to the testator's aunt, in whom it vested at his death. The widow re-married. Held that on the re-marriage of the widow nothing fell into intestacy, and the one-half of the whole income of the residue was thereafter payable to the aunt, but that the aunt was not entitled to demand immediate payment of one-half of the residue.

Miller's Trustees v M'Lellan, (O.H.) 1911, 1 S.L.T. 444.

(457)

——— **Gift of residue to A in life interest and his children in fee—Payment to children not to be made until majority—Whether life interest to A's children implied.**

A testator directed his trustees to hold the residue of his estate for his son A in life interest and the son's children in fee. The children's shares were to be paid to them, if under age at their father's death, at majority, or in the case of daughters, on marriage. Power was conferred on the trustees "after the death of both parents" to pay interest, and to make advances out of capital, to the children. A was survived by his wife and by two pupil children. Held that A's widow did not take by implication a life interest of the residue of the testator's estate.

Spears v Spears, 1873, 11 M. 731; 45 J. 450; 10 S.L.R. 509.

Implied gift of fee—Express gift of income.
[See FEE AND LIFE INTEREST I. 1.]

(458)

——— **Express exclusion of *jus mariti* from part of estate—Implied exclusion from remainder.**

Bruce's Trustees v Bruce's Trustee, 1894, 21 R. 593; 31 S.L.R. 462; 1 S.L.T. 543. HUSBAND AND WIFE, No. 91.

(459)

——— **Gifts of legacies and of shares of residue—Provision as regards legacies—Implication as regards residue.**

A testator bequeathed a number of legacies and directed that the residue of his estate should be divided among the legatees in proportion to the residue. Held that where the *jus mariti* and right of administration (or either of them) were excluded as regards the legacies they were excluded by implication as regards the gift of residue.

Bryce's Trustee, 1878, 5 R. 722; 15 S.L.R. 412.

(460)

——— **Marriage contract—Heritable estate conveyed to trustees—Implied gift of fee to children of marriage.**

By an antenuptial contract of marriage the wife conveyed her whole estate, and particularly the lands of C, to trustees for certain purposes. Under these purposes if the wife was the survivor she was to have the rents of the heritable estate so long as there were issue surviving, and the trustees were directed to reconvey the heritable estate to her if there were no issue or on the failure of such issue by predeceasing her. The only express provisions as to the fee of the heritable estate if the husband was the survivor were limited to the events of there being no issue or the failure of such issue by predeceasing the husband. There was no express provision as to the fee in the event of there being issue surviving both spouses. The marriage having been dissolved by the divorce of the wife and there being three children of the marriage still alive, the divorced wife brought an action for declarator that she had the sole right and title to, and beneficial interest in, the fee of the estate of C. The Court dismissed the action, holding that there was conferred on the children of the marriage, by necessary implication from the terms of the marriage contract, such a contingent right in the fee of the estate of C as at least to disentitle the pursuer to obtain declarator *hoc statu*.

Burgh - Smeaton v Burgh - Smeaton's Judicial Factor, 1907 S.C. 1009; 44 S.L.R. 718; 15 S.L.T. 96.

(461)

——— **Marriage contract—Obligation by wife's father to pay annuity—Annuity to be paid to children after death of both spouses if wife predeceased—Whether obligation implied if husband predeceased.**

Dolphin's Trustees v Baxter, 1888, 15 R. 733. MARRIAGE CONTRACT, No. 110.

6. CASUS IMPROVISUS.

(462)

Gift over if legatee predeceased testator without issue—Legatee surviving testator but dying without issue—Revocation by codicil of bequest in will—Resulting intestacy.

A testator, by his trust disposition and settlement, directed his trustees, inter alia, to pay special legacies of considerable amount to all his children, and to divide the residue among them equally. By a codicil he revoked and recalled these directions, and, "in lieu and place of the same," directed his trustees to pay considerable legacies to all his children except his eldest son. The residue he directed to be held for behoof of his eldest son in liferent and his children in fee, and "in the event of" that son "predeceasing me without issue," to be divided equally among his other children. The codicil concluded thus—"Subject to these alterations and additions I do hereby ratify and confirm the said trust disposition and settlement in the whole heads, articles, and clauses thereof." The eldest son survived his father, but died without issue. **Held** that the codicil revoked the directions in regard to residue in the trust disposition and settlement, and that, although the codicil did not provide, as regarded the residue, for the event which had happened, the directions in the trust disposition and settlement were not thereby revived; and that the children's shares of residue fell to them ab intestato, and not under their father's settlement.

Reynolds v Miller's Trustees, 1884, 11 R. 759; 21 S.L.R. 516.

(463)

Gift to two sons in liferent and their issue in fee — Gifts over in event of sons dying without issue—Predeceasing son leaving issue and survivor not leaving issue.

A testator directed his trustees to divide the income of his heritage between his two sons; and in the event of one of his sons dying leaving issue, to sell the half and hold the proceeds for behoof of his issue equally; and then, in the event of the survivor dying leaving issue, to sell the remaining half and hold the proceeds for behoof of his issue; in the event of the first deceiver dying without issue, to apply his share for the use of survivor or his issue equally; and in the event of both dying without issue, to divide the property among certain charities. He did not expressly provide for the case, which happened, of the predeceasing son leaving issue and the survivor dying without issue. **Held** (1) that by the deed the heritage was destined to the two brothers and their issue, and on their failure to the charities, and that there was no intestacy; (2) that though the testator had failed to express the mode of division among the children of the predeceasing brother, his intention to divide equally was apparent from other parts of the deed, and should receive effect.

Aberdein's Trustees v Aberdein. 1870, 8 M. 750; 42 J. 387; 7 S.L.R. 433.

(464)

Gift over in the event of liferenter predeceasing the testator — Liferenter surviving testator but dying without issue—Intestacy.

Smith's Trustees v Clark, 1920 S.C. 161; 57 S.L.R. 196; 1920, 1 S.L.T. 88. VESTING, No. 71.

(465)

Gift over in event of A and B having children—B dying unmarried.

A and B, two brothers, pro indiviso proprietors of heritable subjects, executed a disposition by which they conveyed the subjects to trustees for behoof of certain liferenters and for the six children of A nominatim in fee. There was a declaration that in the event of any more children being born to A "and in the event of me, B, becoming married and leaving issue," the trustees were to convey one-half of the subjects to the six children of A and any others that might be born to him and the other half to B's children. In the event of there being no such issue of A and B the declaration was to become void at their deaths and the trustees were to make over the absolute fee of the subjects to the six children of A nominatim. A remarried and had a son. B died unmarried. **Held** that the child of A's second marriage was entitled to share in the subjects which belonged to his father, although according to the literal interpretation of the deed he was entitled to participate only in the event of B marrying and having children.

Dunlop v McCrae, 1884, 11 R. 1104; 21 S.L.R. 752.

(466)

A testator, who died leaving no known heir or next of kin, by trust disposition and settlement directed his trustees to divide his estate into three equal shares, and to hold one of these shares for A in liferent, and her children and the survivors of them in fee; another share for B in liferent, and his children and the survivors of them in fee; and the third share for C in liferent, and his children and the survivors of them in fee. The trustees were directed, on the death of the respective liferenters, to pay over to their children in equal shares the fee of the respective shares set apart for them, payable to them on their respectively attaining twenty-one years of age, until which time the income was to be applied for their behoof. In the event of a fiat dying before the period of payment, his lawful issue were to take their parent's share, and if he left no issue the share of the deceiver was to be divided equally among his surviving brothers and sisters, the issue of a predeceasing brother or sister taking their parent's share; "and in the event of the whole fiars to any one share or portion dying without leaving issue before the said period of payment, such share or portion shall revert and fall to be administered as part of the residue of my estate." A and B died leaving issue. C died without ever having had issue. On the death of C, **held** that although the event which had happened had not been expressly

provided for, it sufficiently appeared from the deed that the testator's intention was that the direction at the close of the residuary clause should apply if there were no issue of a liferenter of a share to take such a share, whether that resulted through the death of children who had been born, or because no children had ever been born, and that therefore the one-third share of the estate liferented by C did not fall to the Crown as intestate estate, but to the issue of A and B equally per stirpes.

Flett's Trustees v Elphinstone, (O.H.)
1900, 38 S.L.R. 564; 8 S.L.T. 310.

(467)

Gift over in event of annuitant not accepting—Annuity to servant—Testator having no servant at death.

A testatrix directed her trustees to apply in certain proportions the residue of her estate in purchasing annuities for certain persons, and, *inter alia*, an annuity for the servant maid who might be with her at the time of her death, and added a provision that in the event of any of the annuitants failing to accept, or dying before the purchase of the annuities, the sum so set free should be set free for behoof of the surviving annuitants in the same proportion as the original provisions in their favour. Held that this clause applied to the share of residue set free in consequence of the testatrix having no servant at the date of her death.

Kennedy's Trustees v Warren, 1901, 3 F.
1087; 38 S.L.R. 827; 9 S.L.T. 149.

(468)

Direction to settle daughters' shares by antenuptial contract—Application to daughters married at date of will.

Fyfe's Trustees v Duthie, 1908 S.C. 520;
45 S.L.R. 368; 15 S.L.T. 803, No. 730,
infra.

7. THE SUBJECT OF THE GIFT.

(1) WORDS IMPORTING GIFT OF HERITAGE.

Titles to Land Consolidation (Scotland) Act,
1868—31 & 32 Vict. c. 101, sec. 20.

(469)

"Property"—Direction to sell "remainder of my property wherever situated"—Moveable estate insufficient to pay legacies.

A testatrix died in 1882, leaving a testamentary deed, in which she nominated a "sole executor and trustee." After a few bequests of moveables there came this clause—"I also direct my trustee to sell the remainder of my property, wherever situated, and to divide it equally among all my grand-nieces." The whole estate, with the exception of furniture and a balance in bank, consisted of heritage. The legacies more than exhausted the moveable estate. Held that the deed imported an intention on the part of the testatrix to bequeath her whole heritable and moveable property, and that her

heritage was effectually conveyed to the trustee.

M'Leod's Trustee v M'Luckie, 1883, 10 R.
1056; 20 S.L.R. 714.

(470)

"Residue of my property."

A testatrix, by a holograph will, after leaving certain pecuniary legacies and bequests of furniture and effects, made this further provision—"My dear friend, Miss A C, for the kindness she has to me I leave the residue of my property." By a codicil she made further bequests of specific articles, and appointed trustees and an executor. The pecuniary legacies amounted to £510. The moveable property left by the testatrix amounted to £266 18s., of which £110 19s. represented the furniture and effects which she had specifically bequeathed. She also left heritage, consisting of a dwelling-house of the value of £900. She was aware of the amount of her moveable estate. Held that the testatrix had intended to dispose of, and had effectually disposed of, her heritable as well as her moveable property.

Craw's Trustees v Blacklock, 1920 S.C.
22; 57 S.L.R. 20; 1919, 2 S.L.T. 231.

(471)

"Remainder to be invested."

A testator by a holograph "last will and testament," after bequeathing two pecuniary legacies of £100 each, provided "remainder to be invested as my trustees may direct," and gave instructions as to the disposal of the interest and capital of the sum so invested. At his death his estate consisted of the house in which he lived, furniture valued at £170, an insurance policy for £300, about £1000 of invested capital, and about £700 of cash. Held that the testator's house was not carried by his will.

Woodard's Judicial Factor v Woodard,
1919 S.C. 350; 56 S.L.R. 214; 1919, 1
S.L.T. 129.

(472)

"All the property, goods, money, gear."

A holograph testament was in these terms, viz.—"I . . . do hereby dispoise, leave, and allocate all the property, goods, money, gear, stock, shares, boats, scrip, &c., which I may be possessed of at the time of my death, to be divided." Held that the testament conveyed heritage.

Oag's Curator v Corner, &c., 1885, 12 R.
1162; 22 S.L.R. 784.

(473)

Estate—"Whole estate."

A testator by holograph will appointed executors, and instructed them after paying his debts to divide the income of "the balance" between his brother and sister equally, and on the death of either to pay the whole income to the survivor; on the death of both "I wish my whole estate realised and equally divided between my cousins on my mother's side." The testator left about £3300 of moveable property, and also had a personal right to a share (valued

at under £100) of a small heritable property. **Held** that the heritable property was carried by the will.

Copland's Executors v Milne, 1908 S.C. 426; 45 S.L.R. 314; 15 S.L.T. 733.

(474)

—“All my estate.”

A testator by his will, dated in 1905, appointed an executor whom he directed to realise “all my estate,” and to pay certain legacies. He further directed that “the residue of my estate,” after payment of the legacies, should be divided among his family. The testator died possessed of both heritable and moveable property. **Held** that the heritable property had been validly conveyed by the will to the executor, and that he had power to sell the same.

Jack's Executor v Downie, 1908 S.C. 718; 45 S.L.R. 545; 15 S.L.T. 989.

(475)

—Whole estate and execntry of every description — Appointment of executors — Power to intromit—No words of conveyance.

Terms of a testamentary writing which were held not to carry heritage.

Grant v Morren, 1893, 20 R. 404; 30 S.L.R. 442.

(476)

—Residue of my estate — Nomination of executor.

A testator died in 1877, leaving a holograph will in which he appointed his nephew to be his “executor,” and directed that “the residue of my estate shall be divided equally” among the children of the testator's half-brother (his executor being one). **Held**, on a construction of the whole terms of the will, that heritable property belonging to the testator was not conveyed thereby.

Observations on sec. 20 of the Titles to Land Act, 1868, in regard to the terms sufficient to import a bequest of heritage or a general disposition.

Urquhart v Dewar, 1879, 6 R. 1026; 16 S.L.R. 602.

(477)

A testatrix by a holograph document described as her “last will and testament” appointed executors to whom she gave legacies. She then instructed them “to distribute the rest of my estate after payment of funeral expenses and debts” by the payment of a number of legacies, providing that, if the “money” left by her was insufficient to meet the legacies, the legacies should be reduced proportionately. After disposing of books, furniture, and other articles, she concluded—“I desire the residue of my estate, if any, to be divided into six equal parts,” one part to go to each of six funds connected with the United Free Church. The testatrix left moveable property amounting to £2949, which was more than sufficient to meet all the legacies. She also left heritable estate consisting of two dwelling-houses of the value of £300 and £190 respectively. **Held** that the testatrix

intended to deal with, and had effectually dealt with, her whole property, both heritable and moveable.

Smith's Executors v Smith, 1918 S.C. 772; 55 S.L.R. 716; 1918, 2 S.L.T. 132.

(478)

—“Whole residue of my estate” —

Nomination of trustees and executors.

Terms of a will which were held not to carry heritage.

Bell v Bell, (O.H.) 1906, 14 S.L.T. 244.

(479)

—“All my other means and estate” — Direction to turn into cash.

There was found in the repositories of a deceased an informal holograph document in these terms—“All furniture, books, and personal effects to A absolutely, and the free liferent use of all my other means and estate. After A's decease, the whole of the estates to be turned into cash at the time my trustees deem most suitable for best realising, and proceeds safely invested for disbursing as under.” There then followed certain pecuniary legacies and a bequest of residue, and a nomination of trustees “for carrying out the foregoing.” **Held** that this document was equivalent to a general disposition of his heritable estate in favour of the trustees.

Aim's Trustee v Aim, &c., 1880, 8 R. 294; 18 S.L.R. 204.

(480)

Whole means and estate bequeathed to wife as executrix.

By antenuptial contract of marriage a husband conveyed to A, his intended wife, his whole household furniture and plenishing and the liferent use of a cottage, which belonged to him, along with the half of a plot of garden ground attached to it. He further took his heir bound to pay the wife an annuity of £15 out of certain other heritage belonging to him. He further gave his wife “full power and liberty, by mortis causa deed, to test upon and divide and apportion among my lawful children, whether by my first or this intended marriage . . . my whole means and estate . . . and to that end I hereby appoint the said A to be my executrix, with power to give up inventories of my estate, and all other powers competent to an executrix; and I hereby leave and bequeath my whole means and estate to her as executrix foresaid.” The husband died shortly afterwards, survived by children of a former marriage only, and without leaving any other deed of a testamentary character. **Held** that the terms of the marriage contract did not express or imply an intention on the part of the husband to convey the heritage to her.

Question, whether the widow's power of apportionment covered heritage.

Campbell v Campbell, 1887, 15 R. 103; 25 S.L.R. 97.

(481)

Means and effects—Heritage acquired subsequent to date of will.

A testator left a holograph testamentary writing in these terms—"In order to prevent all dispute after my death regarding the disposal of my property, I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession, or belonging to me at the time of my decease, to be absolutely at her disposal." At the date of the writing the testator had no heritable property, but he subsequently acquired heritage. **Held** that the will carried the heritage.

Forsyth v Turnbull, 1887, 15 R. 172; 25 S.L.R. 168.

(482)

Means and substance.

Observed (per Lord Pearson, Ordinary)—"The expression 'means and substance' would, I think, according to its common acceptation, include all disposable property."

MacLagan's Trustees v Lord Advocate, (O.H.) 1903, 11 S.L.T. 227.

(483)

"All and sundry goods, gear, debts, effects, sums of money, heritable and moveable."

By mutual disposition in 1840 two spouses proceeded to "assign and dispose" to each other respectively, and to the survivor, "All and sundry goods, gear, debts, effects, sums of money, heritable and moveable, household plenishing and furniture, and others whatsoever resting, pertaining, and belonging to" each of them "at the time of my death by bond, bill, ticket, account or in any other manner of way whatever," reserving to each spouse power to alter. At the date of execution neither of them had any heritable bonds or securities, and they never acquired any such, nor had they at that time any lands or houses. Many years afterwards the husband acquired certain heritable subjects, and took the title to himself and his wife in conjunct fee and liferent, for her liferent use alienably, and to his heirs and assignees whomsoever, reserving to himself power at any time, without her consent, to sell, burden, or gratuitously dispose the subjects. He afterwards acquired other heritable subjects, the title to which he took to himself and his heirs and assignees whomsoever. After the husband's death the wife claimed the whole estate, heritable and moveable, belonging to her husband at the date of his death, as hers, in terms of the mutual disposition. **Held** that the mutual disposition did not convey lands.

Farquharson v Farquharson, 1883, 10 R. 1253; 20 S.L.R. 836.

(483a)

"All I have in the world."

A person died in 1872 leaving a holograph settlement dated in 1861, and a codicil dated in 1870. By the settlement he left and bequeathed "all that I have in

the world—life assurance, money in the bank, goods in bond and in my shops, . . . also household furniture, bed and table linen, silver plate, and all other effects in my house," to his wife, under certain deductions in favour of his children. At the date of the settlement he was possessed of no heritable property, but before the date of the codicil he, in 1864, purchased a house, the title of which he took to himself and his wife in conjunct fee and liferent, for her liferent use alienably, and to his heirs and successors in fee. The codicil bore that he had looked over his settlement, and, "as far as the disposal of all my effects, in money, stock-in-trade, and otherwise are concerned, I hereby confirm the same to be at the disposal of my wife." He then made certain alterations in the provisions to his children. He was survived by his wife. **Held** that the heritable subjects purchased in 1864 were not conveyed by the settlement and codicil.

Ford's Trustees v Ford, 1884, 11 R. 1129; 21 S.L.R. 767.

(484)

"Effects."

A person possessed of heritage and moveables left a testament in these terms—"I hereby declare that B, my brother, shall not inherit any of my effects, but that they shall all descend to my brother C." **Held** that the word "effects" could not be construed to include lands.

Pitcairn v Pitcairn, 1870, 8 M. 604; 42 J. 306; 7 S.L.R. 329.

(485)

Held that a bequest in the following terms—"I hereby solemnly declare it to be my will that all my brothers and sisters share equally in any effects I may leave," was not habile to convey heritage.

M'Innes v Hill, (O.H.) 1912, 1 S.L.T. 80.

(486)

Will made in foreign country.

A native of British Guiana who had been resident in Scotland for some years died in 1903 possessed of heritage in Scotland, leaving a will which had been executed in British Guiana in 1891. The will bore that the testator was about to leave the colony, and that in order to prevent disputes arising after his demise "as to the disposition of my effects in or out of the colony. . . . I now order as follows . . . I will and bequeath to . . . all my effects to be divided equally between the three . . ." The will concluded with a nomination of executors. **Held** (1) that the question whether the will carried the Scottish heritage was a question for the Scottish Court; (2) that as the will was expressed in ordinary language, and as there was no relevant averment that it contained any technical term, or that it fell to be construed in accordance with any technical canon of construction peculiar to the colony, it was not necessary for the Court

to resort to any foreign Court for aid in its interpretation; and (3) that the will did not convey the testator's heritable estate in Scotland.

Griffith's Judicial Factor v Griffith's Executors, 1905, 7 F. 470; 42 S.L.R. 361; 12 S.L.T. 730.

"Belongings."

(487)

Held that the word "Belongings" contained in a holograph will included heritage.

M'Crorie's Curator Bonis v M'Crorie, (O.H.) 1909, 1 S.L.T. 544.

(488)

A testator died leaving several testamentary writings, the latest in date being a holograph writing, executed on the day before his death, in these terms—"I leave and bequeath all my moneys and belongings to my dear wife J S." The value of the whole estate was £966 3s. 1d., of which sum £860 represented heritage. There were no surviving children. Held that the holograph will operated as an effectual settlement in favour of the testator's widow of his whole estate, both heritable and moveable.

Simson's Trustees v Simson, 1922 S.C. 14; 59 S.L.R. 5; 1921, 2 S.L.T. 238.

(489)

"Investments."

Terms of a holograph settlement which were held to carry two unfinished houses in course of erection at the time of the testator's death, although the deed contained no words of direct conveyance.

Edinburgh Merchant Maiden Hospital v Greig's Executors, (O.H.) 1902, 10 S.L.T. 317.

(490)

"Funds."

Circumstances in which it was held that a bequest of "funds" included heritage. Sibbald v Lord's Trustees, (O.H.) 1913, 2 S.L.T. 86.

(491)

"Moveable and personal estate" — Separate note of values.

A bequest of "all the moveable and personal estate which shall belong to me at the time of my death," taken in conjunction with the terms of a holograph letter of instructions by the testatrix, in which the amount of the estate as detailed included the value put upon certain house property belonging to her, held to be sufficient to carry that heritage.

Pringle, 1877, 15 S.L.R. 89.

(492)

"Investments"—Villa.

Circumstances in which held that the word "investments" occurring in a will included two villas belonging to the testator, and that the villas accordingly fell under a will which contained an appointment of executors, but no words of disposition.

Edinburgh Merchant Maiden Hospital v Greig's Executors, (O.H.) 1902, 10 S.L.T. 317.

(493)

"Everything else"—"Remainder."

Terms of a holograph testament containing the expressions "Everything else to be sold" and "I leave the remainder," which were held sufficient to import a bequest of heritage.

Crowe v Cook, 1908 S.C. 1178; 45 S.L.R. 904; 16 S.L.T. 332.

(494)

"Residue"—Appointment of executor.

A testatrix, by her holograph testamentary disposition, on the narrative that she had "resolved to provide for the settlement of my affairs," appointed a "trustee and executor"; and after making bequests which were all of moveable property, declared "that if there be any residue after all expenses and legacies are paid, I bequeath the said residue to" three nieces, reserving her "life use of the whole estate and effects hereby conveyed."

Held that the testatrix's heritable property was not carried by this deed, but passed to her heir at law.

Bryden v Cormack, 1913 S.C. 209; 50 S.L.R. 76; 1912, 2 S.L.T. 381.

(495)

Appointment of residuary legatee—Lapse of gift of heritage.

A testator left the estate of N to his nephew, and after various legacies he provided as follows:—"I leave as my residuary legatee my niece Annie Amelia Wallace, who will pay my funeral expenses and any debts I may justly owe." The nephew died six months before the testator, who was aware of his death, but made no alteration on his will. Held that the estate of N was carried by the residuary clause.

Wallace's Executors v Wallace, 1895, 23 R. 142; 33 S.L.R. 87; 3 S.L.T. 162.

(496)

"Rent of my houses."

A farmer by holograph will provided, inter alia, "the rent of my houses to be equally divided to my nephew Colin, in Strathglass, and my two sisters, and one-half share to my niece Jessie and her sisters, in America. . . . My nephew Colin, Strathglass, to be trustee." There was no other reference to heritable property in the will and no clause of residue. The testator died possessed of certain house property. Held that the bequest was not void from uncertainty: that the subject of the bequest was, the rent of the houses and not the houses themselves; and that the rent was divisible into two equal shares, one share being payable to Colin and the testator's two sisters, and the survivors and survivor of them, and the other share to his niece Jessie and her sisters, and the survivors and survivor of them.

Mackenzie's Trustee v Mackenzie, 1899, 2 F. 330; 37 S.L.R. 254.

Lease.

(497)

A testator by his will appointed trustees and directed them to do everything necessary for the comfort of his wife and family, and "that they entirely take charge of the farm, all means and moveables, until the youngest is twenty-one, then to be an equal division . . . and they also have power to take it from the one and give it to the other in case of any imprudence. . . . The whole managements are to be wholly through the trustees. They shall also have power to retain or give up the farm as they see it of most advantage to the family." **Held** that the lease of the farm rented by the testator was carried by the will.

Hardy's Trustees, 1871, 9 M. 736; 43 J. 406; 8 S.L.R. 499.

(498)

Long lease—"Property either in money, bonds, debts, business, and other effects."

A person who carried on the business of an innkeeper, in premises of which he held a long lease, and who died in 1872, left testamentary writings in these terms:—"I do hereby bequith, in event of my death before my wife, H E, the whole of property either in money, bonds, debets, bussness, and other afficts whatsoever, . . . and I appoint H E, my wife, heir and executor of this my last will and testament." **Held** that the words could not be so construed as to include the lease of the inn.

Edmond v Edmond, 1873, 11 M. 348; 45 J. 236; 10 S.L.R. 210.

(499)

Accessory—Heritable estate to be acquired subsequent to date of will—Heritable burden over land owned by testator at date of will.

The proprietrix of lands held of the Crown, subject to certain duties payable in kind to a donatory of the Crown, executed a mortis causa trust settlement, in which she directed her trustees to hold the said lands for certain charitable purposes, and to convey to certain persons named "all such lands, houses, or other heritable subjects, of whatever nature or denomination the same may be, which I may acquire or succeed to after the date of these presents." The testatrix subsequently obtained by purchase a disposition from the Crown donatory of the said duties, on which she was infeft. **Held** that the duties thus acquired were not to be regarded as a separate heritable subject from the land in the sense of the trust deed.

Dennison v Fea's Trustees, 1873, 11 M. 392; 45 J. 259; 10 S.L.R. 246.

(500)

English will dated in 1866—Testator surviving till 1875.

In the construction of a will **observed**—(1) That it was an important element of interpretation that the words of conveyance employed were not at the date of the will habile to convey heritage in Scotland, though they afterwards became so by a change in the law

several years before the testator's death; (2) that instructions to prepare a mortis causa deed are not admissible in construing the deed as evidence of the testator's intention; (3) that deeds and holograph writings made subsequently are admissible as evidence.

Farquhar v Farquhar's Executors, 1875, 3 R. 71; 13 S.L.R. 36.

(2) REQUESTS OF MONEY AND CORPOREAL MOVEABLES.

(501)

"Heritable"—"Moveable"—Titles to Lands Consolidation Act, 1868, sec. 117.

Where a testatrix gave directions with respect to her "heritable" estate and other directions with respect to her "moveable" estate, **held** that bonds and dispositions in security in favour of herself and her executors or assignees, and in favour of herself and her heirs or assignees, were to be regarded as part of her moveable estate.

Hughes' Trustees v Corsane, 1890, 18 R. 299; 28 S.L.R. 242.

(502)

"Money"—"Moneys."

A testator expressly disposed of his heritable estate, household furniture, and stock-in-trade. He directed that all the "money he should leave, wherever deposited," should be divided among his wife and children, such division to take place when his youngest daughter attained majority. By a codicil he gave his wife "the interest of all the moneys left by me up to the time of the division of the same." **Held**, the word "money" and "moneys" included the testator's whole moveable estate which had not been otherwise specifically disposed of.

Easson v Thomson's Trustees, 1879, 7 R. 251; 17 S.L.R. 239.

(503)

—"All moneys and goods in my possession"—"Any money I am entitled to by my late father's will."

A young officer shortly before his death executed a holograph testamentary writing bequeathing to his widow "all moneys and goods in my possession at the time of my death. Also any money I am entitled to by my late father's will." The testator was in right of certain sums bequeathed to him by his father's will. He was also entitled to a share of certain funds (part of which had been invested in a house) settled by the marriage contract of his parents on the children of the marriage, and liferented by his mother, which share had been appointed to him by a mutual deed of division executed by his parents in virtue of a power of appointment contained in the marriage contract. **Held** that the holograph will above-mentioned operated as an effectual bequest not only of the funds to which the deceased was entitled by his father's will, but also of his share of the marriage contract funds.

Dunsmure v Dunsmure, 1879, 7 R. 261; 17 S.L.R. 134.

(504)

"Money in bank"—Deposit receipt.

A husband bequeathed to his wife "all moneys at my death in the house, or in the Bank of Scotland, or the City Bank of London, or in any other bank or banks in my name." At his death he held, in addition to money in his account current with the Bank of Scotland, a deposit receipt in his own name for £2000 with the Queensland National Bank, Limited, repayable four years after its date. **Held** that the deposit receipt was included in the bequest to the testator's wife.

Harper's Trustees, 1903, 5 F. 716; 40 S.L.R. 474; 10 S.L.T. 758.

(505)

"Money in banks" after paying lawful debts—Legacy to testatrix subsequently deposited in bank unknown to her.

A testatrix by a holograph will, after directing payment of certain special legacies, further provided—"Any money in banks after paying my lawful debts, funeral expenses, &c., I give over to my stepdaughter." The will contained no other directions as to the disposal of her estate. After the date of the will she became entitled to a legacy left to her by her brother, but, owing to her state of health, she never knew of it. The amount of the legacy was deposited in bank by the law agents of her brother's executors in their own name in trust for the testatrix. **Held** that the bequest of "any money in banks after paying my lawful debts," &c., could not be construed as a bequest of the money left to the testatrix by her brother, and that it fell to her next of kin as intestate succession.

Masson v Smellie, 1903, 6 F. 148; 41 S.L.R. 104; 11 S.L.T. 450.

(506)

"Sums contained in" policies of insurance—Bonus additions—Deduction of sums paid as premiums—Periodical interest on premiums.

A testator left a legacy of £4000 to his sister under declaration "that the said sum of £4000 represents the sums contained in" certain policies of insurance "under deduction of the sums already paid or yet to be paid for premiums of insurance thereon, . . . it being expressly declared that while the amount of the said provision may be found to be less than, it shall in no case exceed the amount of £4000." **Held** (1) that the legatee was not entitled to a sum of £4000, but only to the balance of the proceeds of the policies of insurance after refunding the amount of premium paid; (2) that under the terms "sums contained in" the policies of insurance bonus additions were included; and (3) that the deduction of sums paid as premiums fell to be made without adding periodical interest thereon.

Gollan's Trustees v Dallas, (O.H.) 1905, 13 S.L.T. 720.

(507)

Furnishings and plenishing in mansion-house—Plate deposited in bank.

A testator left to his wife a liferent of two estates and of the "whole plenishings, furnishings, and articles" in the mansion-houses thereof. He also constituted her his sole residuary legatee. At the time of his death there was lying deposited in a bank for safe keeping certain plate which was not in ordinary use in his house. **Held** that it did not fall within the legacy of a liferent of the "plenishing, furnishing, and articles in the house," but was part of the ordinary moveable estate, and therefore that his widow was fiae of it under the residuary clause.

Fraser v Croft, 1898, 25 R. 496; 35 S.L.R. 420.

(508)

All outside or inside a house—Watches.

A testator bequeathed a house "and all that may join that is mine, namely, buildings, lands, household furniture, all outside or inside of the above-named place." **Held** that the bequest did not carry certain gold watches and chains found in a desk in the house.

Rennie's Trustees v Watt, 1904, 12 S.L.T. 195.

(509)

Stock and cropping on "farms occupied by testator."

A testator directed his trustees to assign to his sons William and Robert the leases of the farms of K and B, and "any other farms I may occupy at the time of my death," and to deliver to them the whole stock, crop, implements, and all other effects thereon. At the time of his death the testator was in occupation of the farms of K and B, of which he was the tenant, and also of the farms of A and T, of which he was the proprietor. **Held**, on a construction of the settlement as a whole, that under the above direction the sons were entitled to stock and crop on those farms only of which the testator was the tenant.

Graham's Trustees v Graham, 1899, 2 F. 232; 37 S.L.R. 163; 7 S.L.T. 283.

(510)

"Uniforms and all other personalities."

Held that a bequest of "my uniforms and all other personalities, except such as I may specially bequeath to others," did not carry the residue of the testator's personal estate.

Douglas's Executors, 1869, 7 M. 504; 41 J. 268; 6 S.L.R. 324.

(511)

"Carriage"—Motor car.

The proprietor of an estate died in January, 1907, leaving a trust disposition and settlement dated in 1890. In it he directed his trustees to make over his landed estate to his wife, and with certain small exceptions his whole "furniture and plenishing, including books, plate, pictures, jewellery, ornaments, and bed and table linen, and also my horses and carriages, live stock, plants, and

garden and stable implements." At the date of his settlement the testator had carriages and horses, but subsequently he sold these and bought two motor cars, which he possessed at the time of his death. **Held** that the bequest of carriages included the motor cars.

Denholm's Trustees v Denholm, 1908 S.C. 43; 45 S.L.R. 32; 15 S.L.T. 429.

(512)

Shares—Ordinary and preference.

A testator made a bequest of shares in a certain company which should belong to him at the date of his death. He died possessed of both ordinary and preference stock in the company. **Held** that the bequest carried the preference stock as well as the ordinary shares.

Morland v M'Dowall's Trustees, (O.H.) 1919, 1 S.L.T. 162.

(513)

Sum invested in whisky—Realisation or valuation.

A testator bequeathed to pupil beneficiaries "whatever sum I may have invested in whisky." **Held** that the beneficiaries were entitled to the sum which the trustees had received on a prudent realisation of the whisky after confirmation, and not to the value of the whisky ascertained by valuation as at the date of death, the consent of the beneficiaries to such a valuation being unobtainable in respect of their pupillarity, and, further, that there should be no deduction in respect of the expenses of realisation or of warehouse rents to the date of realisation.

Chapman v Alexander, (O.H.) 1909, 1 S.L.T. 403.

(514)

War Loan and Exchequer Bonds.

A testatrix left to a legatee her "holdings of British Government War Loan and Exchequer Bonds." In addition to War Loan and Exchequer Bonds she possessed at her death certain War Bonds. **Held** that the legatee was not entitled to claim the War Bonds.

Lumsden's Trustees v Lumsden, (O.H.) 1921, 1 S.L.T. 155.

(515)

Moneys saved out of annual income of estate.

A testator directed that all moneys "saved by my trustees and my wife out of the annual income payable to my wife shall be given by my trustees after my wife's death to my daughter Emily." **Held** that, in so far as the annual proceeds of the estate were left by the widow at the time of her death in the hands of the trustees, they were saved in the sense meant by the truster, and belonged to his daughter. **Observed** that the provision in the will did not apply to income actually paid to the widow.

Wood v Menzies, 1871, 9 M. 775; 43 J. 418; 8 S.L.R. 517.

(516)

Bequest of debt—Whether interest included.

A lady lent £2000 to her nephew and took a receipt. Ten days afterwards she wrote and signed a testamentary writing in these terms—"I give the £2000 I lent . . . my nephew to his mother . . . at my death." The testatrix survived for thirty-four years, during which time she never asked or received any interest on the loan either from her nephew, who predeceased her, or from his executor. After her death, **held** that, on the assumption that interest was payable on the loan from its date, it was intended to be included in the bequest, and belonged to the legatee.

Cunninghame v Vassall, 1871, 10 M. 49; 44 J. 27; 9 S.L.R. 31.

(517)

Bequest of capital required to yield £120 per annum.

A testator who died in 1885 directed his trustees to keep a sum of money "invested safely so as to yield a life interest to my wife amounting to £120 sterling annually," and after her death to realise and divide "the said surties" equally among his nephews and nieces. The wife did not accept this provision, as she had a liferent of her husband's whole estate under their marriage contract, and no sum was set aside and invested to yield a sum of £120 per annum. In 1899, when the trust came to be wound up, on the death of the widow, the question arose as to the amount of the bequest to the testator's nephews and nieces. **Held** that the amount of the bequest was £4000—that being the sum which the trustees would, on a fair calculation, have been bound to lay aside as likely, one year with another, to produce £120.

Munro's Trustees v Munro, 1899, 1 F. 980; 36 S.L.R. 761.

(518)

Bequest of legal rights.

A widow who is bequeathed her legal rights under her husband's will is a creditor on his estate, and not a beneficiary. She should not be debited with the expense of administration nor with interest on sums advanced in respect of *jus relictæ*.

Henderson v Henderson's Trustees, (O.H.) 1916, 2 S.L.T. 292.

(519)

Power to bequeath capital retained by trustees to meet annuity—Capital retained in excess of capital required.

Chivas' Trustees v Stewart, 1907 S.C. 701; 44 S.L.R. 15; 14 S.L.T. 357, No. 1272, *infra*.

(3) GIFTS SUBJECT TO BURDENS.

(520)

Burden of heritable securities—Payment of heritable debt—Testator taking assignation to bond—Ground annual—Confusio.

A lady, by trust disposition and settle-

ment, directed her trustees to dispoſe certain heritable ſubjects to a perſon named, "under burden of any heritable ſecurities that may affect the ſame, and the feu-duty, ground annual, and other burdens affecting it." Prior to the date of her ſettlement the truſter had obtained aſſignations to the only ground annuals affecting the ſubjects. She ſubſequently paid up a bond affecting the ſubjects, and took an aſſignation there-to. **Held** (1) that the bond had been extinguished confuſione, and that the diſpoſee was entitled to the property free of the burden of this bond; but (2) that he muſt take the property under burden of the ground annuals, that being the intention of the truſter as expreſſed by her ſettlement.

Murray v Parlane's Truſtee, 1890, 18 R. 287; 28 S.L.R. 223.

(521)

—House burdened by heritable ſecurity—Extrinsic evidence.

J S in 1879 executed a ſettlement in which he conveyed his eſtates to truſtees in truſt to pay and make over to his ſiſter-in-law, Mrs. B, wife of W B, in liferent, and her children in fee, one-half of the reſidue, and to his brothers and ſiſters the other half. On 4th January, 1881, J S executed a bond over his houſe and grounds of L for £4000, and the bond was recorded. By a codicil dated in 1889 the teſtator conveyed to Mrs. B in liferent, and to J B, her daughter, in fee, his houſe and grounds of L, ſtating that he revoked the ſettlement only in ſo far as it conveyed the dwelling-houſe, &c. After the death of J S, Mrs. B and her daughter raiſed an action for declarator that the bequeſt of the houſe and grounds was not burdened with the debt contained in the bond, and that the truſtees were bound to pay it out of the deceased's other eſtate. They made averments to the effect that J S never intended the bond to be acted upon, except in the event of his bankruptcy, and had deſtroyed it; and that the houſe and grounds were not worth more than £3000. **Held** that the purſuers' averments were irrelevant, and action diſmiſſed.

Brand v Scott's Truſtees, 1892, 19 R. 768; 29 S.L.R. 641.

(522)

—Sum payable out of price of herit- age — Taxative or demonſtrative — Rents accruing prior to ſale.

A teſtator directed his truſtees to ſell his eſtate of A, and to apply £4000 of the price in reducing the debt of £14,000 with which his eſtate of B was burdened, and, after the death of his brother, to convey B to certain perſons, "ſubject to the real burden of the bond preſently affecting the ſaid lands to the extent of £10,000, part of the principal ſum of £14,000 therein contained (the ſum of £4000 being payable by my truſtees in part of the principal ſum as herein provided)." The price received for A was only £2400 or thereby. **Held** that the perſons to whom the teſtator had left B were not entitled to have the eſtate diſburdened of the

balance of the £4000 which the price of A did not cover, by payments out of reſidue.

Adam's Truſtees v Wilſon, 1899, 1 F. 1042; 36 S.L.R. 819.

(523)

Obligation to impoſe real burden on herit- age—Contingent real burden.

The proprietrix of a heritable eſtate died, leaving a mortis caſa diſpoſition of the eſtate to A and the heirs of his body, whom failing to B and the heirs of her body, whom failing, &c., under the condition "that in the event of any part of the ſaid lands and eſtate . . . that may remain unſold at the time of my death being thereafter ſold or diſpoſed of or exchambiſed by any proprietor or poſſeſſor of the ſame or adjudged, or attempted to be adjudged or carried away in any manner or way for his or her debt, that then and in any of theſe events there ſhall be paid out of the price of the lands . . . if and when ſold or created a real lien and burden on the ſame if they ſhall remain unſold to and in favour of ſuch of the children of F as may then be in exiſtence or to their heirs . . . the ſum of £10,000." **Held** that the provision in favour of the children of F was effectual as a condition of the gift to A.

Falconar Stewart v Wilkie, 1892, 19 R. 630; 29 S.L.R. 534.

(524)

Legacy of ſpecific moveable ſubjects taken cum onere.

Held that the legatee of a ſpecific moveable ſubject muſt take it cum onere, and redeem it for himſelf if it has been pledged or aſſigned in ſecurity by the teſtator ſubſequent to the date of the bequeſt.

Stewart v Stewart, (O.H.) 1891, 19 R. 310; 29 S.L.R. 907.

(525)

Direction to entail lands—Lands burdened with heritable debts—Right of heirs of entail to have lands relieved of debt.

Macleod's Truſtees, 1871, 9 M. 903; 43 J. 517; 8 S.L.R. 597. HERITABLE AND MOVEABLE, No. 143.

(526)

Debt laid by teſtator upon two eſtates to which different beneficiaries ſucceeded.

A proprietor of two eſtates, B and S, after executing an entail of B, reſerving power to alter, executed a truſt diſpoſition and ſettlement conveying both eſtates to truſtees, with full power to burden and ſell S if required to pay the debts of the truſter, but with no ſuch powers as regarded B, but merely an inſtruction to pay out of the annual produce of B certain legacies and annuities, to grant no leases longer than the duration of the truſt, and at its expiration to reſpond B to the ſeries of heirs called in the deed of entail. The truſter ſubſequent- ly granted a bond and diſpoſition in ſecurity over both eſtates for £1500. S having been ſold and the proceeds applied, in ſo far as neceſſary, to pay the truſter's debts, **held** that the beneficiaries having the

reversionary right to S had no claim for relief of the debt of £1500, or any part thereof, against the heir entitled to B.

Carter v Macarthur, 1870, 8 M. 480; 42 J. 289; 7 S.L.R. 282.

(527)

Between three estates destined to B, with substitutions to C, D, and E, which on B's death passed partly to his heir at law, partly to the substitute heirs of provision.

By mortis causa settlement A conveyed his whole estates, under burden of debts, legacies, and of certain annuities, to his brother B, with a substitution, "under the burdens and provisions before written" in favour of three individuals, C, D, and E, each of whom he substituted to his brother in a particular portion of his heritable estate, and of certain relatives to whom he destined the residue of his estates. B made up a title to the estates as his brother's heir at law, but did not evacuate the destination in his brother's deed except in regard to a portion of the subjects which he conveyed to himself and his heirs at law. In a trust settlement executed by B on death-bed he directed his trustees (1) to pay the said burdens and annuities, and (2) to convey the estates substantially in accordance with his brother's settlement. B's settlement was reduced ex capite lecti as regarded their respective interests by his heir at law, and by C as heir of provision. D and E took under B's settlement the portions of A's heritage conveyed thereby to them. In a question between B's heir at law and C, D, and E, held (1) that the annuities in A's deed were heritable burdens, which became burdens on B when he succeeded to the universitas of A's estate; (2) that as A had not made the annuities specific burdens on his lands, they did not pass as specific burdens on the heirs of provision succeeding to B; and (3) that as B had not in his settlement declared these annuities burdens on the portions of A's estates conveyed by him to D and E, his heir at law remained liable for them.

Park's Curator v Black, 1871, 9 M. 1078; 43 J. 590.

(4) MISDESCRIPTION OF SUBJECT OF GIFT.

(528)

Lease.

A testator left to his sisters "my heritable property at S, and tack thereof, dated in 1807, as described in the translation or assignation thereof granted by A B in my favour." The property in S was held in two tacks, dated respectively in 1807 and 1808, to both of which the testator acquired right by the translation above mentioned, and the property had been occupied by the truster's sisters as one subject. Held, on a consideration of the whole deed, that the sisters were entitled to the subjects contained in the tack of 1808, as well as those in the tack of 1807.

Wright's Trustees, 1870, 8 M. 708; 42 J. 363; 7 S.L.R. 408.

(529)

Shares.

By a holograph codicil a testator bequeathed to his son "all the gas companies' shares that were lately bought by me from Mrs. T. Bruce's trustees for £300." There were no gas companies' shares purchased by the testator for £300; but he had about six months before the date of the codicil purchased from Mrs. Bruce's trustees, as one transaction, shares in various gas companies for £798, and some shares in a steel yard for £2. Held that the words "for £300" must be taken as mere falsa demonstratio, and were not used as taxative of the bequest, and consequently that the legatee was entitled to the whole gas shares (but not the steel yard shares) purchased by the testator from Mrs. Bruce's trustees.

Bruce's Trustees v Bruce, 1875, 2 R. 775; 12 S.L.R. 485.

(530)

Inter vivos trust—Amount of deposit receipt.

A father by inter vivos trust deed conveyed to trustees, inter alia, "the sum of seven thousand pounds sterling on deposit receipt in my name in the Bank of Scotland, Edinburgh," for behoof of his daughter. He had a deposit receipt with that bank for £5000 but none for £7000. He delivered the deposit receipt for £5000 to the trustees. He had a deposit receipt with the Union Bank for £2000, which he did not deliver to the trustees. He died a month after executing the trust deed. Held that he had conveyed £7000 to the trustees.

Gellatly's Trustees v Royal Infirmary of Edinburgh, (O.H.) 1905, 13 S.L.T. 38.

(531)

Residue—Error calculi.

A truster in a holograph trust disposition and settlement appointed one person to receive two-thirds of the residue, another person to receive one-third, and a third person to receive "the other third." Held that the shares must be paid in the proportion of one-half to the first party and one-fourth to each of the others.

Smith's Trustees v Smith, 1883, 10 R. 1144; 20 S.L.R. 764.

(532)

Bequest of estate "left by" father of testator—Inter vivos disposition by father.

A by his last will and testament, dated in 1895, bequeathed "all my right, title, interest, claim, and estate as one of the children and heirs of my deceased father and mother in and to the estate left by them and situated in the city of Glasgow." At the date of the will A had right to the following property in Glasgow:—(1) A share of heritage under an inter vivos deed granted by his father in 1858 in favour of the granter and his wife in liferent and trustees for his children in fee—(the surviving liferenter had died in 1881); (2) part of a brother's share of the heritage under

the same deed left to A by his brother's will; (3) heritage to which A succeeded under his father's will. **Held** that A's bequest included his original share of heritage under the inter vivos deed, but not that which he had acquired under his brother's will.

Neilson's Trustees v Neilson, 1903, 5 F. 938; 40 S.L.R. 697; 11 S.L.T. 108.

(533)

Power of disposal—Intention to exercise—Misdescription of event in which power exercisable.

Donaldson's Trustee v Donaldson, 1894, 21 R. 1025; 2 S.L.T. 151, No. 1288, *infra*.

8. THE BENEFICIARY.

(1) MEANING OF DESCRIPTIVE TERMS.

(a) Heirs.

(534)

"Lawful heirs"—Widow—Moveable subject.

A widow is not one of her husband's "lawful heirs," and is not entitled to share in a legacy of a moveable fund in favour of the lawful heirs of her husband.

Inglis v Inglis, 1869, 7 M. 435; 41 J. 234; 6 S.L.R. 271.

(535)

"Heirs"—Estate consisting both of heritage and moveables.

Held under a direction in a trust deed, by which estate both heritable and moveable was conveyed to trustees with instructions to settle certain heritable subjects upon the trustor's children in liferent allenerly and their heirs and assignees in fee, with a provision that the issue of any predeceasing child should take "equally" the fee of the whole heritable and moveable estate "as if their parent had been in life, or had been liferented by him or her"—that the eldest son of one of the trustor's children, who survived the trustor and enjoyed a liferent right, was entitled to the fee of the heritable property held in liferent by his parent.

Renton's Trustees v M'Culloch, (O.H.) 1881, 19 S.L.R. 216.

(536)

"Heirs and assignees"—Husband—Foreign law.

A domiciled Scotswoman, in contemplation of marriage, conveyed her whole estate to trustees for behoof, failing children of her marriage, of her heirs and assignees. She married an Australian, and died in Australia, without issue and without leaving a will. It appeared from the opinion of Australian counsel that the whole moveable estate of a wife predeceasing her husband intestate passed to the husband, but it did not appear that the husband was on that account regarded as his wife's heir. **Held** that the husband was not entitled to the wife's estate under the destination in the trust deed in

respect that he was not an "heir" of his wife either by the law of Scotland or by the law of Australia.

Brown's Trustees v Brown, 1890, 17 R. 1174; 27 S.L.R. 995.

(537)

"Heirs and successors."

A testator directed her trustees to pay the following legacies, viz.:—"To" A and B, each £100, whom failing, "then to their heirs and successors equally," "To" C, £200. "To John Craw, doctor of medicine" (her stepson), "and his heirs and successors, the sum of £1000: In the event of the said John Craw, doctor of medicine, predeceasing me without leaving lawful issue of his body, I leave and bequeath to John Craw, my husband, his heirs and assignees, the sum of £500, in consideration of the expenditure incurred by him out of his own funds on my property." **Held** that the bequest to the husband showed that by the words "heirs and successors" of the stepson in the preceding bequest, the testatrix meant the heirs of his body, and that they were to be so construed.

Craw's Trustees v Craw, 1899, 1 F. 572; 36 S.L.R. 414; 7 S.L.T. 3.

(538)

"Heirs whatsoever"—Deed of entail.

Terms of a deed of entail, in which the words "heirs whatsoever" occurring in the destination were held to mean "heirs whatsoever of the body."

Earl of Northesk v Paul, 1882, 10 R. 77; 20 S.L.R. 62.

(539)

"Heir at law"—Direction to sell heritage.

A testatrix directed her trustees to sell certain heritable property particularly described, and her whole other means and estate, heritable and moveable, and after payment of legacies, &c., to pay over the residue "to my heir at law, whom failing to my next of kin." **Held** that by the term "heir at law" the testatrix did not mean to denote her heirs in mobilibus, but her heir in heritage.

Glen v Stewart, 1874, 1 R. (H.L.) 48; 11 S.L.R. 496.

(540)

Nearest heirs "in and through my mother"—Mixed estate—Heir of line or heir of conquest.

A trustor left his property "to my own nearest heirs and assignees whomsoever in and through my mother, hereby excluding the relations by my father, and all others except through my said mother." **Held** (1) that the estate was not intended to pass as a universitas to his mother's next of kin, but that his mother's heir at law succeeded to the heritage, and her heirs in moveables to the moveables; and (2) that although part of the property was conquest in the trustor, the mother's heir of line, not her heir of conquest, succeeded.

Mitchell's Trustees v Waddell, 1872, 11 M. 206; 45 J. 150; 10 S.L.R. 149.

(541)
"Heirs whatsoever"—Heir of line or heir of conquest—Entail.

A person purchased an estate and entailed it upon himself and his heirs-male, and, after various substitutions, on his own heirs whatsoever. **Held** that under the destination to his own heirs whatsoever the heir of line was to be preferred to the heir of conquest. *Mackintosh v Ross*, 1873, 11 M. 636; 45 J. 402; 10 S.L.R. 436.

(542)
"Heirs direct and collateral."

Direction to entail an estate "on my heirs direct and collateral so long as the estate of C is theirs," **held** to be an effectual direction to entail, in respect that it imported a destination to the trustor's own heirs in blood and therefore a destination which did not coincide with the legal order of succession. *Moubray's Trustees v Moubray*, 1895, 22 R. 801; 32 S.L.R. 593; 3 S.L.T. 56.

(543)
"Heirs-female"—Heirs-portioners.

A trustor, "in order to make and secure additional provisions for" his second son and the other heirs of entail succeeding him in the lands and estates of Cromartie to enable them to support the dignity and title of Earl of Cromartie, conveyed to trustees certain securities, and directed them, after his death, to pay the free proceeds thereof to his second son and the heirs-male of his body, whom failing to certain substitutes, "whom failing to the heirs-female of the body" of the said second son. The second son, the Earl of Cromartie, died leaving only two daughters, of whom the elder succeeded her father in the title and estates of Cromartie. **Held** that the direction to the trustees to pay the income to the "heirs-female" of the body of the second son being unambiguous, must receive effect, and that, as the two daughters were heirs-portioners, each was entitled to one-half of the income of the trust funds.

Mackenzie v Duke of Devonshire, 1896, 23 R. (H.L.) 32; [1896] A.C. 400; 33 S.L.R. 628; 4 S.L.T. 12.

(544)
"Heirs in mobilibus"—Heirs ab intestato or executor-nominate.

A, in his settlement, directed his trustees to hold the residue of his estate for behoof of certain of his uncles and aunts, declaring that the provisions in their favour should not vest or be assignable, but should be purely alimentary. He gave his trustees power to retain the capital of the shares falling to any of the residuary legatees. He further provided that in the event of any portion of the capital, or income of the share of any residuary legatee remaining in the trustees' hands at the death of the recipients thereof, the trustees should be bound to pay the same to the deceased legatee's heirs in mobilibus. The trustees retained the share of B, one of the residuary legatees, and made periodical payments out of interest and

capital to him. B died leaving a will. **Held** that the balance of B's share vested under A's settlement in B's heirs in mobilibus ab intestato, and not in his executor-nominate.

Haldane's Trustees v Sharp's Trustee, 1890, 17 R. 385; 27 S.L.R. 303.

(545)
"Heirs, executors, and successors whomsoever"—Legal heirs or executor-nominate.

Held, in construing a testamentary settlement, that a destination over to "the heirs, executors, and successors whomsoever" of a legatee operated in favour of the legatee's legal heir or heirs and not of his executor-nominate, there being nothing in the settlement which disclosed an intention on the part of the testator that the destination should be construed otherwise.

Lady Kinnaird's Trustees v Ogilvy, 1911 S.C. 1136; 48 S.L.R. 917; 1911, 2 S.L.T. 275.

(546)
"Nearest heirs and next of kin whomsoever in accordance with law."

Steedman's Trustees v Steedman, 1916 S.C. 857; 53 S.L.R. 654; 1916, 2 S.L.T. 64, No. 572, *infra*.

(547)
Heirs substitute in deed of entail—Subsequent disentail.

A testator directed his trustees to execute an entail of his estate of Newmore in favour of Mrs. Inglis and a series of heirs specified, and failing the whole persons specified, then to the heirs in possession of the estate of Highfield under the entail thereof for the time, and to the other heirs substitute in said entail in the order set down in the said entail successively. While the estate of Newmore was still in possession of the Inglis series of heirs, Highfield was disentailed. **Held** that although the substitution in favour of the heir in possession of the estate of Highfield under the entail thereof for the time had become void, the following substitution of the other heirs in the entail was effectual, as it was not qualified by the condition that the successive heirs should be in possession of the estate of Highfield under the entail thereof.

Inglis v Gillanders, 1895, 22 R. (H.L.) 51; [1895] A.C. 507; 32 S.L.R. 478; 3 S.L.T. 30.

(548)
—Heir entitled to succeed under deed of entail.

By a general trust disposition and settlement a testator directed his trustees to entail his estate of Kintail upon a series of heirs specified in a destination therein set forth, and gave certain beneficial interests in the residue of his estate "to the heir for the time being entitled to succeed under the said deed of entail," upon his attaining the age of twenty-four. The institute under the tailzied destination upon attaining the age of twenty-one obtained a conveyance in fee-simple, under sec. 27 of the Entail Act of 1848, of the lands directed to be

entailed. He evacuated the tailzied destination, and thereafter died without issue before attaining the age of twenty-four. **Held**, upon a construction of the whole testamentary writings of the testator, that the beneficial interests in the residue above mentioned were conferred upon the heir for the time being under the tailzied destination, and that it was not a condition of such heir taking these beneficial interests that he should at the time be in possession as heir of entail under the deed of entail.

Mackenzie's Administratrix v Mackenzie's Trustees, 1907 S.C. (H.L.) 17; [1907] A.C. 440; 44 S.L.R. 985; 15 S.L.T. 364.

(549)

——— **Heirs of entail who may be in possession or have right to be in possession of entailed estate.**

A testator conveyed heritage to his sister A in liferent, and after her death to his nephew B (who was heir of entail in possession of the estate of X) in liferent, and after his death the testator gave "such liferent use and enjoyment as aforesaid to the heirs of entail who may in succession and for the time be in possession, or have right to be in possession, of the entailed estate of X" under and in virtue of deed of entail. B predeceased A, having disentailed X and evacuated the destination in the entail. On A's death, **held** that as no one could claim to be heir in possession of X under the deed of entail, the destination in favour of such heirs was inoperative, and that the heritage fell to the testator's heir at law.

Schank v Schank, 1895, 22 R. 845; 32 S.L.R. 634; 3 S.L.T. 66.

(550)

——— **"Heirs of entail successively entitled"—Disentail.**

An onerous inter vivos trust deed provided for the payment of certain sums to "the heirs of entail successively entitled and succeeding to" a certain entailed estate. **Held** that the disentail of the estate had the effect of evacuating the destination.

Davidson v Davidson, (O.H.) 1906, 14 S.L.T. 337.

(551)

——— **"Heirs of entail in possession"—Entail invalid.**

A testatrix left a heritable bond to "the heir of entail who might be in possession of" the estate of A at the death of all the daughters of B. The deeds of entail under which the estate of A was held were found to be ineffectual, and the tailzied destination was evacuated, with the result that there was no heir of entail in possession of the estate of A at the death of the last survivor of the daughters of B. **Held** that the person who would have been heir of entail in possession had the deeds of entail remained in force was not entitled to succeed to the bond, which fell into intestate succession.

Colville's Trustees v Marindin, (O.H.) 1907, 15 S.L.T. 26; affirmed 1908 S.C. 911; 45 S.L.R. 746; 16 S.L.T. 197.

(552)

Destination to heirs-male of marriage other than heir-male succeeding to certain estates—Sale of estate before succession opened.

At the date of his marriage L held the estate of W under an entail in favour of himself and the heirs-male of his body, and had a contingent right to the estate of B. By his antenuptial marriage contract (which recited the destination of the W entail) L bound himself to convey the estate of B to himself and the heirs-male of his body by the intended marriage. The wife's father settled the estate of E on "the heirs-male of this present marriage other than the heir-male succeeding to the said estates" of W and B. There were two sons of the marriage. L acquired B but sold it during his life. W was disentailed during L's life and was purchased by the eldest son for a full price. **Held** that the words "heir-male of this present marriage other than the heir-male succeeding to the said estate" of W and B meant the heir-male of the marriage other than the heir contemplated by the marriage contract as entitled to succeed to these estates under the destination recited in the marriage contract, and that the younger son was entitled to succeed to the estate of E, notwithstanding the sale of B and the disentail of W.

Livingstone v Waddell's Trustees, 1899, 1 F. 831; 36 S.L.R. 580; 6 S.L.T. 392.

(553)

Gift of residue to A, B, C, and D and the heirs of E—Heritable estate—Division between E's two sons.

A testator directed his trustees to pay the liferent of the residue of his estate to his widow, and on her death "to pay or divide the then free residue of my whole means and estate heritable and moveable, real and personal, to and among" his daughters, A, B, C and D "and the heirs of my son the deceased E, and that equally between them, share and share alike." The testator was survived by his widow and his four daughters. His son E predeceased, leaving two sons who survived the testator. The residue consisted almost entirely of heritage. **Held** that the share of residue falling to the heirs of E belonged to E's two sons equally.

Galloway's Trustees v Galloway, 1897, 25 R. 28; 35 S.L.R. 23; 5 S.L.T. 138.

(b) Executors, Trustees, Representatives, Assignees.

(554)

Executors—Executors and representatives whomsoever.

A bequeathed the residue of her moveable estate to B and to two other persons, "and failing all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever." B predeceased the testatrix, leaving a will by which he nominated certain persons to be his executors. **Held** that the executors of B were entitled to B's share of residue,

and that the next of kin of B had no right thereto.

Scott's Executors v Methven's Executors, 1890, 17 R. 389; 27 S.L.R. 314.

(555)

—Certain persons or "the successor of each" appointed executors—Right of successors to share in bequest.

A testator directed certain of his books to "be parted among" his executors. He appointed as his executors, *inter alios*, his brothers A and B and his sister C, "or their representatives, namely, the successor of each as representing their respective families." B predeceased the testator. C declined to accept office, and her eldest son was assumed as an executor. Held that B's eldest son, being an executor as the successor and representative of his father, was entitled to share in the bequest, but that C's eldest son was not so entitled.

Michie's Executors v Michie, 1905, 7 F. 509; 42 S.L.R. 386; 12 S.L.T. 738.

(556)

—Wife's "own heirs, executors, or assignees whomsoever"—Marriage contract executed in Scotland—Wife dying domiciled in England—*Lex loci contractus* or *lex domicilii*.

An antenuptial contract of marriage, entered into between a domiciled Englishman and a domiciled Scotswoman, provided that, in the event of failure of children of the marriage, the fund contributed by the wife should belong, on the death of the survivor of the spouses, to the wife's "own heirs, executors, or assignees whomsoever." The fund contributed by the wife consisted originally of a sum secured over Scottish heritable property. The marriage contract was prepared by Scottish solicitors, was in favour of Scottish trustees, and was in Scottish form. It contained provisions peculiar to Scots law, such as satisfaction of legitim, exclusion of the *jus mariti* and right of administration, and consent to registration for preservation and execution. The wife died domiciled in England, without issue, and survived by her husband, who, in terms of the contract, received the income of the fund during his lifetime. Held that, on his death, the wife's heirs, according to the Scots law of succession, and not according to the English law, were entitled to the fund.

Battye's Trustee v Battye, 1917 S.C. 385; 54 S.L.R. 326; 1917, 1 S.L.T. 189.

(557)

Trustees—Beneficiary named as trustee predeceasing testator.

A testator conveyed his whole estate to A, B, C, and D "and to the acceptors and acceptor, survivors and survivor of them to be my trustees." He then directed the said trustees to pay the income of the trust estate to his sister in *lifereit*, and on her death he directed "my said trustees the said" A, B, C, and D (naming them) "to divide the free residue . . . amongst

themselves . . . declaring that if any of my said trustees" should die before the residue became payable their share or shares should be payable "to their several heirs, executors, and successors, and I appoint my said trustees to pay and deliver the same to them accordingly." A predeceased the testator; the other three trustees survived and accepted office. Held that A's representatives were not entitled to take under the gift of residue as he had never been a trustee.

Mellis's Trustees v Legge's Executrix, 1893, 25 R. 954; 35 S.L.R. 763.

(558)

—Assumed trustees.

Terms of a will on which held that it was not intended that assumed trustees should be beneficiaries under a bequest of legacies to trustees.

Wilson's Trustees v Wilson, (O.H.) 1909, 1 S.L.T. 124.

(559)

"Representatives"—"Representatives of both spouses"—Marriage contract.

By an antenuptial marriage contract it was provided that the surviving spouse should have the *lifereit* of the whole of the property, heritable and moveable, "and on the death of the longest liver the moveable property so *lifereited* by him or her shall be equally divided between the representatives of both spouses." Held that the true meaning of the term "representatives" depends on the particular terms of the deed in which it is used, and that on the terms of the deed under construction the representative of the widow who survived was her executor-nominate and not her next of kin.

Manson v Hutcheon, 1874, 1 R. 371; 11 S.L.R. 190.

(560)

"Heirs, executors, and successors whomsoever."

Lady Kinnaird's Trustees v Ogilvy, 1911 S.C. 1136; 48 S.L.R. 917; 1911, 2 S.L.T. 275, No. 545, *supra*.

(561)

Assignees—Assignees after vesting—Destination on occurrence of certain event to a person named "and his heirs and assignees."

A testator directed his trustees, on the death or second marriage of his widow, "if and when the whole of my daughters are married or when my son is married, whichever of these events shall first happen," to assign and dispose his dwelling-house to his son "and his heirs and assignees." The son died unmarried, predeceased by his mother, but survived by his sisters, of whom one was unmarried at his death. Held that, in a question between the daughters and the testamentary trustees of the son, the former as heirs of the son were the conditional institutes entitled to the conveyance,

the son having died before any right had vested in him which he could assign.

Montgomery-Fleming's Trustees v Carre,
1922 S.C. 688; 59 S.L.R. 492; 1922
S.L.T. 520.

(562)

Appointees or nominees before vesting.

By his trust settlement a testator directed his trustees to hold the residue of his estate for behoof of his children in equal shares, and "to hold and retain each of my children's shares for his or her alimentary use only, and for his or her issue, whom failing, his or her own heirs and assignees whomsoever in fee." Held that the term "assignees" meant "appointees" or "nominees," so that although the share which a daughter life-tenant did not vest in her, it was carried by her will.

Barr v Parnie, (O.H.) 1903, 11 S.L.T. 426.

(c) Next of Kin.

(563)

Observed (per Lord Watson)—"The expression [next of kin] is no longer [since the passing of the Intestate Moveable Succession Act, 1855] equivalent to legal heirs in mobilibus, inasmuch as it does not include all the members of that class. It appears to me, however, that, in its legal sense, the expression is still applicable to those members of the class who would have been the sole heirs before the passing of the Act."

Gregory's Trustees v Alison, 1889, 16 R. (H.L.) 10; 14 App.Cas. 124; 26 S.L.R. 787.

(564)

Observed (per Lord Stormonth-Darling) that "when a testator speaks of 'next of kin' without anything in the context to show that he affixes to it a meaning of his own, it must be construed in its ordinary legal signification."

Fulton's Trustee v Fulton, (O.H.) 1900, 8 S.L.T. 465.

Surviving parent.

Opinion reserved (per Lord Watson) on the question whether the surviving parent of a deceased person can be regarded as one of the next of kin.

Gregory's Trustees v Alison, 1889, 16 R. (H.L.) 10; 14 App.Cas. 124; 26 S.L.R. 787.

(566)

Mother.

A lady, by her antenuptial contract, conveyed certain moveable property to trustees, directing them to convey it after her death to her "next of kin" in certain events (which happened). Her nearest relatives at the time of her death were (a) her mother; and (b) a paternal uncle and a paternal aunt. Held that the uncle and aunt were entitled to the whole property left to the next of kin of the deceased, the mother not being in law one of her "next of

kin," and there being nothing in the marriage contract to show that that term was used in another than its technical sense.

Honeyman's Trustee v Donaldson, 1900,
2 F. 539; 37 S.L.R. 388; 7 S.L.T. 363.
[See Muir, 1876, 4 R. 74; 14 S.L.R. 24.
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(567)

Mother's relatives.

A testator bequeathed a third of his residue to the "nearest of kin" of his first wife. The wife died prior to the date of the will, leaving no relations on her father's side. Held that relatives of the wife on her mother's side were not her nearest of kin, and were not entitled to claim the share of residue.

Andrew's Trustees v Andrew, (O.H.)
1918, 2 S.L.T. 12.

(568)

"Nearest in kin"—Intestate Moveable Succession Act, 1855, sec. 1.

Held that a legacy to a person's "nearest in kin" was not to be construed as a legacy to his heirs in mobilibus.

Young's Trustees v Janes, 1880, 8 R. 242;
18 S.L.R. 135.

(569)

"Next of kin who would have been entitled to succeed to my moveable estate had I died intestate."

Held that, in construing the trust disposition and settlement, dated in 1874, of a testatrix who died in 1883, a bequest in favour of "my next of kin who would have been entitled to succeed to my estate had I died intestate," fell to be construed as a gift in favour of the heirs in mobilibus of the testatrix.

Tronson v Tronson, 1884, 12 R. 155; 22
S.L.R. 125.

(570)

"Nearest of kin according to law"—Intestate Moveable Succession (Scotland) Act, 1855.

Held, in construing the terms of a testament, that the expression "nearest of kin according to law" signifies heirs in mobilibus at common law, and does not include the wider class called to succeed on intestacy under the Intestate Moveable Succession Act, 1855.

Murray's Factor v Melrose, 1910 S.C. 924;
47 S.L.R. 778; 1910, 2 S.L.T. 60.

(571)

"Next of kin according to the law of moveable succession in Scotland."

Held, on a construction of a trust disposition and settlement, that a destination of residue to "my next of kin according to the law of moveable succession in Scotland" imported a destination to the testator's heirs in mobilibus, and not to his next of kin in the strict sense.

Rutherford's Trustees v Dickie, 1907 S.C.
1280; 44 S.L.R. 960; 15 S.L.T. 296.

(572)
"Nearest heirs and next of kin whomsoever in accordance with law."

Under a bequest of residue by a testator to his "nearest heirs and next of kin whomsoever in accordance with law," held that, in so far as the residue consisted of moveable estate, the beneficiaries were the testator's next of kin at common law, and not the wider class of heirs under the Intestate Moveable Succession Act, 1855.

Steedman's Trustees v Steedman, 1916 S.C. 857; 53 S.L.R. 654; 1916, 2 S.L.T. 64.

(573)
International law—"Next of kin"—Marriage contract executed in Scotland—Spouses dying domiciled in England—Lex loci contractus or lex domicilii.

An antenuptial contract of marriage was entered into between an Englishman residing in Scotland and a Scotswoman. The contract was prepared by a Scottish solicitor, was in Scottish form, and contained a provision that a fund provided by the wife should, after her death failing issue, belong to her "next of kin, excluding her husband." Some years after the marriage the parties moved from Scotland to England, and the wife died domiciled there. Circumstances in which held that it was the intention of the parties to the contract that the wife's next of kin entitled to succeed to the fund should be ascertained according to the law of Scotland, and accordingly that brothers and sisters of the half-blood were excluded.

Lister's Judicial Factor v Syme, 1914 S.C. 204; 51 S.L.R. 166; 1914, 1 S.L.T. 12.

(d) Children.

(574)

Sons.

Terms of a trust settlement in which a destination to "sons" was held to be limited, and not to include descendants in a more remote degree.

Magistrates of Perth v Irvine, (O.H.) 1895, 5 S.L.T. 23.

(575)
Grandchildren—Gift of intermediate income—Capital payable at majority of youngest child.

A testator directed his trustees to pay the free income of his estates to his widow, and after her death or second marriage to "pay to or apply for behoof of my children until the youngest attain the age of twenty-one years complete the free income of my said estates." The testator further directed his trustees, on the youngest child attaining twenty-one and the termination of the widow's liferent, to pay or convey the residue of his estate to his children, the issue of any predeceasing child coming in place of their parent. Held that the word "children" in the above-quoted clause did not include grandchildren, and that the income accruing between the widow's death and the date when the youngest child attained majority fell to be divided among the surviving chil-

dren, to the exclusion of issue of predeceasing children.

Adams' Trustees v Carrick, 1896, 23 R. 828; 33 S.L.R. 620; 4 S.L.T. 49.

(576)
Children equally among them—Whether "equally among them" applied to grandchildren.

Heritage was destined to B in liferent and her children in fee equally among them. B had one child who predeceased her, leaving a son and a daughter, who survived B. Held (1) that B was *fiar* at the date of her death; (2) that the destination to B's children included her grandchildren; and (3) that the words "equally among them" did not apply to the grandchildren, and that the subjects went to B's grandson as heir of provision.

Ranken, 1870, 8 M. 878; 42 J. 523; 7 S.L.R. 544.

(577)
Surviving children.

Terms of a trust settlement under which held that a bequest to "surviving children" did not include surviving grandchildren.

McDonald's Trustees v Gordon, (O.H.) 1909, 2 S.L.T. 321.

(578)
Children of marriage equally among them—Long lease.

Certain subjects were leased for 950 years to A P "and his heirs as after-mentioned," and, failing him, "then the whole subjects to and in liferent only to the present wife of the said A P . . . and after the death of the said spouses . . . then to the children of their marriage equally." Held that the word "children" in this destination did not include grandchildren.

Marquis v Prentice, 1896, 23 R. 595; 33 S.L.R. 415; 3 S.L.T. 314.

(579)
Spouses and "their children"—Husband's children by a former marriage.

A father, who had been twice married and had children by each wife, took two railway debenture bonds, payable in five years, in favour of himself and his second wife in liferent and "their children" in fee. Held that the intention and effect of the destination was not to exclude the children of the first marriage, but that the funds in the debentures fell to be divided equally among the children of both marriages.

Buchan v Porteous, &c., 1879, 7 R. 211; 17 S.L.R. 90.

(580)
Children of husband by a second marriage.

A trustor appointed his trustees on the lapse of a liferent to divide the residue of his estate equally among a number of nephews and nieces, the children of any who should predecease him coming into their parent's place. By a codicil he directed his trustees to retain out of the shares falling to one of his nephews, James Whittet, and

one of his nieces, Mrs. Jane Whittet, £200, and to divide this sum "among their children equally." James and Jane Whittet were spouses, and at the date of the trust settlement had two children. After the truster's death, but before the expiration of the liferent, Mrs. Jane Whittet died, and Mr. Whittet married a second time, and had, when the liferent expired, six children by this second marriage. **Held** that the children of the second marriage were not entitled to participate in the sum of £200.

Whittet's Trustees v Whittet, 1892, 19 R. 975; 29 S.L.R. 834.

(581)

Illegitimate children.

Terms of a trust settlement in which a bequest "for behoof of the children of my said brother A B by his present wife" (i.e. the brother's second wife), **held** not intended by testator to include a child of the brother and his second wife, who was illegitimate, having been born before the death of the brother's first wife, because the meaning of the word "children," when used in a will, was settled to mean lawful children, unless there was in the will itself the clearest evidence to the contrary.

Govenlock's Trustees v Govenlock, (O.H.) 1895, 3 S.L.T. 163.

(582)

Surviving children.

Circumstances in which **held** that a bequest to "surviving children" did not include illegitimate children. **Observed** that "where a testator refers to 'children' he is held to mean 'legitimate children,' unless there is something in the will or in the surrounding circumstances which points to a different intention."

M'Donald's Trustees v Gordon, (O.H.) 1909, 2 S.L.T. 321.

(583)

Gift to "lawful children."

Terms of a trust settlement in which the expression "whole lawful children" was **held** to be intended by the testator to include children alleged to be illegitimate.

Sharp's Trustees v Sharp, (O.H.) 1894, 2 S.L.T. 124.

(584)

By his trust disposition and settlement, A M made a bequest of heritage to his son, D M, in liferent, "and to his lawful children at my death equally," whom failing, to his married daughter, Mrs. L, in liferent, "and to the whole children procreated or that may yet be procreated of her body." At the date of the settlement Mrs. L had an illegitimate child, G C, who lived with the testator, and for whom he made special provision by legacy, designating her as his "grand-daughter." D M having died without issue, and subsequently Mrs. L having died, leaving no issue but G C, a competition arose between G C, claiming under the destination to the "whole children" of Mrs. L, and the widow of D M, claiming under

his settlement. **Held** that the word "children" must be construed here in its ordinary meaning as applying to legitimate children only, the testator not having clearly indicated an intention to include G C in the bequest to the children of Mrs. L.

Mitchell's Trustees v Cables, (O.H.) 1893, 30 S.L.R. 969; 1 S.L.T. 156.

(585)

Gift to children born or to be born.

A woman in contemplation of marriage executed an inter vivos trust deed, whereby she conveyed her estate to trustees, inter alia, "for behoof of the child or children born or to be born of me." At the time the deed was executed she had two illegitimate children. **Held** that these children were beneficiaries under the trust purpose. **Opinion** that illegitimate children born subsequent to the deed would not have been beneficiaries.

Gentle's Trustees v Bunting, (O.H.) 1908, 16 S.L.T. 437.

(586)

Marriage with deceased wife's sister.

A testator by his testamentary settlement bequeathed his whole estate "to and in favour of A B, my wife, in liferent for her liferent use alienarly, and to my children C D and E F, and to any child or children that may yet be born to me, equally among them, share and share alike in fee." The "wife" referred to was his deceased wife's sister, and the marriage was not legal according to the law of Scotland. **Held** that children of this union born after the date of the settlement were intended by the testator to share along with a child of the testator by his former wife.

Allan v Adamson, (O.H.) 1902, 9 S.L.T. 404.

(587)

Bequest to grandchildren born before testator's death—Grandchildren illegitimate at testator's death subsequently legitimated—Grandchild in utero at testator's death.

A testator by his settlement directed his trustees to retain the residue of his estate until the youngest child of his son, J F B, "born prior to the date of my death," should attain majority; and on that event to make over the residue equally "to such of the children then surviving of the said J F B who were born prior to the date of my death." The testator also declared that the issue of children who died before the date of division should not take their parents' shares, it being his desire "that only those children of the said J F B who are born prior to the date of my death, and who survive said date of division, shall be entitled to participate in my estate." At the date of the testator's death there were four children of J F B by his first marriage; and there were also two illegitimate children, who were legitimated by his marriage with their mother after the testator's death. Another child of J F B's second marriage was in utero at the

testator's death, but was not born till after the marriage. The second marriage took place before all the children of J F B's first marriage had attained majority. **Held**, on the terms of the settlement, that the two children who were illegitimate, and the child who was in utero, at the date of the testator's death, were not included in the class of residuary legatees.

Burns's Trustees v Burns, 1917 S.C. 117; 54 S.L.R. 111; 1916, 2 S.L.T. 318.

(588)

Right of posthumous child to share—Bequest to two children nominatim.

A father executed a holograph will in 1878, when he was a widower, leaving his whole estates, heritable and moveable, to his two children nominatim. In 1884, before entering into a second marriage, he executed a marriage contract in which he assigned £3000 to trustees to secure payment of an annuity of £150 to his second wife should she survive him, with directions to the trustees on her death, should she survive him, to divide the trust funds among his children of both marriages equally, and, in the event of his wife predeceasing him, to restore the fund to himself, the marriage contract, in that event, containing no provision for children of the second marriage. He died six months after this marriage, survived by his widow, who subsequently gave birth to a posthumous child. This child claimed a share of the provisions made for the other children in the holograph will in addition to a share of the trust fund. The Lord Ordinary repelled the claim.

Findlay's Trustees v Findlay, (O.H.) 1886, 14 R. 167; 24 S.L.R. 56.

(589)

"Children of this marriage"—Eldest son.

A clause in an antenuptial marriage contract declaring that the provisions conceived in favour of "the children of this marriage" were in full satisfaction to them of their legal rights, was **held** not to apply to the eldest son, as the provisions referred to conferred no benefit on him.

Countess-Dowager of Kintore v Earl of Kintore, 1886, 13 R. (H.L.) 93; 11 App.Cas. 394; 23 S.L.R. 877.

(e) Issue.

(590)

Children or descendants generally.

The term "issue" in a destination under a *mortis causa* deed to a person named "and his issue" has no technical meaning, and it will depend upon the context and the intention of the testator whether it is confined to children, or includes grandchildren and descendants generally. Circumstances in which a gift of heritable subjects in favour of issue was **held** to be a gift in favour of children to the exclusion of more remote descendants.

Opinion (per Lord Shand) that the term "issue" occurring in a settlement is to be taken in its ordinary or primary sense, and

implies a bequest to children, and not to more remote descendants.

Young's Trustees v M'Nab, 1883, 10 R. 1165; 20 S.L.R. 789.

(591)

Held that a destination to a person's "issue" in the ordinary case includes not children only but direct descendants of every degree.

Turner's Trustees v Turner, 1887, 24 R. 619; 34 S.L.R. 468; 4 S.L.T. 332.

M'Murdo's Trustees v M'Murdo, 1897, 24 R. 458; 34 S.L.R. 339; 4 S.L.T. 263.

Dalziel v Dalziel's Trustees, 1905, 7 F. 545; 42 S.L.R. 404; 12 S.L.T. 793.

Bowie's Trustees v Black, 1899, 36 S.L.R. 475.

(592)

Although the general rule is that the term "issue" includes not children only but direct descendants of every degree, it may appear from the terms of the deed that this was not the testator's intention. Terms of a will on which **held** that "issue" meant children only and accordingly that the exercise of a power of appointment which gave part of the fund to grandchildren was an invalid exercise of a power the objects of which were "issue."

Bannerman v Bannerman's Trustees, (O.H.) 1906, 13 S.L.T. 754.

(593)

Issue of marriage—Marriage contract.

Observed (per Lord Herschell, Lord Chancellor)—"It seems to me that in the natural meaning of the words 'issue of the marriage,' the grandchildren are included as much as the children. I do not accede to the argument that the primary meaning of 'issue' is 'children' only, and that it is departing from the primary meaning of 'issue of the marriage' if you include the children of children."

Macdonald v Hall, 1893, 20 R. (H.L.) 88; [1893] A.C. 642; 31 S.L.R. 279.

(594)

Terms of an antenuptial marriage contract on which **held** that a power of apportionment among "issue" of the marriage extended to children only, and not to children of a predeceasing child.

Cattanach's Trustees v Cattanach, 1901, 4 F. 205; 39 S.L.R. 154; 9 S.L.T. 284.

(595)

"Lawful issue of her body"—Settlement of heritage.

The Court, without determining the general effect of the words "lawful issue of her body" occurring in a deed of settlement of heritage, **held**, in conformity with the opinion expressed in 1852 at a prior stage of the case by Lord Rutherford, Ordinary (15 D. 176), and by Lord Wood in the Inner House (15 D. 185), that in the particular deed the context showed that they were to be construed as equivalent to "heirs of her body."

Campbell v Campbell, 1881, 8 R. 694; 18 S.L.R. 440.

(596)

Conveyance of mixed estate.

A testator directed his trustees to pay certain legacies and expenses out of his moveable estate in the first place, and only in event of that being inadequate for the purpose to make up any deficiency by selling or burdening his heritable estate. He further directed his trustees to convey the residue of his estate, heritable and moveable, to his daughter for her life, and to the lawful issue of her body in fee, with this declaration and condition, that any son of the daughter "succeeding to the heritable subjects shall be bound to assume" the testator's surname. **Held** that the heritable estate was destined to the daughter's eldest son, and the moveable estate fell to be divided equally among the other children. *Christie v Wisely*, 1874, 1 R. 436.

(f) Family.

(597)

Grandchildren.

A bequest to the "family" of A **held** not to include the grandchildren of A.

Low's Trustees v Whitworth, 1892, 19 R. 451; 29 S.L.R. 389.

(598)

Held that the word "family" occurring in a testamentary bequest "to A B, my sister, and failing her her family equally," meant children and did not include grandchildren.

Phillips' Trustees v Davies, (O.H.) 1910, 2 S.L.T. 161.

(599)

Held (per Lord Johnston, Ordinary, and acquiesced in) that where a testator directed his trustees to divide the residue of his estate "in equal proportions amongst the families of" B and C, his two brothers-in-law, the word "families" included only the immediate issue of B and C, and did not include a grandchild of B whose parent had died before the date of vesting.

Searcy's Trustees v Allbuary, 1907 S.C. 823; 44 S.L.R. 536; 14 S.L.T. 898.

(600)

A testator directed his trustees to pay a share of the residue of his estate "to the family of my deceased brother J G surviving at my death equally among them." At the time when the testator made his will one of the daughters of J G had died leaving issue. **Held** that there was nothing in these circumstances to displace the ordinary signification of the word "family" as being limited to sons and daughters only, and accordingly that the issue of the deceased daughter were not entitled to participate in the bequest.

Greig's Trustees v Simpson, 1918 S.C. 321; 55 S.L.R. 284; 1918, 1 S.L.T. 189.

(601)

"Families" of nephews and nieces.

A testator directed a share of the residue of his estate to be invested for behoof of A

in life and her children in fee, and failing children "to go to the survivors of my nephews and nieces or the families of such as may have predeceased." A died without issue. **Held** that the word "families" included all descendants of nephews and nieces, and that the grandchildren of a nephew were entitled to succeed per stirpes to the share which their predeceasing parents would have had.

Irvine v Irvine, 1873, 11 M. 892; 45 J. 546; 10 S.L.R. 625.

(g) Relatives and Relations.

(602)

"Relatives."

A trustee directed that the residue of his estate should be "equally divided amongst all my relatives, my sister Maria to get half more than the others." Of his four sisters and two brothers only one—Maria—survived him, but several nephews and nieces did. **Held** that the testator's sister and all his nephews and nieces were entitled to share in the residue, per stirpes, the sister receiving half as much again as any of the other stirpes.

Cunningham's Trustees v Cunningham, 1891, 18 R. 380; 28 S.L.R. 266.

(603)

A testator bequeathed certain legacies to his blood relations, whom he mentioned in his will, and included in the list of legatees the name of his sister-in-law. There were also other legacies left to strangers, and a final direction that the residue of the estate was to go to the relatives already mentioned in the will. **Held** that the term "relatives" was not limited to the testator's heirs in mobilibus. Circumstances in which the word "relatives" **held** to include a sister-in-law. **Opinion** that the word relatives in ordinary circumstances is limited to blood relations.

Stewart's Trustees v Stewart, (O.H.) 1917, 2 S.L.T. 267.

(604)

"Relatives according to their legal rights."

Direction to dispose of share of residue among "my relatives according to their legal rights," **held** to import that the share was to be treated as having fallen into intestacy.

Johnston's Trustees v Johnston, 1891, 18 R. 823; 28 S.L.R. 634.

(605)

Nearest relatives.

Terms of a trust settlement in which the expression "nearest relatives of me the said A B entitled to succeed to my moveable estate," **held** to mean A B's heirs in mobilibus, and not to be restricted to his next of kin.

Thomson's Trustees v Thomson, (O.H.) 1903, 11 S.L.T. 67.

Relations.

(606)

Circumstances under which **held** that the term "relations" used in a trust settlement was not limited to the testator's next of kin.

Tait's Trustees v Bannatyne, (O.H.) 1894, 2 S.L.T. 168.

(h) Cousins.

(607)

The word "cousins" in a testamentary deed means first cousins only, unless there is something in the context of the deed or in the circumstances of the case to show that the word is used in a different sense.

Copland's Executors v Milne, 1908 S.C. 426; 45 S.L.R. 314; 15 S.L.T. 733.

(608)

"Second cousins"—First cousins once removed.

A trustor left bequests (1) "to my second cousin and servant, H B" (naming a person who was no relation); (2) "to each of my cousins" (naming them); and (3) "to each of my second cousins other than the first above-named H B." She further left a legacy to J S, "one of my second cousins" (he being in reality a first cousin once removed). **Held** that the term "second cousins" was used to denote not merely persons standing in that relationship strictly speaking, but also first cousins once removed.

Drylie's Factor v Robertson, &c., 1882, 9 R. 1178; 19 S.L.R. 884.

(i) "Survivors"—Whether Equivalent to "Others."

(609)

Liferent to children, and failing issue, to survivors—Capital to issue—Stirpital survivorship.

A testator directed his trustees to hold the residue of his estate for his three children, a son and two daughters, equally among them in liferent and for their issue in fee. He then directed that, if any of his children should die without leaving issue, or if such issue should die before majority or marriage, the trustees should hold the capital of their shares for "behoof of the survivors" of his said son and daughters, if more than one, or for the survivor if only one, "in the same way as is hereinbefore provided with regard to" their original shares. The testator next directed that, if any of his children should predecease him leaving issue, such issue should receive the capital which would have been liferented by their parent, and that, if any of his children should predecease him leaving no issue, their shares should be divided equally among his surviving children and the issue of predeceasing children per stirpes. Then followed a direction that, failing any survivor of his son and daughters or issue of any of them, his trustees should pay over the shares

of his son and daughters to their nearest heirs and representatives in moveables. The testator was survived by his three children. The son died unmarried, survived by the issue of one of his sisters who had predeceased him, and by the other sister and her issue. **Held** that the word "survivors" was used in the settlement in a stirpital sense, and included not only a child surviving in person, but also one who, figuratively, survived in his or her issue, and accordingly that, while half of the share of the son accresced to the surviving daughter and her issue, the other half accresced to the issue of the deceased daughter.

Curle's Trustees v Millar, 1922 S.C. (H.L.) 15; 59 S.L.R. 21; 1921, 2 S.L.T. 262.

(609a)

A testator directed his trustees to divide his estate into shares and to hold the shares for his children and their spouses in liferent, and for their respective children in fee. It was declared that the shares of any children dying without leaving issue should accresce "to my other children then surviving in liferent, and to their respective issue in fee." **Held** that the share of one of the testator's children who died without issue passed to the other children alive at her death in liferent, and to their issue in fee, to the exclusion of the issue of children then dead.

Swan's Trustees v Swan, 1912 S.C. 273; 49 S.L.R. 222; 1912, 1 S.L.T. 11.

(610)

By her trust disposition and settlement a testatrix provided for payment to each of her three daughters a share of her estate in liferent, and to their issue in fee. She further provided that in the event of any of her daughters dying without issue her share should go to the surviving daughters in liferent and their issue in fee. Two of the daughters died leaving issue, but the last survivor of the daughters died without issue. **Held** that the word "surviving" must be given its ordinary signification, and that, accordingly, the issue of predeceasing daughters were not entitled to any part of the last surviving daughter's share, which fell into intestacy.

Stevenson's Trustees v Stevenson, (O.H.) 1913, 1 S.L.T. 292.

(611)

Liferent to beneficiaries with fee to children—Destination over to surviving beneficiaries in liferent and their children in fee.

A testator directed his trustees to hold the residue of his estate for the liferent use of ten persons named, with fee to their children. Failing children of any of the persons named, the testator directed that the shares which would have fallen to such children should "accresce and belong to the survivors of the parties before named in liferent, and to their children in fee, all in the same manner as the proper shares of the parties themselves." **Held** that "survivors" was

equivalent to "others," and that therefore the children of those of "the parties before named" who did not survive to take an accrescing liferent took no accrescing fee. **Question**, whether the same result would have followed had the childless liferenter been the last survivor of the liferenters, and, consequently, had the question been one of testacy or intestacy.

Forrest's Trustees v Rae, 1884, 12 R. 389; 22 S.L.R. 285.

(611a)

A testator, after providing for the payment of certain annuities, directed his trustees to divide the remainder of the income arising from his estate among his children, share and share alike, for their liferent use allenerly, and upon the death of any of his children leaving lawful issue, to pay the portion of the estate which had been liferented by the decesser equally among the decesser's children on their attaining majority, or being married, "declaring that in the event of any of my children dying without leaving lawful issue, his or her share of the liferent of my means and estate shall thereafter be divisible and payable equally among my surviving children and their issue in liferent and fee respectively in the same manner and subject to the same restrictions as are above specified in regard to the provisions in favour of my children and their issue generally." **Held** that upon the death of one of the testator's children without issue the share liferented by him fell to be divided equally among the testator's children then surviving and their issue in liferent and fee respectively, the issue of the testator's predeceasing children being excluded.

Ward v Lang, 1893, 20 R. 949; 30 S.L.R. 823; 1 S.L.T. 138.

(612)

A testator directed his trustees upon his death to secure and lend upon good and sufficient bonds, payable to themselves, the sum of £700 in trust for behoof of each of his five daughters in liferent allenerly, and the lawful issue of each in fee. The deed provided that in case any daughter should die before the testator, or die without issue, "the sum or sums provided and intended for them and theirs as aforesaid, not only the original sum so provided, but the sum or sums accrescing to her or them by virtue of the present clause shall appertain and accresce to the survivor or survivors of my said daughters in liferent for their liferent use allenerly, and to their issue and children, share and share alike, in fee. . . ." The deed further provided that at the request of any of his daughters, the trustees were to invest her £700 in the purchase of land or houses, and were to take the titles to her in liferent allenerly and her issue in fee, "whom failing, to my said other daughters in liferent, and their respective issue and children in fee, in case of their death or their dying without leaving such issue and children, as in manner before mentioned." The testator left the residue of

his estate to his sons. **Held** that on the death of a daughter without issue her provision fell to her surviving sisters in liferent and their respective children in fee (children of predeceasing sisters being excluded), and that on the death of the last surviving sister without issue, the fee of the fund liferented by her fell into residue.

Hairsten's Judicial Factor v Duncan, 1891, 18 R. 1158; 28 S.L.R. 873.

(613)

A testator directed his trustees to hold the residue of his estate for his sisters nominatim, equally in liferent, and for their children respectively in fee, "declaring that, in the event of the decease of one or more of my said sisters without children, her or their shares shall be held by my said trustees for the liferent use of the survivors and their children in liferent and fee as aforesaid." **Held** that the word "survivors" in the clause above quoted ought to receive its natural meaning, and consequently that the share set free by the death of the childless sister fell to the testator's surviving sister and her children, in liferent and fee respectively, the children of a sister who had predeceased taking nothing.

Monteith v Belfrage, 1894, 21 R. 615; 31 S.L.R. 499; 1 S.L.T. 560.

(614)

Gift to surviving beneficiaries in liferent and "their" issue in fee—Right of issue of predeceasing beneficiaries.

A testator, inter alia, gave a portion of his estate to his grandnieces in liferent allenerly and the fee to the issue of the grandnieces, "whom failing to the survivors of them and my grandnephews, equally in liferent and their issue also equally in fee, after the death of the longest liver of me and my wife." One of the grandnieces survived the testator, but predeceased his wife without issue. One of the grandnephews survived the grandniece but predeceased the testator's wife, leaving a son who survived the widow. **Held** that the son was not entitled to any part of the share set free by the failure of issue of the grandniece as that share was destined to grandnieces and grandnephews who survived the testator's widow in liferent and the issue of such survivors in fee.

Richardson v Macdougall, 1868, 6 M. (H.L.) 18; 40 J. 466; 5 S.L.R. 454.

(615)

Gift of income to beneficiaries and survivors—Fee to issue, whom failing, to issue of survivors—Last survivor of liferenters leaving no issue.

A testator directed his trustees to pay the free income of his estate, after deducting an annuity to his widow, in equal portions to his brother and four sisters, and failing them without issue, to the survivors and survivor. He further directed his trustees, on the death of any of his brothers or sisters leaving issue, to pay to such issue (and the issue of any predeceasers) the capital sum

liferent by their parents, so far as this could be done consistently with securing the widow's annuity, and on the widow's death to make over and settle his whole estate "in equal shares upon my said brothers and sisters in liferent allennarly, and the issue of their bodies respectively, whom failing, to the issue of the survivors or survivor in fee." The truster was survived by his widow, his brother, and his four sisters. His brother and three of his sisters predeceased the widow, the brother and two of the sisters leaving issue. The remaining sister survived the widow and died without issue. **Held** that the words "survivors or survivor" were to be construed as equivalent to "others or other," and that the share liferented by the last surviving sister fell to be divided among the issue of the predeceasing liferenters who had left issue.

Ramsay's Trustees v Ramsay, 1876, 4 R. 243; 14 S.L.R. 168.

(616)

Gift of fee to two beneficiaries—Destination over to issue—Failing issue, destination to survivor and issue of survivor—Survivor dying without issue—Accretion to issue of predeceaser.

By a trust disposition and settlement, dated in 1881, a testator directed his trustees to pay to W and R, the sons of his half-sister, equally between them, the sum of £2500, "declaring that should both or either of them be at present deceased, or should, hereafter predecease me, leaving lawful issue, such issue shall take the share that would have fallen to their parent if in life, equally per stirpes, and in default of such issue, the same shall fall and accrete to the survivor of the said W and R, and the issue of the survivor, whom all failing, the same shall fall into and form part of the residue of my estate." The testator died in 1889. Both W and R predeceased him, W having died in 1867, leaving two sons who survived the testator, and R having died in 1872 without issue. **Held**, upon a construction of the terms of the bequest, that the word "survivor" was to be read as equivalent to "other," and therefore that W's sons were entitled to R's share of the bequest.

Paterson's Trustees v Brand, 1893, 21 R. 253; 31 S.L.R. 200; 1 S.L.T. 369.

(617)

Gift of fee to named beneficiaries—Destination to heirs of bodies of persons named—Destination over to heirs of bodies of survivors of persons named—Vesting in heirs of body of predeceaser.

In a mortis causa disposition and settlement the grantor disposed certain heritable subjects to A, his youngest son, "and the heirs whomsoever of his body, whom failing, to the heirs of the bodies of" B, C, D, and E, his other children, one-fourth to each, "and in case of the death of any of the said B, C, D, and E without issue, or that the children of any of them should fail, then to the heirs of the bodies of the sur-

vivors or survivor of the said B, C, D, and E, and their heirs, successors, and assignees whomsoever." **Held** that the words "survivors or survivor" fell to be read as "others or other."

Smith's Trustees v Smith's Trustees, 1905, 7 F. 815; 42 S.L.R. 657; 13 S.L.T. 190.

(j) Servants.

(618)

Blacksmith employed whole time on estate at weekly wage.

The proprietor of landed estates, with a large establishment of servants of all kinds, in a holograph will, left a legacy of £4000 to his factor and certain specific legacies to his butlers, his coachman, and his housekeeper nominatim; he then bequeathed "to each of my other servants who shall be in my service at the time of my death, and who shall have been with me for four years, one year's wages." **Held** that a blacksmith engaged by the year for whole-time employment was entitled to a legacy.

Brown v Maxwell's Executors, 1884, 11 R. 821; 21 S.L.R. 549.

(619)

Servants of testator—Persons employed by trustees of whom testator one—Persons paid by testator for road trustees.

An heir of entail in possession of entailed estates left legacies to his factor, butler, coachman, and housekeeper, nominatim, and "to each of my other servants who shall be in my service at the time of my death, and who shall have been with me four years, one year's wages." At the time of the testator's death about forty persons, including ordinary day labourers, were employed at outdoor work on the entailed estates (Pollok), and had been so employed for the four years immediately preceding. Besides these persons there were some others who had been employed (also at outdoor work) for a greater or less portion of the four years on a contiguous estate called Pollok-shields, which was held by trustees (of whom the testator was one) to be sold in payment of the subsisting debt on Pollok, and the residue, if any, entailed on the same series of heirs as that estate; for the remainder of the four years these persons were employed on Pollok, and they were transferred from the one estate to the other without notice of any change of employment. There were also other persons who had been employed for part of the four years in work on the statute labour roads in the neighbourhood of Pollok and paid, through the testator's managers, out of money intrusted to him for that purpose by the road trustees, but were for the rest of the four years employed on Pollok, and were likewise transferred from the one work to the other without notice of any change of employment. **Held** (1) that those of the employees who had for a substantial part of the four years in question been employed either on Pollok-shields or in work on the statute labour roads could not be regarded as servants of

the testator; but (2) that all the remaining employees were entitled to a legacy.

Stirling-Maxwell's Executors v Grant,
1886, 13 R. 854; 23 S.L.R. 584.

(620)

Employees in the testator's business—Office cleaner.

A testator left legacies "to the employees and workpeople who may at the time of my death be employed in the business" carried on by his firm. Held that a woman whose duty it was to clean out the offices was not entitled to a legacy.

Young v Dick's Trustees, 1904, 12 S.L.T. 20.

(k) Clergy.

(621)

Clergy of Episcopal Church — Clergy of diocese.

A testatrix belonging to the Scottish Episcopal Church directed her trustee to invest a sum of £4000 "and to divide the annual income derived therefrom among the clergy of the diocese of Aberdeen in supplement of their stipends." Held (1) that the Bishop, clergymen instituted to regular incumbencies, clergymen holding the licence of the Bishop and appointed to independent mission charges, curates or assistants to regularly instituted clergymen, and the "supernumerary clergymen," i.e., a clergyman who performed clerical duties when required on behalf of other clergymen in the diocese, were "clergy" of the diocese within the meaning of the bequest, and entitled to participate in the income; but (2) that clergymen formerly officiating in the diocese who had retired and were on the aged and infirm clergy funds, but who still held the licence of the Bishop, were not entitled to participate, as they had no stipends and were under no obligation to perform clerical duties.

Chivas' Trustees v Douglas, 1900, 3 F. 270; 38 S.L.R. 199.

(622)

Clergy of diocese of A—United diocese.

A testatrix belonging to the Scottish Episcopal Church in Aberdeen by a codicil dated six years before her death (which took place in 1878) directed her trustee to invest a sum of money "and divide the annual income derived therefrom among the clergy of the diocese of Aberdeen." In 1864 the diocese of Orkney was united with the diocese of Aberdeen and thereafter the two sees were administered as one. Held that the clergy of the original diocese of Orkney were entitled to participate in the income as well as those of the original diocese of Aberdeen.

Chivas' Trustees v Douglas, 1900, 3 F. 270; 38 S.L.R. 199.

(2) DATE AT WHICH BENEFICIARIES ASCERTAINED.

(623)

Ascertainment prior to death of propositus. Observed (per Lord President Inglis)—"I

do not think anybody can fulfil the part of a man's heir during that man's lifetime. A man's heir has no existence until he dies, and it never can be ascertained till he dies who will be his heir."

Todd v Mackenzie, 1874, 1 R. 1203; 11 S.L.R. 679.

(624)

"Heirs-male of the body."

A testator by his settlement disposed a heritable estate to his brother J F and the heirs-male of his body, whom failing to other substitutes. By a codicil the testator restricted the interest of J F to an alimentary liferent. Held that the heirs-male of the body of J F could not be ascertained until after J F's death.

Ferguson v Ferguson, 1875, 2 R. 627; 12 S.L.R. 435.

(625)

"Heir of body of A."

A testator, by his trust disposition and settlement, directed that "after the death of" his father, "the residue of the capital of my estate shall be paid and made over by my trustees to the heirs of the body of" his brother, "whom failing, to the heirs of the body of" his sister, "whom all failing, to my own heirs in mobilibus." There was no provision for the disposal of the income of the trust subsequently to the father's death. The brother, who never was married, predeceased, and the sister survived, the father. In a special case presented on the father's death, and in the lifetime of the testator's sister, her children claimed immediate payment of the residue, on the ground that, as there was no object of the trust requiring a postponement of vesting, the trust must be held to have intended to benefit the children of his sister who might be in existence at his father's death, and that the terms "heirs of her body" must be construed in that sense. Held that effect must be given to the ordinary meaning of these terms, and that vesting was postponed till the death of the testator's sister, until which date the "heirs of her body" could not be ascertained.

Gollan's Trustees v Booth, 1901, 3 F. 1035; 38 S.L.R. 762; 9 S.L.T. 121.

(626)

Heirs of marriage.

The heirs of a marriage cannot be ascertained until the dissolution of the marriage. Opinion that they fall in the ordinary case to be ascertained at that date.

Maule, 1876, 3 R. 831; 13 S.L.R. 532.

(627)

Representative of testator or trustee—"Heirs whomsoever."

Boyd v Denny's Trustees, (O.H.) 1877, 9 R. 299; 15 S.L.R. 16.

[*Cf. Gregory's Trustees v Alison*, 1889, 16 R. (H.L.) 10; 14 App.Cas. 124; 26 S.L.R. 787; and *Anderson's Trustees v Forrest*, 1917 S.C. 321; 54 S.L.R. 282; 1917, 1 S.L.T. 142, Nos. 634 and 641, *infra*.]

(628)

By antenuptial marriage contract, a husband disposed his whole estate to his wife in *liferent* and to the children of the marriage, and, failing children, to his "heirs whomsoever" in fee, subject to certain powers to his wife to encroach or consume; but, in case these powers were not exercised, the estate, or the residue thereof, at her death should devolve upon the heirs as if the above powers had not been given. The husband predeceased the wife without issue, and the wife died without exercising any of the powers conferred by the marriage contract. **Held** that the husband's heirs fell to be ascertained at his death.

Howe's Trustees v Howe's Judicial Factor, 1903, 5 F. 1099; 40 S.L.R. 772; 11 S.L.T. 232.

(629)

———"Nearest heirs in moveables whomsoever"—Destination over, failing issue of *liferenters*.

A testatrix directed her trustees to pay the income of the residue of her estate equally between her grandnieces A and B, and on the death of A and B to convey one-half of the capital to the issue of A and the other half to the issue of B. In the event of A and B dying without leaving issue the testatrix directed her trustees to convey the residue to "my own nearest heirs in moveables whomsoever, the division being always per stirpes and not per capita." The testatrix was survived by A and B, who were among her heirs in moveables at her death. Both A and B died without leaving issue. **Held** (by a majority of seven judges) that the testatrix intended only one date of distribution, the death of the survivor of A and B, and that her heirs in moveables were to be ascertained at that date.

Haldane's Trustees v Murphy, 1881, 9 R. 269; 19 S.L.R. 217.

(630)

A testator destined a certain sum to his grand-daughter in *liferent* and in fee to her issue, and failing issue to be divided between his daughters A and B, and failing either of them to her issue, "whom also failing to my nearest in kin." The *liferentrix* and the daughters survived him, but the daughters and their issue predeceased the *liferentrix*. The daughters were his nearest in kin at the date of his death. On the death of the *liferentrix* without issue, **held** that the parties entitled to succeed were the nearest in kin of the testator at the death of the *liferentrix*.

Opinion that, in construing the words "nearest in kin" occurring in a testamentary bequest there is no presumption to be founded on any supposed primary meaning of these words as indicating "nearest in kin at the testator's death."

Johnston's Trustees v Dewar, 1911 S.C. 722; 48 S.L.R. 582; 1911, 1 S.L.T. 316.

(631)

Terms of a trust settlement under which

held that a destination by the testatrix on the expiry of a *liferent* to "my heirs in *mobilibus* according to the law of Scotland," conferred a vested right in the testatrix' heirs in *mobilibus* as ascertained at the time of her death.

Brown v Brown's Trustees, 1912, 1 S.L.T. 474.

(632)

Gift to daughter and her issue—Destination over to testator's heirs, executors, and assignees.

A testator directed his trustees to hold his whole estate for the alimentary *liferent* of his daughter and for her issue in fee, and on her death without issue "then my trustees shall, as soon as convenient thereafter, pay, assign, and dispose the said residue and remainder of my said whole estate to and in favour of my heirs, executors, and assignees whomsoever." The testator's heir in heritance and in moveables at the time of his death was his daughter, the *liferentrix*. She died unmarried. **Held** that the testator's heir was to be ascertained at the date of his death and that the testamentary trustees of the daughter were entitled to succeed.

Barron's Trustees v Barron's Trustees, (O.H.) 1897, 5 S.L.T. 100.

(633)

"Nearest of kin."

By postnuptial contract spouses disposed their whole estate to each other and gave the survivor the *liferent* of the whole. On the death of the survivor, one-half was to be paid to legatees to be appointed in writing by the husband, and failing an appointment by him to his "nearest in kin." The husband predeceased the wife without making an appointment. **Held** that the next of kin fell to be ascertained at the husband's death, and not at the death of the wife.

Ferrier v Angus, 1876, 3 R. 396; 13 S.L.R. 263.

(634)

By a postnuptial marriage contract the spouses conveyed their whole estate to the survivor in *liferent* and to the children of the marriage in fee. In the event of the dissolution of the marriage by the death of either spouse without leaving children, or of the decease of all the children in the lifetime of the surviving spouse the husband's estate, failing exercise of a power of disposal, was to "fall to and become the property of his own nearest of kin." The marriage was dissolved by the death of the husband. There was one child of the marriage who survived the husband but predeceased the wife, leaving a son who also predeceased the wife. **Held** that the husband's nearest of kin were to be ascertained at his own death, not at the death of the wife.

Gregory's Trustees v Alison, 1889, 16 R. (H.L.) 10; 14 App.Cas. 124; 26 S.L.R. 787.

(635)

Trustees under a mutual settlement were directed on the expiry of certain *liferents* to divide the capital "among the lawful

issue of all of them in life equally and proportionally, and failing their having issue the same shall descend to our own (the trusters') nearest in kin." **Held** that the right to a share vested in the "nearest in kin" of the trusters at the date of their respective deaths.

Scott's Trustees v Cochrane, (O.H.) 1896,
3 S.L.T. 316.

(636)

———"Heir at law"—Destination to "A, whom failing without lawful issue, to my heir at law."

A testator by his trust disposition and settlement gave his wife, if she survived him, a life interest of his heritable estate, and directed his trustees on her death to dispose certain heritable subjects belonging to him "to my son A, whom failing without lawful issue, to my heir at law." The testator was survived by his wife and by A, who was his heir at law as at the date of the testator's death. A predeceased the widow without issue, leaving a settlement. **Held**, in a question between A's representatives and the testator's heir at law as at the date of the widow's death (1) that the expression "my heir at law," meant the testator's heir at law as at the date of his death (viz., A), the strong presumption being in favour of that interpretation, and the terms of this particular deed not being such as to require a different construction; and (2) that the property in question vested in A a morte testatoris, and was carried by his settlement.

M'Donald's Trustees v M'Donald, 1907
S.C. 65; 44 S.L.R. 49; 14 S.L.T. 407.

(637)

A testator bequeathed a third of his residue to his "nearest of kin." The bequest vested a morte. **Held** that the testator's "nearest of kin" fell to be ascertained at the date of his death.

Andrew's Trustees v Andrew, (O.H.) 1918,
2 S.L.T. 12.

(638)

L and H were married on 1st September, 1874. By antenuptial contract L had conveyed her whole estate to trustees, directing them that in the event of there being no child of the marriage, or no child surviving the period of vesting, which was to take place on arrival at twenty-one years or on marriage, they should on the expiration of the husband's life interest, make over the fee to such persons as she should appoint, "and failing such writing to her heirs and assignees whomsoever." She died on 17th June, 1875, survived by the only child of the marriage, who died on 22nd June, a few days after its birth, and by her husband, who died on 13th July of the same year. She had not executed any writing of appointment. **Held**, in a question with the Crown as to succession duty that the destination by L in favour of "her heirs and assignees whomsoever," was a destination in favour of a class to be ascertained at the time when the

distribution fell to be made, and not at the date of her death.

Lord Advocate v Lamond, (O.H.) 1886, 23
S.L.R. 602.

(639)

———"Heirs and executors" of trustor.

Under an antenuptial marriage contract the trustees were directed to pay the income of the funds settled by the wife to her husband during his life should he survive her and, on the death of the survivor of the spouses, to pay these funds (1) to the children of the marriage if and when they attained majority; or (2) should the wife predecease her husband without leaving issue, or should issue survive her but predecease her husband without attaining majority, to such persons as the wife might appoint, and failing appointment, "to her heirs and executors whomsoever." The wife died (without having made any such appointment), survived by her husband and by one child. The child died in infancy during the lifetime of the husband. On the death of the husband the funds were claimed (1) by his testamentary trustees, on the ground that the child, being also the wife's heir, had acquired a vested right therein, which had passed to the husband as its heir, and (2) by relatives of the wife as her heirs, at the date of (a) the child's death, or (b) the husband's death. **Held**, on a construction of the terms of the marriage contract, that the funds fell to be paid to the heirs of the wife as ascertained at the death of the husband.

Muirhead's Trustees v Torrie, 1913 S.C.
85; 50 S.L.R. 182; 1913, 1 S.L.T. 5.

(640)

———"Heirs in mobilibus."

A testator, by his testamentary settlement, directed his trustees to hold a portion of the residue of his estate in equal shares for his son and daughter in life interest, and for their issue respectively in fee, vesting in the issue being suspended till their parent's death. It was declared that, if either child died without leaving issue, the share life interest by him or her should fall to the testator's "heirs in mobilibus," and that neither of the testator's children should "have any vested right in the capital." Both of the testator's children survived him, and thereafter the daughter died without issue, but leaving a will. **Held** that the testator's heirs in mobilibus fell to be ascertained at his death and not at the death of the daughter, and, accordingly, that the share life interest by the daughter fell to be divided equally between the son and the daughter's executor.

Hannay's Trustees v Graham, 1913 S.C.
476; 50 S.L.R. 310; 1913, 1 S.L.T. 91.

(641)

———"Heirs or assignees" — Marriage contract.

Under an antenuptial marriage contract the trustees were directed to pay the income of the estate settled by the wife to her, and

after her death to her husband if he survived her, and, upon the death of the survivor of the spouses and upon the youngest child of the marriage attaining the age of twenty-one, to convey the estate to the children of the marriage. It was declared that the provision to the children should not vest until the occurrence of both of these events; and it was further provided that, in the event of no children surviving the deaths of the spouses, or of all the children predeceasing the period of vesting, the trustees should make over the wife's estate to her "heirs or assignees." The wife died intestate survived by her husband and by one child. This child died in infancy during the husband's lifetime. **Held** that the heirs of the wife fell to be ascertained as at the date of her death.

Anderson's Trustees v Forrest, 1917 S.C. 321; 54 S.L.R. 282; 1917, 1 S.L.T. 142.

(642)

Substitution—Marriage contract—Heritable subjects destined to children of marriage, whom failing, to heirs and assignees of wife.

By a marriage contract certain heritable subjects belonging to the wife were disposed in fee "to the children of said intended marriage equally among them, share and share alike, whom failing, to the heirs and assignees" of the wife. The wife died survived by one child, who died in pupilarity. **Held** that the last clause of the destination was a substitution and not a conditional institution merely; and that the heirs of the wife were to be sought as at the date of the child's death.

Smith's Trustees v Smith's Trustees, 1905, 7 F. 815; 42 S.L.R. 657; 13 S.L.T. 190.

(643)

By an antenuptial contract of marriage a husband conveyed the whole estate belonging to him at the date of the contract, or which should belong to him at the time of his death, to and in favour of himself and his wife and the longest liver in liferent allennary, and to the children of the marriage, whom failing, to his own heirs and assignees in fee. The husband died intestate and without issue, but was survived by his widow. **Held** that the heir entitled to succeed to the husband's heritage fell to be ascertained at the date of his own death, and not at the date of the widow's death.

Brown v Brown, (O.H.) 1913, 2 S.L.T. 314.

(644)

Substitution—Destination to son of settler, whom failing, her own heirs, assignees, and disponees whomsoever.

Watson v Giffen, 1884, 11 R. 444; 21 S.L.R. 299, No. 940, *infra*.

(645)

Substitution—Heirs-male of testator—Direction to trustees to convey heritage in terms of destination.

A testator directed his trustees to hold a
v 14

heritable estate for his widow in liferent, and on her death to convey it to G B, "whom failing, to the heirs of his body, whom failing, to my own heirs-male and the heirs of their body, whom failing, to my own nearest heirs whomsoever, excluding heirs-portioners." When the testator died, G B was his heir-male, but he predeceased the widow without issue. **Held** that the testator's heir-male was to be ascertained at the death of the testator's widow.

Baillie's Trustees v Whiting, 1910 S.C. 891; 47 S.L.R. 684; 1910, 2 S.L.T. 23.

(646)

Representative of beneficiary—Destination, on expiry of liferent, to a person named "or his heirs in heritage."

A testator, who died survived by his wife, directed his trustees to hold his dwelling-house, the furniture therein, and a sum of £3000, for his wife in liferent, and on the death of the survivor of himself and his wife to convey the house and furniture, and to pay the sum of £3000, to his cousin, A B, "or his heirs in heritage." A B survived the testator, but predeceased the widow. He was survived by his eldest son, who also predeceased the widow without leaving issue. A B's second son survived the widow. **Held** (1) that the destination to the heirs in heritage of A B was a conditional institution which suspended vesting until the death of the testator's widow; and (2) that the heir in heritage of A B fell to be ascertained at that date. **Held**, accordingly, that A B's second son was entitled to the legacies.

Wylie's Trustees v Bruce, 1919 S.C. 211; 56 S.L.R. 156; 1919, 1 S.L.T. 41.

(647)

"Executors"—Gift payable on death of liferenter.

Two spouses conveyed to trustees the estates which should belong to them "respectively" at their deaths, in order to pay the income to the survivor, and "in order that the trustees may and shall at the death of the longest liver" of the spouses convey certain property, heritable and moveable, to A, B, and C, "their heirs and assignees, providing that if A, B, or C should have predeceased their heirs should be entitled to their share of the heritage and their executors to their share of the moveables." Vesting was suspended until the death of the surviving spouse. **Held** that the executors of the legatees were the persons who would have succeeded them ab intestato at that date.

Stodart's Trustees, 1870, 8 M. 667; 42 J. 330.

(648)

"Heirs"—Gift payable on death of liferentrix.

A testator directed his trustees on the expiry of a liferent to sell his heritable estate and pay an equal share of the proceeds "to each of the said A B, my brother, and C D, my sister, or their heirs." A B and C D both survived the testator, but predeceased

the liferentrix. Vesting was held to be postponed until the death of the liferentrix. **Held** that the heirs of A B and C D fell to be ascertained as at the death of the liferentrix.

Highet's Judicial Factor v Hamilton, (O.H.) 1912, 1 S.L.T. 474.

(649)

——— "**Heirs of body**" of liferenter.

An estate was conveyed to a father in liferent for his liferent use only, and to the heirs of his body in fee. **Held** that the heirs of the liferenter's body fell to be ascertained at his death, and that vesting took place at that date.

Black v Mason, 1881, 8 R. 497; 18 S.L.R. 319.

(650)

Heirs at law of A alive at death of B.

Held that a destination in an inter vivos trust deed in favour of "the heirs at law in moveables of A who shall be alive at the death of B" referred to the heirs at law in moveables of A as at A's death.

Stodart's Trustees v Lorimer, (O.H.) 1895, 2 S.L.T. 551.

(651)

——— **Heirs-male of marriage — Heirs-female of marriage.**

In a marriage contract the wife's father entailed an estate on the spouses and the longest liver in liferent (subject to conditions which restricted their right to a liferent allenarly) and the heirs-male of the marriage, whom failing the heirs-female of the marriage in fee. The marriage was dissolved by the death of the husband, leaving daughters, but no sons. **Held** that the heirs of the marriage fell to be ascertained at the dissolution of the marriage, and that the estate vested in the eldest daughter at that date.

Maule, 1876, 3 R. 831; 13 S.L.R. 532.

(652)

Liferent to A—Fee to children of B, whom failing to children of C—B in life at death of A, but having no issue—Payment to child of C.

Testamentary trustees were directed, after payment of certain annuities, to hold the residue of the testator's estate for behoof of his brother George, and, failing him, his cousin John, in liferent, and thereafter for "payment and delivery" thereof to the children of George, whom failing, for payment of a legacy and the balance to the children of the testator's brother Archibald, whom failing, to the children of the testator's brother William. At the death of the last survivor of George (who never married), John, and the annuitants, Archibald was alive, but had no children, and William was alive, and had an only son. **Held** that after payment of the special legacy, William's only child was entitled to have the residue made over to him.

Stewart's Trustees v Stewart, 1868, 7 M. 4; 41 J. 5; 6 S.L.R. 3.

(653)

Executors of deceased R H—Will dated in 1849—Testator dying in 1867.

A testator, by a will dated in 1849 (prior to the passing of the Intestate Moveable Succession Act of 1855) left a portion of his property "to the executors of the deceased R H," who died in 1841. The testator died in 1867. **Held** that the persons entitled to take under the bequest were those who would have been the heirs in mobilibus of R H had he died at the same time as the testator.

Ewart v Cottom, 1870, 9 M. 232; 8 S.L.R. 182.

Children—Class gift.

[See VESTING IV.]

(3) **INACCURATE DESCRIPTION OF BENEFICIARY.**

(654)

Misdescription of object of bequest—Societies.

A lady who occasionally contributed to the funds of "The Scottish Society for the Conversion of Israel," which some years prior to her death became associated with the United Presbyterian Church mission scheme, left a bequest to "The Society for the Conversion of the Jews." It appeared that there was no society with that designation, although there were at least three having a similar object, viz., the Scottish society above-mentioned, and two others in England. The English societies did not claim the legacy. **Held** that the bequest was not void by reason of uncertainty, and that the society was entitled to it.

Wilson's Executors v Scottish Society for the Conversion of Israel, 1869, 8 M. 233; 42 J. 102; 7 S.L.R. 137.

(655)

A testator made bequests inter alios to "the Society for the Prevention of Cruelty to Animals, Glasgow," "the Society for the Prevention of Cruelty to Animals, Paisley," and "the Society for the Prevention of Cruelty to Animals, Greenock." The two latter societies did not exist, but the Glasgow and West of Scotland Society for the Prevention of Cruelty to Animals had a district branch in Greenock, and although it had no branch in Paisley carried on operations there. **Held**, after a proof, that the Glasgow society was entitled in addition to the bequest in its own favour to take along with its Greenock branch the bequest to the Greenock society, and also to take the bequest to the Paisley society on giving an undertaking to set up a resident officer there.

Jaffrey's Trustees v Society for Prevention of Cruelty to Animals, (O.H.) 1903, 10 S.L.T. 651.

(656)

Circumstances in which **held** that the Foreign Missions Committee of the Church of Scotland which carried on mission work at Poona in the Bombay Presidency was entitled to a bequest "to the India Mission

of the Church of Scotland, Bombay branch."

Allison v Anderson, (O.H.) 1907, 15 S.L.T. 529.

(657)

Circumstances in which **held** that a legacy to "the Mission to the Wynds, Glasgow," was intended for a mission known as the "Wynd Church," which at one time had been carried on in the "Wynds," but before the testatrix's death had been transferred to another district of Glasgow.

M'Grouther's Trustees v Lord Advocate (O.H.) 1907, 15 S.L.T. 652.

(658)

—Individuals.

A testator in a family settlement made a bequest "to Edith Johnstone, of 28 Athole Gardens, Glasgow." There was no one who exactly answered this description, but the bequest was claimed by a grandniece, Ethel Maud Johnstone, who used to live at 28 Athole Gardens, Glasgow, and by a niece, Mrs. Edith Johnstone or Mitford Burgess, who had never lived there. After proof of the circumstances, **held** that Ethel Maud Johnstone was entitled to the bequest.

Johnstone's Executors v Johnstone, (O.H.) 1902, 10 S.L.T. 42.

(659)

—Bequest to son of A — A deceased leaving a daughter.

Circumstances in which a legacy in favour of "my late brother James' son," was **held** effectual to the only child of James, who was a daughter.

Macfarlane's Trustees v Henderson, 1878, 6 R. 288; 16 S.L.R. 198.

(660)

—Error in description of substitute heir in a tailzied destination — Whether it amounted to falsa demonstratio or indicated a falsa causa dantis.

Lord Lovat v Fraser, 1884, 11 R. 1119; 21 S.L.R. 759, No. 218, supra.

(661)

—Falsa enumeratio.

A testator left to his niece E £3000, and "to each of the other three" children of his brother J £2000. J left four children other than E. **Held** that the legacy was effectual to the whole four other children of J.

Bryce's Trustee, 1878, 5 R. 722; 15 S.L.R. 412.

(662)

A testatrix left the residue of her estate to be divided equally between her nephew A and the four youngest sons of her nephew B, and the survivors and survivor of them. B had only three sons, and one of the sons was born after the date of the will. B had also five daughters. **Held** that the residue must be divided into four parts, one to go to A and the other three to the three sons of B.

Lumsden's Trustees v Lumsden, (O.H.) 1921, 1 S.L.T. 155.

(663)

Class described as of a certain number — Demonstrative or taxative.

A testatrix directed her trustees to divide the free residue of her estate "equally among the children of my late brother A, of whom there are nine, the children of my brother B, of whom there are ten, and the children of my brother C, of whom there are seven, who may survive me." At the date of the will B had ten children. Before the death of the testatrix three other children were born to him. All B's children survived the testatrix. **Held** that all the children of B were entitled to share in the residue.

Millar's Trustees v Rattray, 1891, 18 R. 989; 28 S.L.R. 760.

(664)

Certain members of class expressly named — Exclusion of members of class not named.

A testator had power to apportion a fund among his children. He directed the fund to be paid amongst and between the whole of his children "videlicet" (then followed the names of five of his six children). **Held** that the child not named by the testator was excluded from participating in the fund.

Campbell's Trustees v Berry, (O.H.) 1921, 2 S.L.T. 199.

(665)

Ragged school in Dundee — Training ship beyond burgh boundaries.

A testator directed a share of the rents of his estate to be paid for a period of years "to the Ragged Schools in Dundee." Claim of the "Mars" Training Ship Institution to participate sustained, though the "Mars" training ship was moored in the Tay beyond the boundaries of the parish and burgh of Dundee, and nearer to the Fifehire than to the Forfarshire coast, but within the limits of the harbour of Dundee.

Bogie's Trustees v Swanston, &c., 1878, 5 R. 634; 15 S.L.R. 342.

(666)

Charitable purpose—Whether particular institution indicated.

A testatrix left property near Edinburgh to "the blind soldiers who have lost their sight in the present war." The money derived from the property was to go to a home situated in Edinburgh. The Royal Blind Asylum and School, Edinburgh, presented a claim and averred that they carried on a home for training blinded soldiers in Edinburgh, and further that they were the only institution who carried on this work in Edinburgh. The testatrix was well aware of the existence and designation of the claimants, but refrained from naming them in the bequest. **Held** that the claimants were not entitled to the legacy.

Sanderson's Trustee v Edinburgh Royal Blind Asylum, (O.H.) 1919, 1 S.L.T. 39.

9. DIVISION PER STIRPES OR PER CAPITA.

(1) GENERALLY.

(667)

Gift "equally between" children of A and children of B.

A testatrix directed her trustees to divide the whole of her estate "equally between the children of my late brother A and the children of my late sister B." Held that the division between the children of the deceased brother and sister fell to be made per capita.

Bogie's Trustees v Christie, 1882, 9 R. 453; 19 S.L.R. 363.

(668)

"Amongst the families."

A testator directed his trustees to divide the residue of his estate "in equal proportions amongst the families of" B (the brother of his first wife), and C (the brother of his second wife), "in equal proportions, share and share alike." Held that the word "amongst" meant "between," and that the residue fell to be divided in two equal shares between the family of B and the family of C, the share falling to each family being then divided equally among the members of that family.

Searcy's Trustees v Allbuary, 1907 S.C. 823; 44 S.L.R. 536; 14 S.L.T. 898.

(669)

Equally between A, B, and C, and the children of their deceased sister.

A testator who had one brother and six sisters, of whom two of the sisters predeceased him, by his last will and testament directed his trustees and executors to convert his estate into money and to divide it as follows, viz.:—One-seventh part to his brother, his brother's wife, and their daughter equally; one-seventh part to each of his four surviving sisters; one-seventh part equally among the children of his deceased sister Lucinda Dalrymple; and one-seventh part "equally between Robert Horne, Jessie Horne, Mary, the wife of Mr. Lloyd (the children of my deceased sister, Margaret Horne), and the children of Lucinda Forester, the deceased daughter of the said Margaret Horne." Held that the last-mentioned one-seventh share fell to be divided among the beneficiaries per stirpes and not per capita, and that, accordingly, the nephew and the two nieces of the testator were each entitled to one-fourth part, and the children of his deceased niece to the remaining fourth part equally among them.

Robertson's Trustees v Horne, 1921 S.C. 817; 58 S.L.R. 561; 1921, 2 S.L.T. 155.

(670)

Residue to be paid "equally between A and the children of B equally between them"—Double use of "equally."

A testator directed her trustees to pay the whole residue "equally between John

Inglis and the children of Daniel M'Neil . . . equally between them." John Inglis was a nephew of the testator, and Daniel M'Neil's wife was a niece. Both survived the testator. Held that the division was bipartite between Inglis and the M'Neils, and equal again among the M'Neils, of whom there were eight.

Inglis v M'Neil, 1892, 19 R. 924; 29 S.L.R. 795.

(671)

A testator by his trust disposition and settlement left the residue of his estate to his brothers and sisters equally, and provided that "the children of any predeceasing of any issue of beneficiaries entitled to . . . shares of residue shall be entitled equally among them to the shares which their parents would have taken if they had survived." A sister of the testator predeceased, leaving a daughter and seven grandchildren, the children of a predeceasing daughter. Held that the sister's share fell to be divided per stirpes between the daughter and the grandchildren, and that the daughter was entitled to one-half of the share.

M'Meehan's Trustees v M'Clelland, (O.H.) 1918, 56 S.L.R. 280; 1918, 1 S.L.T. 193.

(672)

Double use of equally.

Binnie's Trustees v Prendergast, 1911 S.C. (H.L.) 6; 48 S.L.R. 251; 1911, 1 S.L.T. 142, No. 685, infra.

Campbell's Trustee v Dick, 1915 S.C. 100; 52 S.L.R. 78; 1914, 2 S.L.T. 326, No. 682, infra.

(673)

"Among my cousins and among the children of my uncle J H."

A testator left the liferent of the residue of his estate to his widow, and directed that, on the termination of the liferent, "I desire that all of which I am possessed be divided among my cousins, the Blackwells (leaving out Mrs. Buckle), and among the children of my uncle, James Hay, Esq., of Belton." Held that the residue fell to be divided among the members of the Blackwell and Hay families per capita.

Hay Cunningham's Trustees v Blackwell, 1909 S.C. 219; 46 S.L.R. 175; 16 S.L.T. 592.

(674)

To next of kin of spouses equally—Mutual settlement.

Two spouses by contract and mutual disposition disposed their whole estate to the survivor, and on the death of the survivor, "to the nearest in kin of us, the said . . . equally." In a question between the sole next of kin of the wife and three next of kin of the husband, held on a construction of the whole deed, that the estate fell to be divided among the next of kin of both spouses as a single class per capita.

Hogg v Bruce, 1887, 14 R. 887; 24 S.L.R. 651.

(675)

Division per stirpes—Question as to heads of stirpes.

A testatrix directed her trustees to pay the residue of her estate to "my own nearest heirs in moveables whomsoever the division always being per stirpes and not per capita." The testatrix was survived by two granddaughters, A and B, of a deceased brother H (through H's only daughter, who predeceased the testatrix), and by a son and three daughters and the issue of six deceased children of a deceased sister, W. On the assumption (contrary to the finding of the Court) that the heirs of the testatrix were to be ascertained at her death, *opinions* (per Lord President Inglis and Lord Mure) that the effect of the words "the division always being per stirpes not per capita" was to bring in per expressum the rule of representation introduced by the Moveable Succession Act, 1855, and that the nephews and nieces of the testatrix were to be taken as the heads of the stirpes. *Opinion* (per Lord Shand) that the testatrix intended the heads of the stirpes to be taken as near in relationship to herself as they could be found, and that these were her own brother and sister.

Haldane's Trustees v Murphy, 1881, 9 R. 269; 19 S.L.R. 217.

(2) GIFTS TO RELATIONS OF DIFFERENT DEGREES.

(676)

Residue to be "equally divided amongst all my relatives"—Relatives of different degree.

A trustor directed that the residue of his estate should be "equally divided amongst all my relatives, my sister Maria to get a half more than the others." Of his four sisters and two brothers only one—Maria—survived him, but several nephews and nieces did. *Held* that the testator's sister and all his nephews and nieces were entitled to share in the residue per stirpes, the sister receiving half as much again as any of the other stirpes.

Cunningham's Trustees v Cunningham, 1891, 18 R. 380; 28 S.L.R. 266.

(677)

Direction to divide equally between A and his children and B and his children.

A testator by the residuary clause of his will provided—"I bequeath the remainder of my estate . . . to be divided equally between my brother P and his children and my brother G and his children, my nephews J and A, sons of my brother P, not to participate in this last bequest." *Held* that the bequest was not one to the brothers with a conditional institution of their respective children, but was a bequest to the brothers and their children (other than the two who had been excluded) concurrently, and that the division among them fell to be made per capita and not per stirpes.

Cobban's Executors v Cobban, 1915 S.C. 82; 52 S.L.R. 89; 1914, 2 S.L.T. 357.

(678)

Gift equally between surviving brother and sisters and issue of decessors—"Share and share alike."

A testator bequeathed the residue of his means and estate "to be divided between my surviving brothers and sisters, and the lawful issue of those who may be deceased, share and share alike." *Held* in a competition between the surviving brother and sisters, and the issue of a brother who was dead when the settlement was made, that the division fell to be made per stirpes, and not per capita.

Laing's Trustees v Sanson, 1879, 7 R. 244; 17 S.L.R. 128.

(679)

Gift to nephews and nieces and issue of predeceasing and survivors of them.

A testator directed his trustees to pay the liferent of the residue of his estate to his widow, and on her death to convey and make over one-half of the residue to his nephews and nieces, and to the lawful issue of such of his said nephews and nieces as may have died leaving lawful issue their deceased parents' share equally among them, and failing any of his said nephews and nieces without leaving lawful issue, to the survivors of them equally, whom also failing to their nearest lawful heirs whomsoever. The testator died, survived by his widow and all the beneficiaries called by him. Between his death and the death of the liferentrix three of the beneficiaries died, one without issue, the others both leaving issue. On the death of the liferentrix *held* (1) that the words of the primary clause imported a division per stirpes among nephews and nieces who had survived the liferentrix and the issue of those who had predeceased, and (2) that the share which would have fallen to the nephew dying without issue, if he had survived the liferentrix, fell to be divided per stirpes among the nephews and nieces of the testator and those grandnephews and grandnieces named or instituted as primary legatees in the settlement who had survived the liferentrix.

Still's Trustees v Hall, 1899, 36 S.L.R. 390.

(680)

Gift to A, B, C, D, and the heirs of E—"Equally between them, share and share alike."

A testator directed his trustees to pay the liferent of the residue of the trust estate to his widow, and on her death "to pay or divide the then free residue of my whole means and estate, heritable and moveable, real and personal, to and among" his daughters, M, N, J, and A, "and the heirs of my son, the deceased J, and that equally between them, share and share alike." The testator was survived by his widow and by his four daughters. His son J, who predeceased, left two sons, who survived the testator. *Held* (1) that the division fell to be made into five equal

shares, of which the four daughters each took one, and the "heirs" of the son one.

Galloway's Trustees v Galloway, 1897, 25 R. 28; 35 S.L.R. 23; 5 S.L.T. 138.

(631)

Residue to relatives named in will—Children entitled only under conditio.

A testator left the residue of his estate to his relatives already mentioned in the will. There was a legacy in favour of B in liferent and to her children in fee; a legacy to C with destination over to his issue; and to D, a relative mentioned in the will, but who predeceased the testator. D's children were not mentioned in the will, but were entitled to her legacy in virtue of the *conditio si sine liberis*. Held that the children of B and C were entitled to an equal share per capita with the relatives who were entitled to share, but that the children of D were only entitled, among them, to the share which D would have taken on a division per capita, had he survived.

Stewart's Trustees v Stewart, (O.H.) 1917, 2 S.L.T. 267.

(632)

Gift to children in life at date of distribution—Destination over to issue of children—Distribution among issue—Double use of terms importing equality.

Testamentary trustees were directed on the death of the last of three liferentices, "to divide the whole estates and effects hereby conveyed, and to pay the free proceeds thereof among and to the whole of my sons and daughters that may then be in life, share and share alike, and failing any of them by death, to any child or children they may have respectively left, also in equal portions." All the testator's children predeceased the last liferentrix, three of them leaving issue, some of whom also predeceased the last liferentrix. Held that the division among the grandchildren fell to be made per stirpes and not per capita.

Campbell's Trustee v Dick, 1915 S.C. 100; 52 S.L.R. 78; 1914, 2 S.L.T. 326.

(633)

Direction to divide capital equally among liferenter's children and grandchildren per stirpes—Whether children and grandchildren took concurrently.

Mellis' Trustees v Ritchie, 1909 S.C. 606; 46 S.L.R. 479; 1909, 1 S.L.T. 179. No. 936, *infra*.

(634)

Gift to families—Right of grandchildren.

A testator directed a share of the residue of his estate on failure of certain prior institutes "to go to the survivors of my nephews and nieces or the families of such as may have predeceased." A died without issue. Held that the word "families" included all descendants of nephews and nieces and that the grandchildren of a nephew were entitled to succeed per stirpes

to the share which their predeceasing parents would have taken.

Irvine v Irvine, 1873, 11 M. 892; 45 J. 546; 10 S.L.R. 625.

(3) GIFTS TO ISSUE OF LIFERENTERS.

(635)

To children in joint liferent and their issue in fee.

A testator destined a share of his estate to his daughter A in liferent, and after her death to her children in joint liferent, "and to the issue of her said children in fee." By a subsequent codicil he confirmed the destination of A's share to herself and her children in liferent, and provided that the fee "be paid to the lawful issue of her said children, and that equally, share and share alike." In dealing with possible accretions to A's share the testator further provided that the fee of any accreting share should, "as in the case of her, the said A's, own share, be . . . paid equally amongst the issue of her children, and that equally, share and share alike." Held that the fee of A's share, whether original or accreting, was divisible among the issue of A's children equally per capita and not per stirpes.

Binnie's Trustees v Prendergast, 1911 S.C. (H.L.) 6; 48 S.L.R. 251; 1911, 1 S.L.T. 142.

(636)

To children equally in liferent alienably and to their children equally in fee—Preference to sons over daughters to extent of £10 per annum—Direct disposition of heritage.

A testator conveyed his heritable property to and in favour of his children (all of whom were unmarried at his death) nominatim, "in liferent equally during all the days and years of their lifetimes for their liferent uses alienably, and to their lawful children, also equally in fee and property, but always under the preferences provided to my sons and their lawful children over my daughters and their lawful issue as after specified." He directed that after paying certain annuities, &c., the rents of the property should be divided "equally among my children during their respective lives, but each of my sons shall have and be entitled to £10 sterling yearly therefrom more than their equal shares thereof, or than each of my daughters, and which preference of £10 sterling to my sons shall, when the succession to the fee of said heritable subjects takes effect, descend to their children equally, and the same shall be valued accordingly, above the shares thereof due to the children of my daughters: and in case any of my said children die unmarried, or without leaving lawful issue, the shares or share of such shall accrete, and be equally divided among my surviving children in liferent only, and to their lawful issue, equally, in fee and property as aforesaid." In a question between the children of two of the testator's daughters nominated in the deed, held that, on a con-

struction of these clauses of the deed, the division of the heritage fell to be made per stirpes and not per capita.

Allen v Flint, 1886, 13 R. 975; 23 S.L.R. 703.

(687)

Liferent to brothers and sisters with fee to issue—Destination over of lapsed share to issue of "other" liferenters.

A testator directed his trustees on the death of his widow to make over and settle his whole estate "in equal shares upon my . . . brother and sisters in liferent . . . allanarly, and the issue of their bodies respectively, whom failing to the issue or survivors or survivor in fee." The testator was survived by his widow, his brother, and his four sisters. The brother and three sisters predeceased the widow, two sisters leaving issue. The remaining sister survived the widow and died without issue. It having been held that the words "survivors and survivor" were equivalent to "others or other," held also that the fee of the share liferented by the last surviving sister fell on her death to be divided among the then surviving issue of the liferenters per stirpes.

Ramsay's Trustees v Ramsay, 1876, 4 R. 243; 14 S.L.R. 168.

(688)

Liferents to daughters and their husbands—Liferent of accrescing share to survivors—Fee to be "divided equally amongst their lawful children, share and share alike."

A testator left the residue of his estate to be liferented by three daughters and their husbands equally, the fee of the share liferented by each daughter to go in each case on her death to her issue. In the event of any of the daughters dying without issue, it was provided that the share liferented by her "shall, after the death of her said present or future husband, be held by the said trustees for the liferent use and behoof allanarly of her surviving sisters . . . and failing them or either of them, then the said third part or share shall be divided equally amongst their lawful children, share and share alike, on their respectively attaining majority." One daughter died without issue. Held that, the testator having directed the share of a daughter dying without issue to be liferented by her surviving sisters, the fee fell to be divided among their children per stirpes, and not per capita.

Home's Trustees v Ramsay, 1884, 12 R. 314; 22 S.L.R. 221.

(689)

Liferent to two sisters and sister-in-law—One-half of fee to families of sisters.

A testator gave the interest on the residue of his estate equally among his two sisters and a sister-in-law, "the families of the annuitants to get the interest of their mother until the death of the last annuitant," when the residue was to be divided into two parts, one part going to the Free Church, the other to "the

families of my two sisters." All three annuitants had families, and the children of the sister-in-law and one of the sisters enjoyed their mother's interest during the survivance of the longest liver of the sisters. On the death of the last annuitant, held that the half of the residue should be divided between the families of the two sisters per stirpes.

Low's Trustees v Whitworth, 1892, 19 R. 431; 29 S.L.R. 389.

(690)

Gift in fee to issue of children of testator's brothers—Failing child or children of brother without leaving issue to be applied for children of other brother.

A trustee directed his trustees to divide the residue of his estate into three parts, one of which was to be paid to one of his brothers in the event (which happened) of his surviving him and being then unmarried. The other two parts were to be held for each of his other two brothers in liferent, and for their children also in liferent for their behoof "equally, and share and share alike," the fee to go after their death to the "lawful issue whomsoever of the said child or children of my said brothers respectively, equally and share and share alike." Failing "the child or children of any of" his brothers without leaving lawful issue the share of such child or children was to be applied for behoof of "the child or children surviving of any other brothers, each family succeeding equally." Each of these two brothers of the trustee left several children, and a child of one of them having died without issue, but having two sisters, the share liferented by him was claimed by the family of the trustee's other brother. Held (1) that it did not pass to them, but remained in the family of that child's father; (2) that the liferent of it did not accresce to the two sisters of the deceasing child, but that the fee of it fell at once to their issue per capita and not per stirpes.

Buchanan's Trustees, 1883, 20 S.L.R. 666.

10. INTEREST TAKEN BY BENEFICIARY.

(1) WHETHER BEQUEST BENEFICIAL OR IN TRUST.

(a) Generally.

(691)

Appointment of "executor" and "universal intromitter."

By holograph writings a testator appointed one of his nieces to be "executor" and "universal intromitter" with his "goods and money," "except what is otherwise mentioned afterwards" "under the following burdens, to pay my debts, and the following legacies." Held that the executor had been named universal legatary, and was entitled to the residue of the estate.

Jamieson v Clark, 1872, 10 M. 399; 44 J. 225; 9 S.L.R. 233.

(692)

Bequest to "A for behoof of his family."

A testator by his holograph will bequeathed one-fifth share of residue to his brother A "for behoof of his family."

Held (1) that this expression was equivalent to "in trust for his children," and that the beneficial right was in the children only; and (2) that the children being of full age were entitled to immediate payment.

Michie's Executors v Michie, 1905, 7 F. 509; 42 S.L.R. 386; 12 S.L.T. 738.

(693)

Bequest to A "for the benefit of herself and of B."

Held that under a bequest "to A for the benefit of herself and of her sister B," each sister had a vested beneficial right in fee to one-half of the bequest, but that A was bound to retain B's share during their joint lives as trustee for her.

Macpherson v Macpherson's Curator Bonis, 1894, 21 R. 386; 31 S.L.R. 271; 1 S.L.T. 449.

(694)

Money given to A for behoof of B—Power to dispose of balance not paid in B's lifetime—Uncertainty.

Anderson v Smoke, 1898, 25 R. 493; 35 S.L.R. 396; 5 S.L.T. 309, No. 227, *supra*.

(695)

Bequest of income to W for maintenance and education of his children.

By a mutual settlement a husband and wife directed their trustees to apply the annual proceeds of a share of their estate in payment of the premiums on two policies of insurance, the surplus, if any, to be paid to their son W for the education and support of his children. The proceeds of the policies when payable were directed to be paid to the children of W. **Held** that the bequest of surplus income was a provision in favour of W, not a trust in him for the benefit of his children.

Chalmers' Judicial Factor v Chalmers, 1903, 5 F. 1154; 40 S.L.R. 814; 11 S.L.T. 236.

(696)

Bequest of whole estate to wife under obligation of maintaining children — Power of sale.

A testator, who was survived by his wife and a child and also by pupil and minor children of a former marriage, left a will bequeathing to his wife his whole estate, heritable and moveable, and appointing her his sole executrix under the obligation of her bringing up and educating his children, and appointing her sole guardian and curator of his children, and granting her full power of sale of his estate. By a codicil of even date the testator appointed two persons named "to act along with my wife as executors and curators to my said children." **Held** that a trust was constituted for behoof of her and the children.

Urquhart's Executors v Abbott, 1899, 1 F. 1149; 36 S.L.R. 896; 7 S.L.T. 114.

(697)

Residue to be placed "entirely under control" of daughter.

A holograph letter in the following terms:—"Should any accident occur to me . . . until my will is completed and signed by me that the whole of my property, heritable and moveable, belonging to me in part, or wholly, shall be placed entirely under the control of my daughter, to allocate to the members of my family as she thinks proper, and may be guided (if her pleasure) to consult her brother"—**held** to import an absolute beneficial right and not to create a trust.

Miller v Miller, (O.H.) 1906, 13 S.L.T. 770.

(698)

Trust or substitution.

A testator bequeathed his whole estate, consisting of heritage and moveable property, to his wife "and heirs and assignees, heritably and irredeemably," and proceeded—"But these presents are granted and shall be accepted by the said Elizabeth Walker, and the foresaid lands and other heritages hereby conveyed are disposed with and under the burden of the payment of my whole just and lawful debts, and sickbed and funeral charges, and of the payment of the following legacies, viz.: At my wife's death what she had from me shall go to my nephews and nieces, all to have an equal share. Would like the old house where we were all born to be kept in the family." By a subsequent codicil he provided—"I appoint James Stephen, William Stephen, and David Stephen to be trustees; also my wife Elizabeth Walker. I confirm the above will with the exception that I leave my wife Eliza Walker sole trustee, to use principal of money if she requires it." His wife survived and entered on possession of the estate, but did not make up a title to the heritage. On her death, without disposing of it, **held** that whether the deed imported a trust or a substitution, the testator's nephews and nieces were entitled to the property in preference to the wife's relations.

Walker's Factor v Cumming, 1899, 37 S.L.R. 115.

(b) Precatory Bequests.

(699)

"I would like."

A wife left a testamentary writing addressed to her husband, bearing—"I wish to leave everything that may be considered mine, money or personal property, entirely at your disposal, knowing that you will do as I wish with it." Then, after directions as to the disposal of her jewels, it proceeded—"I would like you, from the interest of my money, to give R W, J W, and last not least yourself, a handsome remembrance of me, although they should require to wait some time." In an appeal by the husband from a deliverance of the trustee on his sequestrated estate the husband averred that he had received verbal instructions from his wife to divide her separate estate among her

own relations. **Held** that the writing imported an absolute gift to the husband, and did not make him a trustee for carrying out his wife's wishes.

Wilson v Lindsay, 1878, 5 R. 539; 15 S.L.R. 289.

(700)

"Desire"—**Erroneous recital in codicil of terms of will.**

By his will a testator directed his trustees to pay one-half of the residue of his estate to his son, and to hold the other half for his widow in life and his daughter in fee. By a holograph codicil after erroneously narrating that, "as expressed in my last will and testament that, should my wife survive me she is to be life tenant in whatever means I may be possessed of, and at her death the same to be divided between my son . . . and my daughter . . ." the testator continued, "I wish that to be carried out, but I hereby specially desire, that at the death of my son, should he die without issue, his portion shall pass to my daughter." Circumstances in which **held** that the expression of "desire" that the son's share should, on his death without issue, pass to his sister, was a mere request, which had no effect in law and did not limit the son's absolute right to his share.

Campbell's Trustees v Kinsey-Morgan's Trustees, 1915 S.C. 298; 52 S.L.R. 289; 1915, 1 S.L.T. 89.

(701)

"Desire"—"Should like."

A testator bequeathed his moveable estate to his widow, and stated in his will his "desire" that at her death some part of the estate should go to his brothers' and sisters' families—"In particular, I should like not less than £50 sterling left to" his brother's widow, "and I desire that my wife may make a settlement providing for this." The testator's widow having died intestate, **held** that her executor was not bound to give effect to the testator's request.

Garden's Executor v More, 1913 S.C. 285; 50 S.L.R. 249; 1912, 2 S.L.T. 422.

(702)

"Anxious desire"—"Hope."

A testator bequeathed his moveable estate to his widow, expressing in the testament an "anxious desire," and, in a subsequent writing, a "hope" that she should make a testament bequeathing one-half of the means which might belong to her at her death to certain of his relatives. The testator's widow having died intestate, **held** that her executor was not bound or entitled to give any effect to the testator's request.

Barclay's Executor v M'Leod, &c., 1880, 7 R. 477; 17 S.L.R. 311.

(703)

"I wish."

A testator by his trust disposition and settlement, dated in 1877, left the residue of his estate to his daughters in life and their children in fee. In a holograph letter

by the testator to his trustees the following passage occurred:—"Should a daughter marry, the single one to have at least £600 a year, and balance to go to the married sister. In the event of both being married, then my capital to be equally divided between them. I wish, however, that £200 be paid to Mrs. G S annually during her lifetime, in consideration of her great kindness to me and for her care of my dear children. I do not think they will object to this." **Held** that the letter contained no valid bequest of an annuity to Mrs. G S, and did not impose any burden of such an annuity on the shares of the daughters.

Hamilton's Trustees v Hamilton, 1901, 4 F. 266; 39 S.L.R. 159.

(704)

"I would prefer" construed as **"I wish."**

A testator left a letter addressed to one of his testamentary trustees containing instructions to pay to a lady "on the first of each month after my death the sum of twelve pounds ten shillings, being at the rate of £150 a year. But in lieu of this I would prefer that as soon as you conveniently can, that the sum of £3000 . . . should be taken from my life insurance funds and paid over to her . . ." **Held** that the words "I would prefer" were to be construed as "I wish," and were a form of command; and, accordingly, that the trustees were not given a discretion to pay either the monthly payments or the capital sum, but that the bequest must be construed as a bequest of the capital sum, the monthly payments being merely a temporary expedient until the capital sum should be available for payment.

Reid's Trustees v Dawson, 1915 S.C. (H.L.) 47; 52 S.L.R. 544; 1915, 1 S.L.T. 291.

(705)

"I authorise you" to make new settlement—**Exercise of power to test.**

By mutual settlement a husband and wife conveyed their whole estates to the survivor. In the event of his predecease the husband reserved power to test on three-fifths of the funds remaining at the survivor's death. He predeceased the wife, leaving a holograph writing whereby, on the narrative that the funds of the spouses were £5000, and of this £2000 belonged to the wife in her own right, he provided—"I . . . authorise you . . . my wife after my death to make another settlement, and to leave to my relations the following sums of which they will receive after your death." He then enumerated a number of legacies to his relations, amounting to £2770 and dealt with the residue of the £3000. **Held** that the holograph writing was an exercise of the power to test reserved in the mutual settlement and was binding on the wife, and was not a mere recommendation to the wife to give effect to the husband's wishes.

Reddie's Trustees v Lindsay, 1890, 17 R. 558; 27 S.L.R. 514.

(2) FEE OR LIFE RENT.

[See FEE AND LIFE RENT.]

(3) WHETHER GIFT TO CONDITIONAL INSTITUTE INDEPENDENT OF GIFT TO INSTITUTE.

(706)

Revocation of gift to institute—Effect on conditional institution.

By trust disposition and settlement a testator bequeathed one-tenth part of the residue of his estate to his niece, A, declaring that, in the event of her dying without leaving lawful issue at the time of the division of his estate, the share to which she would have been entitled should "fall to and devolve upon" B. By a codicil the testator, in respect of A's death, recalled the bequest to her, adding this declaration—"Declaring always that these presents shall noways infer a revocation of my said trust disposition and deed of settlement and codicil, but that the same shall stand in full force with these additions, and alterations thereto." **Held** that the conditional institution of B was not revoked.

Stuart's Trustees v Stuart, 1899, 1 F. 699; 36 S.L.R. 519; 6 S.L.T. 360.

(707)

A father by settlement directed his trustees to hold the residue for behoof of such of his surviving children as should, if sons, attain the age of twenty-five years, or if daughters, attain that age or be earlier married, and for the lawful issue (if any) of such of his children as should die without becoming entitled, equally among said children and issue per stirpes; and upon the surviving daughters attaining twenty-five years, or being married, the trustees were further directed to hold or place with other trustees the shares of such daughters in trust "for their life rent use only, and for the lawful issue of said respective daughters, or failing lawful issue, for their next of kin in fee." Thereafter by certain informal holograph writings he excluded one of his daughters "from any right, title, or interest," in his estate personal or moveable whatsoever. **Held** (1) that these writings were part of his will; (2) that they were effectual to exclude the daughter from her share of his estate; but (3) that they were ineffectual to exclude her child, as her issue had a separate and independent interest in the testator's estate.

Calder v Millar, 1890, 28 S.L.R. 230.

(708)

A lady in her settlement directed her trustee "to invest . . . £200 sterling for behoof of" her brother J L, "and out of the sum so invested to pay" to him £3 per month and "to divide whatever balance is over of the sum so invested equally among" his children, and in the event of his predeceasing "instead of investing the said £200 to divide the same equally among" his children. A codicil written by her own hand after her brother's death

bore—"October, 1879, I hereby cancel and annul the legacy bequeathed . . . to J L now deceased, but in all other respects hereby ratify and confirm the foregoing settlement." Then followed another codicil, undated, which bore—"I hereby bequeath to G C and S L my late brother's daughters the sum of £20." **Held** that the codicils cancelled the contingent legacy in the settlement in favour of J L's children.

Macfarlane, 1885, 12 R. 936; 22 S.L.R. 614.

(709)

A testator, by his trust disposition and settlement, bequeathed certain legacies and, inter alia—"To my niece, A B, and her heirs the sum of £100 sterling." He directed that "after payment of the above legacies the residue of my estate, if any, shall be disposed of at the discretion of my said trustees." In a codicil he made the following statement:—"My niece, A B, having died, the legacy to her has lapsed." **Held** that the codicil showed that the testator regarded the legacy to A B as extinguished, and accordingly that it did not pass to A B's heirs as conditional institutes, but fell into residue.

Davidson v Christie, (O.H.) 1895, 3 S.L.T. 126.

(710)

Where a legacy left to A with a destination over to family of A was subsequently revoked by a codicil, question whether the revocation by codicil also revoked the conditional institution of the family.

Stewart's Trustees v Stewart, (O.H.) 1917, 2 S.L.T. 267.

(711)

Bequest to children of A excluding one child otherwise provided for—Right of issue of excluded child.

Alexander Macfarlane senior, who died in 1863, directed his trustees, after the decease of the longest liver of himself and his wife, and upon the death of the longest liver of his son Alexander Macfarlane junior and his wife, to divide certain shares of his estate among Alexander Macfarlane junior's children, excluding Alexander Macfarlane tertius. He also provided that should grandchildren predeceasing the term of payment leave issue, then such issue shall be entitled to their parent's share. Alexander Macfarlane junior was survived by four children, but only one of them, Robert, survived the period of vesting. **Held** that the exclusion of Alexander Macfarlane tertius excluded his child from all participation in the bequest of the three shares.

Macfarlane's Trustees v Macfarlane, 1906, 8 F. 787; 43 S.L.R. 494; 13 S.L.T. 915.

(712)

Institute in debt to testator.

A testator directed his trustees to accumulate one-third of the income of his estate for behoof of B, and to pay the remaining two-thirds to C. If either B or C died without issue before B attained the

age of twenty-five the share of the predeceaser was to accrete to the survivor. C died before B attained the age of twenty-five, and died within a year of the death of the testator. He owed the testator a sum in excess of the amount of income which accrued prior to his death. **Held** that the legacy to C must be imputed pro tanto in extinction of his debt.

Paris' Trustees v Gow, 1870, 8 S.L.R. 184.

(713)

Direction to pay legacies to sons at majority—Application to conditional institution of issue.

A testator, by the fifth purpose of his settlement, directed his trustees to divide the residue of his estate among his children, in the case of sons, on their attaining majority, vesting being postponed till then, and there being directions as to further postponement. **Held** that the clauses postponing payment until a son attained majority did not apply to a destination over in favour of the son's issue.

White's Trustees v White, 1896, 23 R. 836; 35 S.L.R. 660; 4 S.L.T. 59.

(714)

Power to invest legacy under conditions—Application to conditional institution.

A testator left a legacy of £1500 to a married niece who was of unsound mind, adding—"This legacy may be paid" to the husband of the niece, "or invested for behoof of their children, and under such conditions as shall to my trustees appear most for their benefit." **Held** that the discretionary power given to the trustees applied only to the legacy in favour of the mother, and that the sons were entitled to unconditional payment.

Kinmond's Trustees v Mess, 1898, 25 R. 819; 35 S.L.R. 631; 5 S.L.T. 379.

(715)

Power to restrict beneficiary's interest and invest for issue—Destination over to issue subject to restrictions—Vesting in issue free from restrictions.

By his trust disposition a testator left a legacy of £1500 to a married niece who was of unsound mind, adding, "This legacy may be paid" to the husband of the niece, "or invested for behoof of their children, and under such conditions as shall to my trustees appear most for their benefit." The testator also bequeathed legacies to other nephews and nieces, and declared that the whole legacies should only become payable after his death and the death of his wife, and that the lawful issue of any of the legatees predeceasing the longest liver of himself and his wife should succeed to their parents' share in equal portions, and also that the share of any of them predeceasing the testator and his wife without lawful issue should fall into residue. The testator's niece survived him, but predeceased his widow, leaving two sons. After the death of the testator's widow his trustees executed a

minute, by which they restricted the sons' interest in the legacy to an alimentary life-rent, with a testamentary power of disposal of the fee. **Held** that on a construction of the deed the legacy vested in the sons as conditional institutes on the death of the testator's widow.

Kinmond's Trustees v Mess, 1898, 25 R. 819; 35 S.L.R. 631; 5 S.L.T. 379.

(716)

Liferent to testator's widow—Power to trustees to pay fee to son—If son marry and fee not paid to him, liferent to son and his wife with fee to issue—Son predeceasing testator's widow.

A testator granted his widow the liferent of the residue of his estate, and gave his trustees, on her death, a discretionary power to pay the whole or any part of the residue to his only son, and, in the event of his son marrying, he directed them, "should they not have deemed it prudent to hand over" the residue to him absolutely, to hold or to convey the residue in trust for the spouses in conjunct liferent, and their issue in fee, "such conveyance to be made in such terms and under such conditions, provisions, and declarations, as my trustees in their discretion may think proper," and in the event of the trustees not paying over the residue to the son, or to or for behoof of him and his widow and children, they were directed to apply it for charitable purposes. The son married during the life of the testator's widow, but predeceased her, leaving a widow but no children. **Held** that the provision conceived in favour of the son's wife and children was not conditional on the son surviving the testator's widow.

Reid's Trustees v Reid, 1879, 6 R. 916; 16 S.L.R. 527.

(717)

Application of condition to institutes or substitutes—Profession of Roman Catholicism.

Disposition of heritage "under the express condition" of professing the Roman Catholic religion, **held** to apply to the institutes and conditional institutes merely, and not to the substitutes.

Hay v Brown, 1883, 10 R. 460; 20 S.L.R. 311.

(718)

Accreting share—Limitation of rights of institute—Application to conditional institute.

A trustor directed his trustees to realise his whole estate and "divide" it amongst his children, the daughters' shares being limited to a liferent, with a gift of fee to their children. With reference to the daughters' shares, it was further provided, "if no children, then in that case her share shall revert and be divided, share and share alike, among my other children." A daughter having died unmarried, **held** that the share liferented by her was to be conveyed absolutely to her brothers and sisters, without any restriction of the latter to a

liferent, as in the case of the shares falling to them directly.

Campbell's Factor v Campbell, (O.H.) 1882, 19 S.L.R. 679.

- (4) **LIFERENT TO PARENT AND FEE TO CHILDREN — WHETHER CHILDREN'S RIGHT AFFECTED BY PARENT'S REPUDIATION.**

[See XXI. 5 (2), *infra*.]

11. DIRECTIONS AND POWERS TO TRUSTEES.

- (1) **DIRECTIONS TO CONVEY OR TO SETTLE PROPERTY.**

(719)

Whether direction imported conditional institution or substitution.

A testator by his trust disposition and settlement conveyed his whole estates, heritable and moveable, to trustees, directing them after his death to convey certain lands named "to Gavin, my youngest son, whom failing to his lawful issue equally among them." Gavin survived his father. The trustees conveyed the lands "to Gavin whom failing to his children equally among them whom failing to his heirs and assignees whomsoever." The disposition was recorded on behalf of Gavin. He died intestate, survived by two sons. In a competition between the sons, **held** (1) that the provisions of the trust disposition and settlement imported a conditional institution and not a substitution; (2) that the destination inserted in the conveyance of the trustees was unauthorised and had no effect; and (3) that Gavin's elder son as his heir at law was entitled to the whole lands.

Marshall v Marshall, 1900, 2 F. 1023; 37 S.L.R. 775; 8 S.L.T. 64.

(720)

To convey with heritable destination.

A testator directed his trustees to hold heritage for his widow in *liferent* and on her death to convey it to G B, "whom failing to the heirs of his body, whom failing to my own heirs-male and the heirs of their body, whom failing to my own nearest heirs whomsoever excluding heir-portioners." When the testator died G B was her heir-male, but he predeceased the widow without issue. **Held** that the heir-male was to be ascertained at the death of the widow (per Lord President Dunedin and Lord Kinnear), because the trustees were bound to insert in their deed of conveyance the destination in the trust disposition and settlement and a destination of heritage in such terms meant that the heir called on the failure of the institute was to be ascertained at the opening of the succession.

Baillie's Trustees v Whiting, 1910 S.C. 891; 47 S.L.R. 684; 1910, 2 S.L.T. 23.

(721)

Direction to purchase land and deliver disposition thereof—Effect of disposition to settle

lands on beneficiary as unlimited *fiar*—Right to payment of money.

Spens v Monypenny's Trustees, 1875, 3 R. 50; 13 S.L.R. 25 and 45, No. 1183, *infra*.

(722)

Direction to convey residue to daughter in *liferent* *allanarly* and issue in fee on daughter attaining majority — Failing daughter and issue to convey to trustees for charity.

Simpson's Trustees v Simpson, 1889, 17 R. 248; 27 S.L.R. 175, No. 952, *infra*.

(723)

Direction to settle daughters' shares.

A testator directed his trustees to retain the residue of his estate for his children equally, the shares of each to be payable at the first term after the youngest should attain majority, but directed, *inter alia*, that on the marriage of his daughters a certain proportion should be settled on them in *liferent* and the children of their marriage in fee. At the time of division one daughter was a widow with children. **Held** that the trustees were bound to settle the proportions, not in the precise words of the direction, which would have given her the fee, but in such a way as to secure the fee to her children, giving her a *liferent* *allanarly*.

Mitchell's Trustees v Smith, 1880, 7 R. 1086; 17 S.L.R. 736.

(724)

Direction to entail—Definition of executory trust.

When a testator directs his trustees to make a valid entail of lands such an express trust will not be impaired by a specific direction to insert clauses which taken alone would be inadequate for that purpose. But when a trustee confers no power to make an entail and the trustees are directed to carry out the intention of the trustor by a definite method they must conform their action exactly to the directions so given even although it may be apparent that the testator had some object in view which cannot be effectually attained by the methods prescribed.

Sandys v Bain's Trustees, 1897, 25 R. 261; 35 S.L.R. 211; 5 S.L.T. 238.

(725)

Invalid entail—Failure of trustees to execute trust.

Ochterlony v Ochterlony, 1877, 4 R. 587; 14 S.L.R. 385. *ENTAIL*, No. 7.

(726)

Direction to invest in heritable security taking titles in *liferent* and fee.

A testator by his will directed his trustees to divide his estate into as many shares as he had children, and to invest his daughters' share in heritable securities taking the title to them in *liferent* only, and their children in fee. **Held** that the daughters had a bare *liferent* of their shares and had no interest in the fee.

Fulton's Trustees v Fulton, 1880, 7 R. 566; 17 S.L.R. 377.

(727)

Direction that if there shall be any surplus it shall belong to my son H in liferent and to his issue in fee.

Gifford's Trustees v Gifford, 1903, 5 F. 723; 40 S.L.R. 476; 10 S.L.T. 793.
FEE AND LIFERENT, No. 36.

(728)

To make over to parent in liferent and his children in fee.

A testator by holograph will directed his trustees "to make over" certain heritable properties to his eldest son "with the burden upon them of thirty pounds sterling to his two oldest children of his first marriage during his lifetime, and at his death so as to equally divide amongst his other children." **Held** that the testator had expressed his intention that his son should have a liferent only, and had directed his trustees to take the necessary steps to carry this into effect, and accordingly that the trustees were bound to execute a conveyance of the property in favour of the son for his liferent only and of his children (other than the two eldest) in fee.

Brash's Trustees v Phillipson, 1916 S.C. 271; 53 S.L.R. 205; 1916, 1 S.L.T. 16.

(729)

Direction to settle daughter's property on marriage—Daughter marrying in testator's lifetime.

A testator directed his trustees to set aside one-third of his estate for his daughter, and he further directed that in the event of her marriage her property should be settled on herself in liferent and her family in fee. **Held** that the direction to the testamentary trustees to settle the daughter's share on her marriage applied only to the event of the daughter marrying after the testator's death.

Walker's Trustees, 1870, 8 M. 870; 42 J. 509; 7 S.L.R. 541.

(730)

Direction to settle daughters' share by antenuptial contract—Application to daughters married at date of will—Impossibility of literal fulfilment.

A testator directed his trustees to realise and divide the residue of his estate among his children equally, "declaring . . . that the term of the vesting of the foregoing provisions of residue shall, as regards daughters, be on their respectively attaining majority or being married, whichever of these events shall happen first: As regards said provisions to my daughters, I hereby appoint that the capital of the same shall not be paid to them (except as after mentioned), but that my trustees shall pay to my daughters the revenue of their respective provisions while they remain unmarried, and on their marriage my trustees shall see to it that the said provisions, both revenue and capital, be secured in trust . . . by antenuptial settlement upon my daughters and their children to be born

. . . Further, notwithstanding what is before written, my trustees shall have power on the marriage of such daughter to pay to her, or to pay to any daughter already married at my death, for her own absolute use, such portion (not exceeding one-tenth part) of the capital of her provision as my trustees shall think proper." The testator was survived by two married daughters, whose marriages took place before the date of the settlement. **Held** that the testator's intention that the shares of the daughters, married as well as unmarried, should be secured to them and their children being sufficiently plain, that intention was not to be defeated simply because he had indicated a method of carrying out his wishes which was not precisely applicable to every case, and that the trustees were bound (subject to the power to advance) to settle the shares of daughters, married at the date of the testator's death, in trust in names of the trustees or of other trustees for the daughters' behoof in liferent and otherwise as directed by the testator.

Fyfe's Trustees v Duthie, 1908 S.C. 520; 45 S.L.R. 368; 15 S.L.T. 803.

(731)

Protected right of succession.

Massy v Scott's Trustees, 1872, 11 M. 173; 45 J. 127; 10 S.L.R. 111, No. 1004, *infra*.

Gibson's Trustees v Ross, 1877, 4 R. 1038; 14 S.L.R. 694, No. 1005, *infra*.

(732)

Direction to settle under discretionary conditions—Condition of forfeiture on second marriage—Ultra vires.

A testator directed his trustees in a certain event, to hold or to convey the residue in trust for the testator's son and his wife in conjunct liferent, and their issue in fee, "such conveyance to be made in such terms and under such conditions, provisions, and declarations as my trustees in their discretion may think proper." **Held** that this direction did not warrant the trustees restricting the liferent of the son's widow (he having died before the conjunct liferent opened to the spouses), by a condition that it should terminate on her second marriage.

Reid's Trustees v Reid, 1879, 6 R. 916; 16 S.L.R. 527.

Direction to convey heritage—Destination over—Substitution or conditional institution.

[See XIII. 2 (1), *infra*.]

(2) **POWER TO RESTRICT INTEREST OF BENEFICIARY.**

[See also TRUST V. 2 (3).]

Power to restrict interest to liferent—Repugnancy.

[See XVIII., *infra*.]

(733)

Heritage—Right to demand conveyance in lifeferent.

Ker's Trustees v Justice, 1868, 6 M. 627; 40 J. 324; 5 S.L.R. 382. **TRUST, No. 434.**

(734)

Power to render share alimentary—Reasonable time for exercise—Power not exercised till after action brought.

Adam v Forsyth's Trustees, 1867, 6 M. 31; 40 J. 23; 5 S.L.R. 26. **TRUST, No. 436.**

(735)

Power to restrict beneficiary's interest to alimentary lifeferent—Partial payment without exercise of power—Arrestment by beneficiary's creditors—Subsequent exercise of power.

A testator directed his trustees to hold the residue of his estate for behoof of his children equally among them, "with and under the exceptions and modifications to be afterwards stated." The shares of residue were made payable six months after the testator's decease to those children that were major, and they were declared to vest at the testator's death in those children that survived him. There then followed a provision that, "notwithstanding the periods above appointed for the payment of the shares of the residue," the trustees should have power to restrict the right of the children to a lifeferent, and settle the fee of their shares on their issue under such condition as the trustees should deem expedient. The trustees made payments to account of his share to J C, a son of the testator, but the balance of his share was arrested in their hands by certain of his creditors, who subsequently brought a furthcoming. At the date of the arrestment the trustees had formed no resolution to postpone the payment to J C of the balance of his share of residue, but in their answers to the action of furthcoming they announced their resolution to postpone the payment of the residue to J C, and to apply the annual proceeds thereof for his aliment, and thereafter they executed a deed of trust restricting his right to a lifeferent, and settling the fee on his children. **Held** that, although prior to the arrestment the legatee had a vested right to the fund in the trustees' hands, it remained subject to the power conferred by the deed upon the trustees, and that their right to exercise the power was in no way affected by the arrestment, which could only attach the legatee's right tantum et tale as it stood in him, and that the trustees had validly exercised the power.

Chambers' Trustees v Smith, 1878, 5 R. (H.L.) 151; 3 App.Cas. 795; 15 S.L.R. 541.

(736)

Exercise of power ultra vires.

M'Nicol's Executrix v M'Nicol, 1893, 20 R. 386; 30 S.L.R. 428. **TRUST, No. 437.**

(737)

Power to retain share—Exercise of power—No formal minute—Presumption.

A testator directed his trustees to divide the residue of his estate among his children on their attaining majority, and provided that the capital of one-half of the sons' share should not be payable until they respectively attained twenty-five. Power was conferred on the trustees to pay any part of the capital of the said half after the sons had attained majority, and also to withhold payment of the capital after the sons had attained twenty-five. One of the sons survived the father and died two years after attaining twenty-five without having received payment of the whole of his half share of residue. The trustees had not recorded any minute determining to exercise the power to withhold payment. **Held** that in retaining the portion of one-half-share it must be presumed that the trustees had acted in exercise of the power conferred on them, and there being no evidence to the contrary, that the power had been validly exercised.

White's Trustees v White, 1896, 23 R. 836; 33 S.L.R. 660; 4 S.L.T. 59.

(738)

Discretionary power to retain.

By his settlement a testator directed his trustees to realise his whole estate "and thereafter (subject always to the discretionary power vested in my trustees hereinafter mentioned) to divide" the proceeds equally among his children and the issue of predeceasers. There followed a declaration that "notwithstanding the power of division above mentioned" the trustees should have an absolute discretionary power to retain any of the shares, and to pay over only the annual income, and to pay the capital at such times and by such instalments as they might determine; and a further special declaration "that the whole provisions hereunder in favour of my son J W are purely and strictly alimentary, and the same shall not be attachable by the debts or deeds of the said J W, nor attachable by the diligence of his creditors," and that any share retained by the trustees under their discretionary power should be subject to this declaration. There was no ulterior destination of the shares of residue. In a special case the trustees stated that they were prepared to hand over J W's share to him if they had power to do so, and that they saw no reason to exercise their discretionary power. **Held** that under the direction to divide the estate among the children a right of fee was conferred on J W which was not withdrawn by the subsequent declarations.

Watson's Trustees v Watson, 1913 S.C. 1133; 50 S.L.R. 901; 1913, 2 S.L.T. 172.

(739)

Held that an absolute gift of fee conferred by one of the purposes of a trust deed had not been revoked or reduced to a lifeferent by

powers conferred on the trustees and by the exercise of these powers.

Calder, (O.H.) 1900, 8 S.L.T. 330.

(740)

Power to apportion, exclude, or restrict right of beneficiaries—Exercise of power.

By his trust disposition and settlement a testator directed his trustees to hold a specified share of his estate for behoof of the children of his deceased brother James, to apply the income for their benefit until the youngest should attain majority, and on the youngest attaining majority, to pay over the capital to the children then surviving in equal shares. By a codicil, the testator altered this bequest and conferred the following discretionary powers on his trustees:— (1) A power to apportion the share among the children; (2) a power to exclude any child; and (3) a power, "if they see cause, in place of paying over to one or more of the said children the share or shares which the trustees may apportion to them, . . . to retain the same under their trust for behoof of such child or children, either during their lifetime or during such period as they consider necessary, my intention with regard to the said share of residue falling to the children of my said brother, and interest thereof, being to give my trustees the same powers in apportioning, withholding, or dealing with the same, or interest thereof, as I could have myself were I in life, and the children of my said brother nor their issue shall have no vested interest in the provisions in their favour contained in my said settlement and this codicil, but shall be in the matter of the said provisions entirely under the control of my trustees." The trustees by minute "apportioned and set apart" for Alexander, one of James's children, a specified sum, but resolved that the same should be invested for his behoof, and the annual income or interest should be paid over to him half-yearly, or at such other period as the trustees might fix from time to time. **Held**, on a construction of the settlement and codicil, and of the trustees' minute, that the fee of the share of the testator's estate, by the minute apportioned and set apart for Alexander, vested in him and fell to be applied in terms of his settlement.

Macfarlane's Trustee v Macfarlane, 1903, 6 F. 201; 41 S.L.R. 164; 11 S.L.T. 505.

(741)

Power to postpone payment, apply interest, and settle fee.

A testator empowered his trustees to postpone payment of the shares of all or any of his children beyond the period of payment, and to apply the interest on said shares during the period of postponement for behoof of said child or children, and authorised them to settle the fee of such shares on said child or children or their issue on such conditions as they might deem most expedient.

Held that the trustees had power to restrict the interest of a child to a life interest and settle the fee upon his issue, but such power must be exercised before the beneficiary reached majority.

Slimon v Slimon's Trustees, (O.H.) 1915, 2 S.L.T. 19.

(742)

Gift of whole or portion of annual income of fund—Gift subject to conditions or restrictions as trustees might think fit—Exercise of discretion by trustees.

Train v Clapperton, 1908 S.C. (H.L.) 26; [1908] A.C. 342; 45 S.L.R. 682; 16 S.L.T. 45. *Trust*, No. 439.

(743)

Forfeiture of life interest—Whether whole income affected.

Brown's Trustees v Gregson, 1916 S.C. 97; 53 S.L.R. 80; 1915, 2 S.L.T. 283, No. 1510, *infra*.

(3) DELECTUS PERSONARUM.

(744)

Charitable trust—Failure of person entitled to select charity.

Laurie v Brown, (O.H.) 1911, 1 S.L.T. 84, No. 278, *supra*.

Landale's Trustee v Nicol, (O.H.) 1918, 2 S.L.T. 10, No. 279, *supra*.

(745)

Power of apportionment—Whether power exercisable by assumed trustees.

Hill's Trustees v Thomson, 1874, 2 R. 68; 12 S.L.R. 20, No. 1299, *infra*.

(746)

Power given to two out of four trustees.

Paterson's Trustees v Finlay, 1918 S.C. 713; 55 S.L.R. 759; 1918, 2 S.L.T. 93, No. 1300, *infra*.

(747)

Equal division on failure to apportion.

Weir v Young, (O.H.) 1897, 5 S.L.T. 233, No. 1294, *infra*.

12. MISCELLANEOUS.

Death — Whether divorce equivalent to death.

[See HUSBAND AND WIFE VIII. 2 (2).]

(748)

"Failing a child or children."

Observations on the meaning of the expression.

Scott's Trustees v Brown & Co., 1882, 9 R. 798; 19 S.L.R. 606.

Duff's Trustees v Leighton's Executor, 1908, 45 S.L.R. 349; 15 S.L.T. 775.

(749)

"Leaving issue."

Hickling's Trustees v Garland's Trustees, 1898, 1 F. (H.L.) 7; [1899] A.C. 15; 35 S.L.R. 975. VESTING, No. 144.

Neill's Trustees v Neill, 1902, 4 F. 636; 39 S.L.R. 426; 9 S.L.T. 495. VESTING, No. 155.

Binnie's Trustees v Prendergast, 1910 S.C. 735; 47 S.L.R. 271; 1910, 1 S.L.T. 49; reversed on another point, 1911 S.C. (H.L.) 6; 48 S.L.R. 251; 1911, 1 S.L.T. 142. VESTING, No. 164.

(750)

A testator directed his trustees to divide his estate among his nephews and nieces (afterwards explained to be only in liferent), "declaring that, in the event of any of them dying, whether before or after me, leaving lawful issue, such issue shall inherit their parents' share as well original as what may be added by accretion." Held that there was no bequest to the son of a niece who survived the testator but predeceased the niece without issue.

Crichton's Trustees v Bell, (O.H.) 1900; 8 S.L.T. 177.

(751)

"Second marriage"—Null marriage.

A husband by his will restricted the annuity payable to his widow in the event of her "entering into a second marriage." The widow went through a ceremony of marriage, which was declared by a court of competent jurisdiction to be and to have been absolutely null and void on the ground of impotency on the part of the man. Held that the widow had not entered into a second marriage within the meaning of the provision in her husband's will.

A v B's Trustees, (O.H.) 1907, 15 S.L.T. 108.

(752)

Married daughters.

A testator by his settlement directed his trustees to divide the residue of his estate among his children in equal shares. In a codicil he provided that in the event of each child's share being less than £1000 "the married daughters' shares" should be reduced to £100 each. Held that the restriction applied only to the daughters married before the death of the testator.

Muir's Trustees, 1869, 8 M. 53; 42 J. 25; 7 S.L.R. 24.

(753)

Direction to settle daughter's property on marriage—Daughter already married.

Walker's Trustees, 1870, 8 M. 870; 42 J. 509; 7 S.L.R. 541, No. 729, supra.

Fyfe's Trustees v Duthie, 1908 S.C. 520; 45 S.L.R. 368; 15 S.L.T. 803, No. 730, supra.

(754)

"Succeeding to a peerage"—Heir already a peer.

Earl of Caithness v Sinclair, 1912 S.C. 79; 49 S.L.R. 29; 1911, 2 S.L.T. 368, No. 978, infra.

(755)

Expenses of education.

A testator directed his trustees "to pay the expenses necessary for the education of my children; and it is my desire that my sons A and J should have a university education suitable to prepare them for whatever profession they may adopt." One of the sons, after entering upon the profession of medicine, was proceeding to take a post-graduate university diploma in public health. Held, in an action at his instance, that the trustees were not bound to pay his expenses in connection with the public health diploma.

Dick's Trustees v Dick, 1911, 48 S.L.R. 325; 1911, 1 S.L.T. 95.

(756)

Obligation to maintain testator's children—Separate residence of child.

A trustor directed his trustees to pay to his wife, if she survived him, a certain annuity, and to permit her to have the occupation during her lifetime of a dwelling-house and the use of the furniture therein, declaring that she "shall out of the foresaid provisions educate and maintain my children . . . in a way befitting their station in life, until they shall respectively attain the age of twenty-one years or, if daughters, be married." He was survived by his wife and by several sons and daughters of that and of a prior marriage. The settlement left undisposed of part of the income and most of the capital of his estate, which was of considerable amount. Held that one of the daughters of the first marriage, who was over twenty-one years of age and desired to live apart from the widow, was not entitled under the settlement to a separate maintenance out of the widow's annuity, it being sufficient implement of the widow's obligation that she offered to maintain the daughter in family with her in the dwelling-house left by the trustor.

Barry's Trustees v Barry, 1888, 15 R. 496; 25 S.L.R. 358.

(757)

Obligation to aliment imbecile "so long as he shall be unable to maintain himself"—Imbecile possessed of funds.

Under a mutual settlement executed by a husband and wife, the wife, who survived, became entitled to, inter alia, the liferent of her husband's estate, and "became bound to pay the cost of maintaining W," her husband's son by a former marriage, "in an asylum or elsewhere, so long as he shall be unable to maintain himself." Held that the widow was not bound to make any payment for W's maintenance until the capital of his own funds was exhausted.

McIntyre v Westwood's Trustees, 1894, 22 R. 208; 32 S.L.R. 162; 2 S.L.T. 386.

(758)

"Relations of like degree in Scotland."

A testatrix, who lived in America, bequeathed the residue of her estate to G A

"of Scotland, who I wish to divide what falls to him with my relatives of like degree in Scotland living at the date of my death." Held that a relative in the same degree of relationship to the testatrix as G A, whose home and ordinary residence was in Australia, but who happened to be in Scotland on a visit at the time of the death of the testatrix, was not entitled to participate in the bequest.

Argo v Elmslie, 1905, 8 F. 67; 43 S.L.R. 23; 13 S.L.T. 480.

(759)

"Provision" held to mean "provisions."

A declaration in a trust disposition and settlement that "the foregoing provision in favour of my said son shall be accepted and held by him in full satisfaction of his claim of legitim," held (notwithstanding the use of the word "provision" in the singular) to apply to the whole provisions in favour of the son contained in both the trust disposition and a subsequent codicil.

Wingate v Wingate's Trustees, 1921 S.C. 857; 58 S.L.R. 604; 1921, 2 S.L.T. 163.

(760)

"Real security."

Held that an English will authorizing investments on "real security" authorised investment on a railway mortgage.

Breatchiff v Bransby's Trustees, 1887, 14 R. 307; 24 S.L.R. 233.

(761)

Direction to sell heritage if bond called up—Part of bond called up and replaced.

In the event of a bond over a heritable subject which, "if not sold as after-mentioned," was settled on a certain series of heirs, being called up prior to the date appointed for conveyance, the subject was directed to be sold, and the balance of the proceeds divided among a different set of beneficiaries. Held that the calling up of part of the loan, which was provided for by assigning to a new lender, did not entail a sale or entitle the second set of beneficiaries to claim.

Bryson's Trustees v Clark, 1880, 8 R. 142; 18 S.L.R. 103.

(762)

"Sale or mortgage"—Granting trust deed.

Chaplin's Trustee v Hoile, 1891, 19 R. 237; 29 S.L.R. 190, No. 1211, *infra*.

(763)

"Term of payment"—Heritage.

A testator directed his trustees to convey certain heritable subjects to certain of his children and to divide the residue of his estate, subject to a declaration in case any of his children should predecease "the term of payment of their provisions." Held that this declaration applied to the provisions of heritage.

Muirhead v Muirhead, 1890, 17 R. (H.L.) 45; 15 App.Cas. 289; 27 S.L.R. 917.

X. ADMISSIBILITY OF EXTRINSIC EVIDENCE.

1. WITH REFERENCE TO VALIDITY OF TESTAMENTARY WRITING.

(764)

Unsubscribed document.

Held that a document that was not subscribed could not receive effect as a will, and that no evidence was admissible to set it up.

Foley v Costello, 1904, 6 F. 365; 41 S.L.R. 286; 11 S.L.T. 660.

(765)

Holograph writing—Proof of grantor's intention.

In an action of declarator that a holograph writing was a valid settlement, held that proof that the writer did not regard it as such, but regarded it only as an instruction to his law agent to draw a formal will was incompetent, and that the only competent inquiry was whether or not it was holograph of the deceased.

Robb's Trustees v Robb, 1872, 10 M. 692; 44 J. 383; 9 S.L.R. 454.

(766)

Pencil alterations on a will.

Unsigned pencil alterations made by a testator on his testament written in ink will be presumed to be 'deliberative merely, but if there is evidence, parole or otherwise, to show that he intended them to be final, they will receive effect.

Lamont v Magistrates of Glasgow, 1887, 14 R. 603; 24 S.L.R. 426.

[See also *Pattison's Trustees v University of Edinburgh*, (O.H.) 1888, 16 R. 73. *Writ*, No. 163.]

2. IN QUESTIONS OF REVOCATION.

(767)

Holograph memorandum dated one day earlier than will—Memorandum referring to will of even date.

Tait's Trustees v Chiene, 1911 S.C. 743; 48 S.L.R. 609; 1911, 1 S.L.T. 360, No. 345, *supra*.

(768)

Mutual settlement between sisters—Funds subsequently invested with special destination—Proof that investments not authorised by testators.

Renton's Trustees v Alison, 1876, 3 R. 1142; 13 S.L.R. 696, No. 783, *infra*.

(769)

Testator destroying will containing clause of revocation—Earlier will in existence at date of death—Action for declarator that he died intestate.

A testator, who had executed a will in 1878, executed another will in 1885, by which he revoked all previous testamentary writings. He retained the will of 1885 in his possession, and subsequently destroyed it *animo revocandi*. At the time when that will was being prepared by his law agents

he sent them the will of 1878, with a note of the alterations required for the new will, and the will of 1878 was still in their possession at the time of his death. In an action at the instance of the testator's heir for declarator that the will of 1878 was not operative as a testamentary writing, the pursuer averred, *inter alia*, that the testator believed that that will had been destroyed, and that, when he destroyed the later will, he believed he was annulling the only deed which regulated his succession. The pursuer also averred that the testator had stated that he was leaving no will, and that his property would devolve upon the pursuer or her son. The Court allowed a proof before answer.

Ferguson v Russell's Trustees, 1919 S.C. 80; 56 S.L.R. 57; 1918, 2 S.L.T. 279.

(770)

Re-execution of will—Effect on intervening codicil.

A testatrix, by her will dated 13th January, 1904, directed her trustees to pay the income of a sum of £5000 to her daughter; and on the daughter's death to pay £500 thereof to a grand-daughter and "to pay a further sum of £1500 thereof in the manner directed by me in any writing or writings to be hereafter executed by me." The will contained a clause revoking "all previous writings." The testatrix left no writing subsequent to 13th January, 1904, but there was found in her repositories a holograph document by which she bequeathed the £500 to certain beneficiaries. The will of 13th January, 1904, was in its main provisions the same as a previous will executed on 16th December, 1903, but contained certain alterations, one of them being the provision with regard to the £1500 which did not appear in the previous will. Held that extrinsic evidence (consisting mainly of a correspondence between the testatrix and her law agents) was not admissible for the purpose of establishing that, notwithstanding the clause of revocation in the later will, the testatrix intended the document of 21st December to form part of the testamentary writings.

Hannay's Trustees v Keith, 1913 S.C. 482; 50 S.L.R. 386; 1913, 1 S.L.T. 95.

(771)

No express clause of revocation — Effect on codicil to earlier will.

Dalglisch's Trustees v Crum, 1891, 19 R. 170; 29 S.L.R. 149, No. 371, *supra*.

(772)

Re-execution of codicil — Erroneous belief that first codicil badly executed.

Stirling Stuart v Stirling Crawford's Trustees, 1885, 12 R. 610; 22 S.L.R. 391, No. 373, *supra*.

(773)

Cancellation—Proof of animus revocandi—Unsigned writings holograph of testator.

In a question as to whether portions of a holograph testamentary paper which had been scored out in pencil had been deleted by

the testator *animo revocandi*, held that it was competent to look at unsigned and undated pencil writings which were holograph of the testator.

Lamont v Magistrates of Glasgow, 1887, 14 R. 603; 24 S.L.R. 426.

[See also *Pattison's Trustees v University of Edinburgh*, (O.H.) 1888, 16 R. 73. *Writ*, No. 168.]

(774)

Cancelling trust disposition and settlement —Proof prout de jure that deed destroyed by authority of testator.

Bonthrone, &c. v Ireland, 1883, 10 R. 779; 20 S.L.R. 516. *EVIDENCE*, No. 51.

[*Cf. Leckie v Leckie, &c.*, 1884, 11 R. 1088; 21 S.L.R. 737. *EVIDENCE*, No. 346.]

(775)

Implied revocation of will by birth of child —Extrinsic evidence to negative—Presumption.

At the date of making his will, a testator had one child in existence. Subsequently another child was born. In an action at the instance of the second child for reduction of the testator's trust disposition and settlement, the trustee averred an express declaration by the testator that the will should stand. Parole evidence allowed to prove the trustee's averments.

Chrystal v Mackinlay, (O.H.) 1919, 1 S.L.T. 250.

3. IN RELATION TO EVACUATION OF SPECIAL DESTINATIONS.

(776)

Evacuation of special destinations by general disposition.

Observations (per Lord Selborne (Lord Chancellor) and Lord Colonsay) as to the admissibility of extrinsic evidence.

Glendonwyn v Gordon, 1873, 11 M. (H.L.) 33; L.R., 2 H.L. Sc. 317; 45 J. 183; 10 S.L.R. 451.

(777)

Opinions on the competency of a proof of facts and circumstances to show that the granter of a general disposition did not intend to include in the conveyance an estate which he held under an entail, of which the fetters did not apply to him.

Thoms v Thoms, 1863, 6 M. 704; 40 J. 364; 5 S.L.R. 418.

(778)

Observations (per Lord Selborne (Lord Chancellor) Lord Hatherley, and Lord Blackburn) on the difference between the law of Scotland and the law of England with regard to the admissibility of extrinsic evidence.

Campbell v Campbell, 1880, 7 R. (H.L.) 100; 5 App.Cas. 787; 17 S.L.R. 807.

(779)

It is a question of intention whether an estate which has been disentailed but which still stands on the tailzied destination is carried by a general disposition granted by

the heir in possession. **Observations** (per Lord President Inglis) to the effect that the relation which the granter of the deed bears to the estate in question, the condition of the parties interested in the previous settlement of the estate, and their relation to the granter of the deed, and, above all, the mode in which the granter of the deed has dealt with the estate which is said to be conveyed in other deeds and transactions regarding that estate, and also the way in which she has dealt with her succession generally, if the general disposition is a disposition intended to settle the affairs of the trustor, are fair elements for consideration in dealing with this question of intention.

Gray v Gray's Trustees, 1878, 5 R. 820; 15 S.L.R. 571.

(780)

—Admissibility of revoked general disposition.

Question whether, in considering whether a special destination was evacuated by a general disposition it was competent to look at a revoked general disposition by which the special destination was evacuated.

Currie v M'Lennan, 1899, 1 F. 684; 36 S.L.R. 494.

(781)

—Deeds executed by testator — Inter vivos deeds.

In the construction of a settlement containing a general conveyance of the granter's whole heritage **held** that it was competent to refer to other deeds executed by the granter with reference to his heritage, though not testamentary, as evidence that it was not the granter's intention to include in the conveyance lands held under an invalid entail.

Catton v Mackenzie, 1870, 8 M. 1049; 42 J. 618; 7 S.L.R. 687.

[**Held** in the House of Lords that the entail was valid, 1872, 10 M. (H.L.) 12; L.R., 2 H.L. Sc. 202; 44 J. 191; 9 S.L.R. 425.]

(782)

—Destination in moveable bond—Proof of authority to make investment.

Paterson's Judicial Factor v Paterson's Trustees, 1897, 24 R. 499; 34 S.L.R. 376; 4 S.L.T. 313, No. 319, supra.

(783)

Mutual settlement—Fund subsequently re-invested on special destination—Proof that investments not authorised by testator.

Two sisters executed a mutual disposition and settlement, giving their whole property each to the other in liferent and to certain beneficiaries in fee, but reserving power to each to alter during their respective lives. Thereafter their whole funds were reinvested under the superintendence of two friends, and the new investments were taken in terms such as to confer an absolute title of property in the survivor. The surviving sister left a new settlement, conveying her whole means to trustees. **Held** (1) that it was competent to prove by parole evidence that the

sisters had given no authority to change the terms of the investments; and (2) upon proof that no such authority had been given, that the predeceasing sister's property still remained under the operation of the mutual settlement.

Renton's Trustees v Alison, 1876, 3 R. 1142; 13 S.L.R. 696.

4. IN RELATION TO CONDITIO SI TESTATOR SINE LIBERIS DECES- SERIT.

(784)

Facts and circumstances showing intention of testator.

Elder's Trustees v Elder, 1894, 21 R. 704; 31 S.L.R. 594; 1 S.L.T. 592, No. 390, supra.

M'Kie's Tutor v M'Kie, 1897, 24 R. 526; 34 S.L.R. 399; 4 S.L.T. 308, No. 389, supra.

Smith's Trustees v Grant, (O.H.) 1897, 35 S.L.R. 129; 5 S.L.T. 190, No. 395, supra. Chrystal v Mackinlay, (O.H.) 1919, 1 S.L.T. 250, No. 775, supra.

5. TO AID CONSTRUCTION OF TESTA- MENTARY WRITINGS.

(785)

Testator's circumstances as at date of will.

Subsequent to the date of making his will a testator changed the character of a considerable portion of his estate from moveable to heritable with the result that there was intestacy quoad part of his heritage and insufficiency of moveable residue to meet certain legacies directed to be paid out of it. **Held** that a testator's intention must be ascertained by a construction of his will, which speaks as at his death, and not from a consideration of the state of his affairs as at the date of his will, and from his presumed intentions as at that date.

Boyd v Boyd's Trustees, (O.H.) 1906, 13 S.L.T. 875.

(786)

—Expressions of intention — Memoranda.

In the construction of a will and codicils, the Court is entitled to have regard to the state of the testator's circumstances at the dates when they were written, but not to indications of intention appearing in jottings or memoranda by him.

Trustees of the Free Church of Scotland v Maitland, 1887, 14 R. 333; 24 S.L.R. 290.

See also *Craw's Trustees v Blacklock*, 1920 S.C. 22; 57 S.L.R. 20; 1919, 2 S.L.T. 231, No. 470, supra.

(787)

Revoked trust disposition.

Question, whether, in construing a holograph will, it was competent to look at a prior trust disposition and settlement, prepared by a law agent, which had been expressly revoked.

Maclean v Maclean, 1891, 18 R. 874; 28 S.L.R. 656.

(788)

Instructions to prepare will—Writings subsequent to date of will.

In a case where the question was whether a heritable estate was carried by a gift of residue, **observed** (1) that instructions to prepare a mortis causa deed are not admissible in construing the deed as evidence of the testator's intention; but (2) that deeds and holograph writings made subsequently are admissible.

Farquhar v Farquhar's Executors, 1875, 3 R. 71; 13 S.L.R. 36.

(789)

Letter written by testator.

A letter, which, if extrinsic, must have been rejected, was admitted as testamentary.

Ritchie v Whish, &c., 1880, 8 R. 101; 18 S.L.R. 81.

(790)

Subsequent to date of settlement.

Question (per Lord Colonsay), whether a letter written by a testator subsequent to the date of his settlement may be referred to as extrinsic evidence in its construction.

Glendonwyn v Gordon, 1873, 11 M. (H.L.) 33; L.R., 2 H.L. Sc. 317; 45 J. 183; 10 S.L.R. 451.

(791)

Unauthenticated holograph marginal addition.

Opinions (per Lord Young and Lord Craighill) that an unauthenticated holograph marginal addition could not be admitted to qualify the terms of a holograph document.

Brown v Maxwell's Executors, 1884, 11 R. 821; 21 S.L.R. 549.

(792)

Ambiguity in designation of beneficiary.

Where there is an ambiguity as to the identity of the party to whom a testator has bequeathed a legacy, the fact that the description of one only of the claimants corresponds exactly with the description of the legatee given by the testator does not per se conclude the question in favour of that claimant, and does not preclude inquiry into the question whether another claimant, whose description does not exactly correspond, may not be the legatee intended by the testator; but there is a strong presumption in favour of the party exactly described which cannot be overcome except by cogent positive evidence. A Scotsman, living in Scotland, left, among other legacies to charities, all of which were Scottish, a legacy to "The National Society for the Prevention of Cruelty to Children." In a competition between "The National Society for the Prevention of Cruelty to Children," a society working in England, and "The Scottish National Society for the Prevention of Cruelty to Children," a society working in Scotland, **held** that the legacy fell to be paid to the English society in the absence of clear proof

that the testator intended that it should go to the Scottish society.

Nasmyth's Trustees v National Society for the Prevention of Cruelty to Children, 1914 S.C. (H.L.) 76; [1915] A.C. 207; 51 S.L.R. 725; 1914, 2 S.L.T. 146.

(793)

Direction to entail—Construction of destination—Reference to prior deeds related to that under construction.

A testator directed his trustees to entail lands on A and his heirs whatsoever, whom failing other substitutes. **Observed** (per Lord Watson) that in the ordinary case it was incompetent to refer to other deeds executed by the testator with a view to showing that he used the phrase "heirs whatsoever" in the sense of "heirs whatsoever of the body," but that the earlier deeds might be so closely connected with the latter as to let in the reference.

Gordon v Gordon's Trustees, 1882, 9 R. (H.L.) 101; 7 App.Cas. 713; 19 S.L.R. 899.

(794)

Incidence of burdens—Special legacy of heritable subjects—Heritable security in excess of value of subjects—Bond destroyed by testator.

By a codicil a testator conveyed his house and grounds of L to his sister-in-law in liferent allenerly and her daughter in fee. The house and grounds were burdened by a bond for £4000. The beneficiaries under the codicil brought an action against the trustees of the testator for declarator that the sum in the bond fell to be deducted from the moveable estate. The pursuers averred that the bond had been granted by the deceased without any request on the part of the creditor; that although it had been recorded in the Register of Sasines, it remained in the testator's own hands, and was not intended to be acted on except in the event of his bankruptcy; and that the testator had destroyed the bond in the belief that it was thereby rendered inoperative. The pursuers further averred that the sum in the bond exceeded the value of the property by £1000, and that the testator intended them to have the property disburdened of the bond. **Held** that the pursuers' averments were irrelevant.

Brand v Scott's Trustees, 1892, 19 R. 768; 29 S.L.R. 641.

6. WITH REFERENCE TO SATISFACTION OF LEGACIES AND PROVISIONS.

(795)

Satisfaction of marriage contract obligation by testamentary provision—Testator leaving "legacy" to daughter—Competency of proving that he intended a "provision."

Johnstone v Haviland, 1896, 23 R. (H.L.) 6; [1896] A.C. 95; 33 S.L.R. 511; 3 S.L.T. 279, No. 846, *infra*.

(796)
Satisfaction of legacy by payments in testator's lifetime—Evidence to prove legatee's knowledge of terms of will.

M'Laren v Howie, 1869, 8 M. 106; 42 J. 52; 7 S.L.R. 56, No. 859, *infra*.

XI. LEGACIES.

[See also REVENUE VII. 1.]

1. CLASSIFICATION.

(797)
General or specific legacy—Stock—Shares.

By his trust disposition and settlement a testator directed his trustees "to transfer" to the A C Curling Club "two five per cent. guaranteed shares of £100 each of the Glasgow and South-Western Railway Co." No part of the capital of the railway company consisted of guaranteed shares of £100 each, but the testator held £460 ordinary stock, £310 preference consolidated stock, and £70 perpetual guaranteed stock, interest at the rate of five per cent. being payable on the two latter stocks. **Held** that the bequest was not a specific legacy, but a legacy of such sum as might be required at the date of the testator's death to purchase the stock described in the will.

Barr's Trustees v Ardrossan Castle Curling Club, 1901, 3 F. 903; 38 S.L.R. 658; 9 S.L.T. 84.

(798)
Sum of money in hands of legatee.

By a general disposition and settlement a testatrix bequeathed her whole estate to her daughter F "with the exception of £300 sterling of mine which my son A has invested for me, and which I do hereby leave and bequeath to himself." At the date of the settlement A had in his possession a sum of £300 belonging to his mother on which he paid interest. **Held** that the legacy to A was a specific legacy of £300 in his hands at the date of the settlement.

Maclean v Maclean's Executrix, 1908 S.C. 838; 45 S.L.R. 672; 16 S.L.T. 38.

(799)
Debt due to testator.

A testator bequeathed to his nephew A "the £100 due to me from A H (whose security the said A holds), also the two endowment policies of £100 each with profits due on the said policies." The two policies (both on H's life) had been assigned to the testator merely in security of the debt. **Held** that the legacy was a specific legacy of the debt due by H.

Cobban's Executors v Cobban, 1915 S.C. 82; 52 S.L.R. 89; 1914, 2 S.L.T. 357.

(800)
Proceeds of policy of insurance.

A testator directed his trustees to keep up a policy of insurance for £4000 which he had taken in his own name on the life of his wife, and on her death to divide the proceeds

equally among his children then alive and the issue of predeceasers. **Held** that the legacy was a specific legacy.

Davidson's Trustees v Davidson, 1901, 4 F. 107; 39 S.L.R. 106; 9 S.L.T. 253.

(801)
Deposit receipt.

A testatrix addressed a letter to her law agent which contained the following testamentary direction:—"I empower you to uplift the deposit receipt lying with you for £4000, to lodge it in your own name, and to hold it in trust for my mother's brothers and sister and for their children." **Held** that this legacy was a specific legacy of the sum contained in the deposit receipt.

Anderson v Thomson, 1877, 4 R. 1101; 14 S.L.R. 654.

(802)
Sum of £2000 or fund held by trustees.

L, who died in 1896, by her settlement directed her trustees—"With respect to the disposal of £2000 in which I am liferented under the will of my late uncle A, and of which I consider I am entitled to dispose, I direct that the said sum or so much thereof as may remain at my death shall be divided equally among" certain legatees. L had become entitled to the fee of the residue of Dr. A's estate, and in 1881 Dr. A's trustees had made over said residue to L except two ground annuals which they retained with L's consent to meet her liferent, the minute bearing that as the then value of the ground was in excess of £2000 the surplus was to be at L's disposal. At L's death the ground annuals had further increased in value. **Held** that on a sound construction of L's settlement the bequest was limited to the sum of £2000, the surplus value of the ground annuals falling into residue.

Sym's Trustees v Ayr Hospital, 1897, 25 R. 40; 35 S.L.R. 89; 5 S.L.T. 162.

(803)
Demonstrative legacies.

Question, whether a direction to pay a legacy out of a particular residue rendered the legacy a demonstrative legacy.

Chivas' Trustee v M'Leod, 1881, 9 R. 86; 19 S.L.R. 49.

(804)
Demonstrative or specific legacy—Legacies to be paid out of fund of uncertain amount.

Held that legacies directed to be paid out of arrears of interest due to the testator, the amounts of which were uncertain, were general legacies, the direction as to the source of payment being demonstrative not taxative.

Douglas's Executors, 1869, 7 M. 504; 41 J. 268; 6 S.L.R. 324.

(805)
Sum payable out of life insurance funds.

A testator left a letter addressed to one of his testamentary trustees containing instructions to pay to a lady "on the first of

each month after my death the sum of twelve pounds ten shillings, being at the rate of £150 a year. But in lieu of this I would prefer that as soon as you conveniently can, that the sum of £3000 . . . should be taken from my life insurance funds and paid over to her . . . I had hoped to make this bequest from another source, but have found it impracticable." The life insurance policy being burdened with securities, the life insurance funds were insufficient to pay the legacy in full. **Held** that the bequest of £3000 fell to be paid in full, the reference to the life insurance funds being demonstrative and not taxative.

Reid's Trustees v Dawson, 1915 S.C. (H.L.) 47; 52 S.L.R. 544; 1915, 1 S.L.T. 291.

(806)

—Sum received from estate of husband.

A testatrix directed her trustees "to divide the sum of £400 which I received from the estate of my late husband" equally between her children. **Held** that this constituted a demonstrative and not a specific legacy.

M'Kenzie v Barker's Trustees, (O.H.) 1905, 13 S.L.T. 501.

(807)

—Alleged specific legacy occurring in residue clause.

A testatrix directed her trustees "to hold the . . . residue . . . of my estates (and without prejudice to the said generality, all real property and mortgages over real and personal property in Demerara or elsewhere)" in trust for behoof of her husband. **Held** that this did not constitute a specific bequest of the property in Demerara of the class described.

M'Kenzie v Barker's Trustees, (O.H.) 1905, 13 S.L.T. 501.

(808)

The holograph will of a testatrix, after providing for payment of a number of pecuniary legacies, contained the following clause:—"Fifty pounds to each of my executors, and the residue, with all right to and interest in the monies due to me from my late aunt A W's estate to be given to L." **Held** that the testatrix had not bequeathed to L a specific legacy of her interest in A W's estate, but only, subject to payment of all legacies, the residue of her own estate, including therein her interest in A W's estate.

Fraser's Executor v Dickinson, (O.H.) 1905, 13 S.L.T. 435.

(809)

—Bequest of whole estate in Scotland.

Held that a bequest by a person who had property both in America and Scotland, of "all I have or may be entitled to in Scotland," to a beneficiary named, was not a special legacy, and that the Scottish estate was liable for his debts, rateably along with the rest of his property.

Flowerdew v Lowson, 1874, 12 S.L.R. 65.

2. ADEMPMENT OF SPECIFIC LEGACIES.

(810)

Specific bequest of heritage—Sale of subject under statutory powers—Sale not completed at testator's death.

A testator directed his trustees to convey to A certain heritable subjects, including subjects in N Street, Glasgow, "so far as the same shall belong to me at my death, but under all burdens affecting the same." After the date of the settlement notice to acquire the subjects in N Street was served on the testator by the Glasgow corporation, acting under statutory powers, and he thereafter, by missive, sold the subjects to the corporation, with entry at the Martinmas following, but he died (before Martinmas) without having executed a conveyance to the corporation. After his death his trustees executed a conveyance in favour of the corporation, and received payment of the price. **Held** that, as the testator had died without executing a conveyance in favour of the corporation, the subjects in N Street belonged to him at the time of his death, under the burden of implementing the sale to the corporation; that A's right under the settlement was a right to a conveyance of the subjects by the trustees under the same burden; and therefore that the trustees were bound to make over the price to him.

Pollok's Trustees v Anderson, 1902, 4 F. 455; 39 S.L.R. 324; 9 S.L.T. 393.

(811)

Sale of subject—Suspensive condition—Sale not completed at testator's death.

A testator by his will bequeathed to his daughter, as a special legacy, a hotel of which he was the proprietor. Shortly before his death the testator sold the hotel to William Steven, and signed a minute of sale which bore that "it shall be a condition of this agreement being binding on both parties that Mr. Steven applies for and obtains a transfer of the licence certificate of the said hotel." The transfer was not obtained until after the death of the testator, and thereafter a formal conveyance was executed in favour of the purchaser, and the price paid. **Held** (by a Court of seven judges) that the contract of sale being subject to a suspensive condition—namely, the transfer of the licence, the hotel remained part of the testator's estate at his death, and, accordingly, that the legacy had not been adeemed, and that the price of the hotel belonged to the daughter. **Opinion** that even if there had been no suspensive condition there had been no ademption, the hotel, or the right to its price, remaining part of the testator's estate.

M'Arthur's Executors v Guild, 1908 S.C. 743; 45 S.L.R. 551; 15 S.L.T. 1023.

(812)

Will directing sale of property—Price to be re-invested in lands to be entailed—Property sold by testator.

A testator directed his trustees upon his death to sell a Highland property, and to

purchase with the proceeds an agricultural estate, to be entailed on his only son and a series of substitute heirs. He also made provisions for his widow and younger children, which were conceived in reference to the estate to be purchased, and left the residue of his means and estate to his son. He afterwards sold the property himself, and mixed up the proceeds with his other means. He died two years after the sale, without having executed any new testamentary deed, and leaving only moveable property, of which the total amount was less than the price of the property. **Held** (1) that the direction to purchase an estate was evacuated by the act of the testator in selling the Highland property; (2) that the provisions in favour of his widow and children were effectual, and must be construed so as to give effect to his intentions; (3) that the son was entitled to the residue as residuary legatee.

Congreve's Trustees v Congreve, 1874, 1 R. 1102; 11 S.L.R. 636.

(813)

Sale by curator bonis—Bequest of shares—Change in denomination of shares.

A testator by his will bequeathed to each of certain beneficiaries "100 £5 shares of the Empire Guarantee and Insurance Corporation, Limited." Four months before his death the testator became insane, and a curator bonis was appointed, who, in the course of his administration, sold the entire holding of the testator in the corporation, not as a necessary act of administration for the maintenance of his ward or otherwise, but only because he considered it prudent to do so. Between the date of the will and the date when the curator was appointed each of the £5 shares had been converted into five £1 shares. **Held** that the legacies had not been adeemed, either by the change in the denomination of the shares or through the sale by the curator, and that the legatees were entitled to receive the value of the shares sold by the curator as a surrogatum for their specific bequests.

Macfarlane's Trustees v Macfarlane, 1910 S.C. 325; 47 S.L.R. 266; 1910, 1 S.L.T. 40.

(814)

"Shares in Paisley Gas Company"—Termination of company—Substitution of corporation mortgages for company's shares—Paisley Corporation Gas Act, 1870 (33 & 34 Vict. c. xxxv.), sec. 23.

A testator bequeathed a legacy of "the shares standing in my name in the Paisley Gas Company." Before the date of the will a local Act had transferred the right of supplying gas to Paisley to the corporation, substituting annuities payable to the shareholders of the Paisley Gas Company for the shares in the company, and had provided that the annuities should be conveyed or affected by any deed or will which disposed of the shares. Subsequently to the will, and before the death of the testator, these annuities had been redeemed by the corporation, and the price of the testator's annuity had been lent to the corporation on a mortgage

over the gas undertaking. **Held** that the legacy was not adeemed, and that the legatee was entitled to the mortgage as representing the shares.

Mitchell's Trustees v Fergus, 1889, 16 R. 902; 26 S.L.R. 615.

(815)

Legacy of sum in hands of legatee—Repayment.

By a general disposition and settlement a testatrix bequeathed her whole estate to her daughter F, "with the exception of £300 sterling of mine which my son A has invested for me, and which I do hereby leave and bequeath to himself." At the date of the settlement A had in his possession a sum of £300 belonging to his mother, on which he paid interest to her. This sum he subsequently repaid to her before her death. **Held** that the legacy to A was a specific legacy of a sum of £300 in his hands at the date of the settlement, and that as there was no sum in his hands at the death of the testatrix, it had been adeemed.

Maclean v Maclean's Executrix, 1908 S.C. 838; 45 S.L.R. 672; 16 S.L.T. 38.

(816)

Legacy of debt due to testator—Debt paid prior to testator's death.

A testator by will, executed in 1907, bequeathed to his nephew A "the one hundred pounds due to me from H (whose security the said A holds), also the two endowment policies of one hundred pounds each, with profits due on the said policies." The two endowment policies (both on H's life) had been assigned to the testator merely in security for the debt. One became a claim in 1910, and by arrangement with the testator the proceeds were paid to H; the other matured in March, 1911, when the testator received payment of the £100 debt and interest out of its proceeds. By codicil, dated 21st April, 1911, he directed his executors "to give effect generally to the bequests of the said will," and added—"I confirm the whole bequests of my said will so far as not modified by these presents." **Held** that the legacy to A was not a general legacy which fell to be made good out of the testator's general estate, but a special legacy of the debt due by H, and that, the debt having been paid, the legacy had been adeemed.

Cobban's Executors v Cobban, 1915 S.C. 82; 52 S.L.R. 89; 1914, 2 S.L.T. 357.

(817)

Deposit receipt—Sum uplifted.

A lady on 23rd March, 1875, left a sealed packet with her law agent, marked "to be opened only in the event of my death," containing a letter dated the same day addressed to the law agent, with, inter alia, the following testamentary direction—"I empower you to uplift the deposit receipt lying with you for £4000, to lodge it in your own name, and to hold it in trust for my mother's brothers and sister and for their children." She at the same time verbally instructed her law agent to transfer the £4000

on deposit receipt to his own name, promising to send written instructions as to its disposal, which were not sent. The law agent at the same time said that he had made advances for her of £200, and would keep that sum out of the £4000, to which she agreed, and the balance was put in deposit receipt in his name "in trust." On 12th May, 1875, the law agent suggested to her the investment of this sum upon a heritable security for the purpose of obtaining higher interest. She agreed to £3500 being so invested, and this was done. The testatrix died on 8th June, 1876. **Held** that the legacy was special, and had been adeemed. **Observations** (per Lord Justice-Clerk Moncreiff) on the doctrine that ademption does not depend upon intention.

Anderson v Thomson, 1877, 4 R. 1101; 14 S.L.R. 654.

(818)

Policy of insurance in testator's favour—Payment.

A testator directed his trustees to keep up a policy of insurance for £4000 which he had taken in his own name on the life of his wife, and on her death to divide the proceeds equally among all his children then alive and the issue of predeceasers. The testator was predeceased by his wife. Shortly before her death he had become incapax, and a curator bonis was appointed. He continued incapax down to his death. The proceeds of the policy were received by the curator, who, after making certain payments for behoof of the ward, invested the balance of £3900 on a deposit receipt in his own name, and the sum remained so invested at the date of the testator's death. **Held** that the legacy was a specific legacy of the contents of the policy, and could not receive effect, as these had been merged in the testator's general estate before his death.

Davidson's Trustees v Davidson, 1901, 4 F. 107; 39 S.L.R. 106; 9 S.L.T. 253.

(819)

Alternative legacy—First alternative bequest partly adeemed.

A testator directed his trustees to make over to his sister his farm lease and stocking, furniture and £300, or otherwise, in her option, to pay her £1000. After making his will, the testator left the farm and realised the stocking. **Held** that the sister was entitled to claim £1000 under the will.

Findlay's Executor v Findlay's Trustees, (O.H.) 1921, 1 S.L.T. 247.

3. OPTIONS TO LEGATEES.

(820)

Construction.

A testator directed his trustees after his death to pay over to his widow one-half of his whole means and estate, or, in her option, to pay to her a free yearly annuity of specific amount, and to deliver to her the whole, or such part as she should select, of his household furniture, &c., as her absolute property, or further, in her option, to make payment to her of the "whole interest and annual

produce of his means and estate" during her life. **Held**, on a consideration of the terms of the settlement, that the bequest of furniture was an adjunct of the second mode of provision, and that the widow, who had elected the third alternative provision, was entitled to the furniture not as her absolute property, but only in life interest.

Murray, &c., 1873, 45 J. 574.

(821)

—Date when exercisable.

A testator provided that his wife was "to be life interest in my house Stanley . . . (Seventh). At the death of my wife my son Peter, or failing him my son Ernest, . . . to have the option of buying Stanley as it then stands" for a specified sum; "failing them my daughters to have the same option; and failing them the property to be sold and the money put into general estate." The testator also provided—"The estate of Lounsedale to be offered in turn" at a price specified, "which sum is to be added to my general estate, to my sons Peter and Ernest, or failing them to my daughters; or failing them to be sold and the proceeds treated as above stated." Lounsedale was not life-rented by the widow. **Held** (1) that the option to purchase Stanley could not be exercised until the death of the testator's widow, and was limited to children then in existence; but (2) that the option to purchase Lounsedale fell to be exercised forthwith.

Coats' Trustees v Coats, 1903, 5 F. 401; 40 S.L.R. 330; 10 S.L.T. 585.

(822)

—Option to take over heritable subjects at specified price—Enhancement of value after date of settlement—Recompense—Mora.

By trust disposition and settlement, dated in 1868, and codicil dated in 1871, a trust directed his trustees to carry on his business, assuming as a partner his eldest son, and to assume his second and third sons as partners with shares of profits when and as soon as the trustees should think proper, and to retain the balance of the profits for the general purposes of the settlement. The sons assumed as partners were to have the option of taking over the business premises, subject to a bond for £20,000, at the price of £8000. In 1872 the business premises, which had cost £29,500, were totally destroyed by fire. The testator recovered from insurance companies £11,550, giving security to the bondholder that he would rebuild the premises. The testator approved of plans for their reconstruction on a more expensive scale, and partially carried out the building prior to his death in 1873. The trustees expended £13,000 beyond the insurance money in completing the buildings. The new buildings were valued in 1884 at £51,000. The trustees with the eldest son carried on the business, and in 1884 the second son was assumed as a partner, and in 1891 the third was assumed. After the assumption of the latter the three brothers intimated to the trustees that they exercised the option of

taking over the business premises. **Held** (1) that the three sons had not lost their right to exercise the option by delay; and (2) that they were entitled to have the subjects conveyed to them on the conditions set forth in the settlement, without compensating the general estate for the sums expended on them since the testator's death.

Fraser's Trustees v Fraser, 1894, 21 R. 790; 31 S.L.R. 674; 2 S.L.T. 42.

(823)

Death of legatee before option exercised—Right of legatee's representatives to exercise option.

A testator directed his trustees to make over to his sister certain property, or otherwise, in her option, to pay her £1000. The sister survived the testator but died before making her option. **Held** that the sister's representatives were entitled to elect between the alternative bequests.

Findlay's Executor v Findlay's Trustees, (O.H.) 1921, 1 S.L.T. 247.

4. WHETHER LEGACIES FREE OF DUTY.

(824)

"Free of legacy duty"—To what legacies applicable.

A holograph letter of instructions left by a testator contained a direction to pay legacies, first to relatives and then to servants, concluding—"all which legacies I desire my trustees to pay over," &c. On the margin of the page from this point the words "all free of legacy duty," which were authenticated by the testator's signature, were written upwards. There was no mark to indicate where the words were to be introduced. The page on which they were written contained the legacies to servants. **Held** that the application of the words not being limited, the words must be read as applicable to all the legacies, and not merely to the legacies on the page on which the words were written.

Kirkpatrick v Bedford, 1878, 6 R. (H.L.) 4; 4 App.Cas. 96; 16 S.L.R. 315.

(825)

Bequest of corporeal moveables—Bequest of residue.

A testator, inter alia, directed his trustees to "make offer to the town council of Aberdeen on behalf of the community of that city, free of legacy duty, of my collection of oil paintings, pen and ink drawings, and etchings, together with one-third of the residue of my estate." **Held** that the words "free of legacy duty" applied only to the bequest of paintings, &c., and not to the bequest of residue.

Macdonald's Trustees v Magistrates of Aberdeen, 1902, 4 F. 907; 39 S.L.R. 745; 10 S.L.T. 177.

(826)

Annuity—Substituted annuitant.

A testator by his settlement directed his trustees to pay certain annuities, "each free

of legacy duty." By a supplementary will he nominated four persons, a nephew and nieces of the annuitants, as "heirs to the annuities" of the uncle and aunts, as these should become vacant by the deaths of the annuitants. **Held** that the trustees were not bound to pay the succession duties exigible on the "heirs" becoming entitled to the annuities.

Urquhart's Trustees v Gordon, 1900, 3 F. 242; 38 S.L.R. 148; 8 S.L.T. 329.

Provisions in will regarding legacy duty—Whether applicable to gifts in codicil.

[See IX. 3 (2) (a).]

(827)

Expenses of trust charged on share of residue—Legacy duty—Estate duty.

A testator directed the residue of his estate to be divided into five shares, and after disposing of three and three-fourths of these directed that the remaining one and one-fourth share should be devoted to certain purposes, and, inter alia, "discharging the necessary expenses connected with this trust." **Held** that the expenses chargeable against the one and one-fourth share did not include estate duty and legacy duty.

Michie's Executors v Michie, 1905, 7 F. 509; 42 S.L.R. 386; 12 S.L.T. 738.

5. APPORTIONMENT OF INVESTMENTS TO MEET LEGACIES—SEVERANCE OF TRUST.

[See TRUST V. 3.]

6. CUMULATIVE OR SUBSTITUTIONAL.

(828)

General rule.

When a testator bequeaths the same sums in two separate testamentary writings to the same legatees, the legacies must be regarded as cumulative, unless there is something to show that a different construction is necessary and that the latter legacies were substitutional.

Royal Infirmary of Edinburgh v Muir's Trustees, 1881, 9 R. 352; 19 S.L.R. 249.

(829)

Legacies in different writings of same amount to same persons.

A testator conveyed his whole estate, heritable and moveable, to executors, with directions to pay, inter alia, a legacy of £100 to A. By a subsequent deed the testator appointed different executors with power to deal with his moveable estate, and directed them to pay, inter alia, a legacy of £300 to A and his heirs. **Held** that the second legacy was not intended to be in substitution for the first, and that both were payable.

Hood's Executors, 1869, 7 M. 774; 41 J. 402; 6 S.L.R. 503.

(830)

Legacy in will—Legacy in codicil of same amount to same persons.

By trust disposition and settlement, dated

12th July, 1893, a testatrix directed her trustees to pay certain legacies to each of eight cousins or families of cousins, including a legacy of £800 to Mrs. Isabella Fraser, "whom failing, her children." By a separate informal writing, dated 2nd August, 1893, the testatrix left legacies to the same groups of legatees, including one of £800, "to be divided between the late Isabella Fraser's five sons" (who were her whole children). The other seven legacies were not given on precisely the same conditions as those under the settlement, and two individual legatees under the settlement were omitted in the codicil. In every instance except one the amount of the legacies was the same in both deeds. **Held** that the legacy to Mrs. Fraser's sons in the codicil was additional to the corresponding legacy in the settlement.

Fraser v Forbes's Trustees, 1899, 1 F. 513; 36 S.L.R. 469; 6 S.L.T. 310.

(831)

Legacies in different codicils of same amount to same persons.

A person possessed of moveable estate, amounting to £175,000, on 2nd February, 1880, executed a codicil to his trust disposition and settlement, by which he bequeathed legacies to certain charitable institutions, and to two private individuals. On 30th April, 1880, he executed another codicil in similar terms, by which he bequeathed legacies of exactly the same amounts to the same charitable institutions and persons, with one exception, a legacy of £10 to one of the private persons being doubled. There were in addition legacies to two charitable institutions and to two persons not mentioned in the prior deed, making a total of eighteen legacies, amounting to £6840, as against fourteen in the first deed, amounting to £6310. After the testator's death the second deed was found enclosed in an envelope along with his trust disposition and settlement, but the first was found within the folds of a title deed having no relation to his testamentary affairs. All the documents were found in the same box. **Held** (1) that the testator intended both codicils to receive effect as testamentary writings; and (2) that as there was nothing to indicate that the bequests in the second codicil were to be construed as in substitution of those in the first, they were to be regarded as additional.

Royal Infirmary of Edinburgh v Muir's Trustees, 1881, 9 R. 352; 19 S.L.R. 249.

(832)

Will containing legacies and disposing of residue—Subsequent holograph writing containing legacies, but not disposing of residue—Certain beneficiaries favoured by both deeds—No express revocation.

Low's Executors, 1873, 11 M. 744; 45 J. 452; 10 S.L.R. 505, No. 402, supra.

(833)

Circumstances in which held that a number of legacies of the same amount in favour of

the same beneficiaries contained in separate testamentary writings were substitutional.

Miller's Trustees v Kirkcaldy, (O.H.) 1905, 13 S.L.T. 73.

(834)

Two separate special provisions for same person.

A testator left two testamentary writings dated within six months of each other. By the earlier he bequeathed £4000 to a trustee for behoof of a natural son, A B, the sum to be paid to A B on his attaining twenty-five years of age. Failing A B, by death before reaching that age, the £4000 was to be divided equally among the testator's unmarried female cousins. By the later deed the sum of £6000 was left to three trustees—of whom the trustee named in the earlier deed was one—for behoof of A B, the sum to be paid to A B on his attaining twenty-four years of age. Failing A B, by death before reaching that age, the £6000 was to be divided equally as before, except that £1000 was to go to a married cousin named. **Held** that the provision of £6000 was substitutional.

Arres's Trustees v Mather, 1881, 9 R. 107; 19 S.L.R. 66.

(835)

A testator made a number of bequests of the same amount to each of a number of legatees, some by testamentary writings delivered to the legatees and some by writings which he retained in his own possession. Circumstances in which **held** that some of the bequests were cumulative and some merely reiterative.

Rennie's Trustees v Watt, 1904, 12 S.L.T. 195.

(836)

Legacy to class—Residue to members of class.

A testator directed his trustees to pay legacies of £5000 to A B and C B, two out of three sons of his sister B, and to R K, the third son of his sister K, a legacy of £2000, and to each of his brothers (of whom there were seven) the sum of £1000. He then left the residue of his estate, which exceeded £200,000, to be divided equally between R B, the elder brother of A B and C B, and T K, the eldest brother of R K. **Held** that T K was entitled to a legacy of £1000 in addition to his half of the residue.

Kirkpatrick v Bedford, 1873, 6 R. (H.L.) 4; 4 App.Cas. 96; 16 S.L.R. 315.

(837)

Bequests of residue in will to issue as conditional institutes to parent—Gift of residue in codicil to same persons nominatim.

A testator, by his will, left the residue of his estate to his next of kin, declaring that if any of his next of kin predeceased him leaving issue, such issue should succeed to their parent's share. One of his brothers had predeceased at the date of the will, leaving three children who survived the testator. By a codicil the testator declared that these three children should be his residuary lega-

tees, along with other persons. **Held** that the bequest in the codicil was in substitution of the bequest contained in the will.

Coxe v Cox, 1874, 2 R. 41; 12 S.L.R. 15.

(838)

Legacy in will taken under *conditio si sine liberis*—Direct legacy in codicil.

A testator in his settlement left legacies of £100 each to his nephews and niece, A, B, C, and D. By a codicil he left "to the family of my nephew A," who had died between the date of the settlement and codicil, £1200; to B, who survived the execution of the codicil, but predeceased the testator, £500; to C, who likewise survived the execution of the codicil, but predeceased the testator, £500 in *liferent* *allenarly* and to her children in fee; and "to the family of the late" D, who died between the date of the settlement and codicil, £500 equally among them. It having been held that the *conditio si sine liberis* *decesserit* applied to the four legacies in the settlement, **held** further that the legacies in the codicil in favour of the families of A and D, as well as those in favour of B and C, were in addition to those in the settlement.

Bryce's Trustee, 1878, 5 R. 722; 15 S.L.R. 412.

(839)

Legacy of capital sum in will—Annuity in codicil.

In the construction of a settlement and codicil, **held** that a legacy of an annuity of £40 in the codicil was in addition to a legacy of £100 in favour of the same person contained in the settlement.

Bryce's Trustee, 1878, 5 R. 722; 15 S.L.R. 412.

(840)

Gift of *liferent* in will—Subsequent gift of fee of same sum in bond over local rates.

A father bequeathed £400 to his daughter A, £400 to his daughter B, and directed his trustees to invest £400 for behoof of his daughter C in *liferent* *allenarly*, and of her children in fee. After the death of C's husband her father took her to live with him, and gave her from £40 to £50 a year for her support. He subsequently lent £400 on the security of local rates, the destination in the bond being to C and her heirs. The bond was found in the father's repositories at his death. The Court, looking to the terms of the deeds and to the circumstances of the case, found that it was the testator's intention that his daughter C should receive both the provision under the will and that under the bond.

Milne v Scott, 1880, 8 R. 83; 18 S.L.R. 72.

(841)

Legacies repeated with variations.

A lady who had previously executed a formal settlement left three holograph writings or codicils of later date. Of these the first, dated 22nd May, 1877, bequeathed a number of legacies. The second, dated 6th February, 1878, began thus—"In my former bequests the sums I left to particular friends I now wish to be." Then followed the

names of five of the legatees under the former codicil, with larger sums opposite their names, and of four other persons. The third, dated 16th March, 1878, began thus—"In my former bequests the sums left to particular friends I now wish to increase as mentioned below, therefore I leave and bequeath to," &c. Then followed the names of the five persons named in both the prior writings, with the sums opposite their names as in the writing of 6th February, 1878, and a revocation of the legacies given by the codicil of 22nd May, 1877, "to all these parties." Then, after repeating the names of three only out of the four other persons mentioned in the codicil of 6th February, 1878, with the same sums opposite their names, the testatrix proceeded to bequeath legacies to a number of persons not named in either of the prior writings. Of these codicils the first and third were delivered by the testatrix to her agent soon after they were respectively executed. The second was found after her death, which took place on 7th May, 1878, in her writing desk, which was open. **Held** (1) that the writing of 6th February, 1878, was a subsisting testamentary instrument; (2) that the legacies contained in it and the legacies to the same persons in the codicil of 16th March, 1878, were not cumulative; (3) that the person named only in the writing of 6th February, 1878, was entitled to the legacy there mentioned.

Tennent v Dunsmore, 1878, 6 R. 150; 16 S.L.R. 87.

(842)

Two legacies of £500 to A in two holograph writings—Legacy of £500 to A in subsequent universal settlement.

By holograph writing a testatrix bequeathed legacies of jewellery, and "£500 to my dear niece L." By a second holograph writing, dated a month later, she, *inter alia*, bequeathed £500 to L out of a special fund. By a formal universal settlement, dated three months later still, she bequeathed £500 to L out of the same special fund, and with regard to the division of her jewellery referred to a memorandum to be left by her. The settlement contained no revocation of prior testamentary writings. The first holograph writing was enclosed in a separate gummed envelope, addressed to the brother of the testatrix, and with this memorandum endorsed, dated a month after the execution of the settlement, "to be given to him by and by." **Held** that the legacies to L were substitutional, the earlier holograph writing being preserved in force merely as regarded the disposal of the jewellery.

Brander's Trustees v Anderson, 1883, 10 R. 1258; 20 S.L.R. 834.

(843)

Where double legacies would cause an abatement.

A testator in his settlement, dated in June, 1862, bequeathed (subject to his widow's *liferent*, which extended over the whole estate) a sum of £6000 to the general trustees of the Free Church of Scotland, towards an endowment of a Free Church college, subject to

certain discretionary powers given to the General Assembly of that church. He bequeathed the residue to three nephews, to whom also he gave special legacies of £2000 each. In a codicil to the settlement executed in March, 1864, he directed his trustees, "in addition to all sums therein bequeathed by me, and particularly in addition to the sum of £4000 therein bequeathed by me to my brother F C M, to pay to him the annual interest on the sum of £6000, and if they see cause to do so, to set apart the said sum for his liferent use and behoof; . . . and at decease of both these liferenters," namely, F C M and his widow, "to pay the said principal sum of £6000 to the general trustees of the Free Church of Scotland for the benefit of the Free Church College in Edinburgh, to be applied in such manner as the General Assembly of the said Free Church may direct." It appeared that the testator had entered annually in his books an estimate of his estate. The memorandum of January, 1862, showed a residue available for residuary legatees of £1931 Os. 10d. The memorandum of 20th January, 1864 (being three months before the date of the codicil) showed a residue available for residuary legatees of £3176 3s. 2d. The testator died in September, 1865. The effect of the codicil as in 1864, assuming it to have created a new legacy of £6000, would have been to extinguish the residue and to diminish the prior legacies pro rata, including the legacy to F C M. **Held** that the codicil could not be construed as giving a second legacy of £6000 to the Free church.

Trustees of the Free Church of Scotland v Maitland, 1887, 14 R. 333; 24 S.L.R. 290.

7. LEGACIES IN SATISFACTION OF PROVISIONS.

(844)

General rule—Marriage contract provision—Bequest of residue.

There is no presumption against a gratuitous testamentary provision by a parent to a child being in addition to and not in satisfaction of a previous provision in obligatione. Circumstances in which **held** that a bequest of a share of residue was not intended to be in satisfaction of a provision under a marriage contract.

Cowan v Dick's Trustees, 1873, 1 R. 119; 11 S.L.R. 25.

(845)

Marriage contract provision—Legacy of similar amount.

Observed (per Lord Justice-Clerk Moncreiff) that the question whether a bequest is to be held in satisfaction of or in addition to a prior provision in obligatione depends entirely on the intention of the testator, and that, while the circumstance that the testator is already bound to give so much may be an important element in discovering the intention, it raises no more than a presumption of fact.

Kippen v Kippen's Trustees, 1874, 1 R. 1171; 11 S.L.R. 686.

(846)

Extrinsic evidence.

In an antenuptial marriage settlement between S and C, his intended wife, J, a stranger covenanted to pay, at his death, to the marriage contract trustees £4000 free of duty, with interest at 4 per cent. from that date till payment, to be held for C and her husband, or survivor, in liferent, and their children in fee, and, failing children, to be held for J absolutely. By the marriage contract C was bound to assign *acquiescentia* to her marriage contract trustees to be held in trust for behoof of herself and her children, and, failing children, her executors. By his trust disposition and settlement J directed his trustees to pay "a legacy" of £4000 to C, providing that she should be allowed 5 per cent. interest so long as she should allow it to remain "as part of the share of the indigo concern." **Held** (1) that this legacy was not in satisfaction of the marriage contract provision, and that J's trustees were bound to pay both sums; and (2) that J's trustees were not entitled to lead evidence to show that J used the word "legacy" as meaning "provision."

Johnstone v Haviland, 1896, 23 R. (H.L.) 6; [1896] A.C. 95; 33 S.L.R. 511; 3 S.L.T. 279.

(847)

Marriage contract provision—Bequest of residue.

A father, in his daughter's marriage contract, bound himself to pay to the trustees named therein "a sum of not less than £1000," on the death of the survivor of himself and his wife, for behoof of the daughter and her children in liferent and fee respectively. Four years later he executed a holograph testamentary writing by which he directed his trustees to hold his whole estate for behoof of his widow in liferent, and on her death to divide it among his children in equal proportions, share and share alike, and further directed that a sum of £200 advanced to his daughter for marriage outfit should be deducted from her share of his estate. **Held** that a sum of £1000 fell to be paid to the marriage contract trustees as a debt due by the testator before the estate was divided, and that the married daughter was entitled to an equal share of the residue along with the other children.

Keith Johnston's Trustees v Johnston's Trustees, 1894, 22 R. 28; 32 S.L.R. 24; 2 S.L.T. 277.

(848)

A father, in his daughter's antenuptial marriage contract, bound himself to pay at his death a sum of £1000 to her marriage contract trustees. He afterwards executed a trust disposition and settlement, by which he directed his trustees to pay his debts and divide the residue of his estate equally among his children. **Held** that the provision in the marriage contract was a debt due by the deceased, and was not to be deducted from the daughter's share of residue.

Elliot v Bowhill, 1873, 11 M. 735; 45 J. 446; 10 S.L.R. 610.

(849)

Marriage contract provision to children—Bequest to children with conditional institution of their issue—Deduction of marriage contract provision from share falling to issue.

A testator, by his settlement, bequeathed the residue of his estate to his children equally, "the issue of any of them predeceasing taking the parent's place and share," vesting being postponed till the occurrence of a particular event. This bequest was declared to be in satisfaction of a provision to the children already made in the testator's marriage contract. A son of the testator survived him, and thus became entitled to claim a share of the marriage contract provision, but died before the term of vesting of the residuary bequest, leaving issue. On his death his share of the marriage contract provision was claimed by his executor; his share of the residuary bequest, on the other hand, passed to his issue. **Held** that the amount of the marriage contract provision payable to the son's executor fell to be charged exclusively against the share of the residue falling to his issue, and not against the whole residuary estate.

Scott v Graham, 1913 S.C. 467; 50 S.L.R. 299; 1913, 1 S.L.T. 69.

(850)

Annuity — Marriage contract annuity — Legacy of larger annuity.

By antenuptial contract of marriage a husband settled an annuity of £200 on his wife, in the event of her surviving him. He died, leaving a trust settlement for the purpose, inter alia, of paying his widow an annuity of £400. **Held** upon a construction of the settlement, that the widow was not entitled to both annuities, but that the testamentary annuity was in satisfaction of the annuity provided by the marriage contract.

Thomson v Thomson's Trustees, (O.H.) 1868, 5 S.L.R. 742.

(851)

Marriage contract obligation to provide annuity—Testamentary direction to implement—Subsequent purchase of larger annuity from limited company.

A husband, who was bound in his antenuptial contract of marriage to provide an annuity of £400 a year to his widow, executed a settlement, of which the second purpose was to satisfy this provision. He afterwards, in exchange for certain rights, took from a limited company an annuity of £500 a year to himself and to his wife if she survived him. The wife had become permanently insane before the execution of the settlement. **Held** that the purchase by the husband of the annuity of £500 from the limited company was to be regarded not as in addition to, but as in satisfaction of, the annuity provided in the marriage contract, but that the husband's estate must remain liable for the £400 annuity in case the com-

pany should at any time be unable to pay the £500 annuity.

Buttery's Trustees v M'Clelland, 1879, 6 R. 564.

(852)

Legacy accepted as in satisfaction of marriage contract obligation—Clause of discharge in settlement.

By antenuptial marriage contract the husband assigned to trustees two policies of insurance and his household furniture. The trustees had power to demand £200 in lieu of the furniture. The husband also bound himself to pay his widow £20 for mournings. In the event, which happened, of the husband predeceasing, the estate was to be conveyed to the widow. The trustees never assumed office. The policies of insurance lapsed. By a subsequent trust settlement the husband conveyed his whole estate to trustees, providing for an annuity of £70 to his widow, and declaring that this provision was made and should be accepted as in lieu and in full satisfaction of all claims competent on his estate through his death. The widow elected to take the annuity of £70, but claimed in addition the marriage contract provisions of £200 and £20. She abandoned all other claims under the marriage contract. **Held** that the widow's claims for the sums of £200 and £20 were claims competent on the husband's estate through his death, and were accordingly excluded by the clause in the settlement.

Proctor's Trustees v Proctor, 1905, 42 S.L.R. 566; 13 S.L.T. 114.

(853)

Obligation in inter vivos deed to pay annuity—Subsequent bequest of annuity of like amount.

A father was party to a deed of separation between his son and daughter-in-law, in which he undertook, on behalf of himself, his heirs, executors, or administrators, to pay to the lady an annuity of £1000, for her separate estate, and with restraint on anticipation, terminable on her renewing cohabitation with his son. In his trust disposition and settlement he directed his trustees to pay to his daughter-in-law an alimentary annuity of £1000, restricted to the sum of £250 per annum in the event of her entering into a second marriage. Circumstances in which **held** that the annuity conferred by the settlement was in substitution for, and not in addition to, the annuity secured by the deed of separation.

Campbell's Trustees v Adamson, 1911 S.C. 1111; 48 S.L.R. 908; 1911, 2 S.L.T. 101.

(854)

Obligation to pay sum to children—Obligation to educate—Legacy.

In a voluntary contract of separation a father bound himself, inter alia, to settle £2000 on each of his children, payable at the first term of Whitsunday after his death. He further bound himself to be at the expense of a suitable education for his children. Of the same date, he executed a mortis causa settlement whereby he directed

his trustees to pay to each of his children £2000 at the first term of Martinmas or Whitsunday after his death, and on their respectively attaining majority, with legal interest until that period from the first term of Martinmas or Whitsunday after his death.

Held (1) that the provision in the trust settlement was in implement of the obligation in the contract of separation, and (2) that the children were entitled to the expenses of education until they attained majority, the obligation thereon not being terminated by the death of the testator.

Meiklam's Trustees v Meiklam, 1868, 6 S.L.R. 2.

(855)

Heir of entail—Bond of provision—Partial implement—Legacy—Whether to be imputed to deficiency.

An heir of entail in possession, in implement of an obligation in his marriage contract, granted a bond of provision in favour of younger children, binding himself and the heirs of entail for a sum equal to three years' rent at the date of his death. He thereafter granted bonds of provision in their favour, bearing to be in full of the provisions under the first bond, but amounting in all to a smaller sum than the full obligation, and also bequeathed a sum of money to them in his settlement. The children having been found entitled to the full amount set forth in the first bond, **held** that they were not bound to impute the money legacy to make up the deficiency under the subsequent bonds of provision, and that the maxim *debitor non præsuntur donare* did not apply, as the donor of the legacy was not the debtor in the bond.

Hope Johnstone v Hope Johnstone, 1880, 7 R. 766; 17 S.L.R. 547.

(856)

Bequest to son—Direction to hold for son's marriage contract trustees—Legacy or security.

A testator bequeathed a share of residue to each of his sons and with regard to the share of one son he directed that it should be held and applied by the trustees for behoof of the son's marriage contract trustees, and should be in full of all claims competent against the testator under the son's marriage contract. **Held** (by a majority of seven judges) that the share of residue was not a legacy to the marriage contract trustees for behoof of the beneficiaries under the contract, but a security merely for implement of the testator's and the son's obligations under the contract.

Brown's Trustees v Brown, 1868, 40 J. 145.

8. SATISFACTION OF LEGACIES BY ADVANCES.

(857)

Intention to divide estate equally among family.

A testator directed the residue of his estate to be divided equally among his children. He also left a legacy of £1000 to his only

son, on the narrative that his daughters had each received from him a present of £1000. Subsequent to the date of the will the testator made an additional payment of £1000 to each of his daughters, and a payment of £2000 to his son. **Held** that the son's legacy of £1000 had been satisfied by the payment of the £2000.

Johanson v Johanson's Trustees, 1898, 1 F. 244; 36 S.L.R. 169; 6 S.L.T. 230.

(858)

Testator acceding to trust for creditors of legatee—Interest.

A testator bequeathed a share of residue to his daughters in life rent only and their children in fee, but declaring "that all advances which I have made, or may hereafter make, to my respective sons-in-law, shall be deducted from the respective shares" life-rented by his daughters. On various occasions the testator had lent or guaranteed sums to a firm of which one of his sons-in-law was sole member. The son-in-law's firm, and he, as sole member thereof, suspended payment, and their affairs were wound up under a trust deed. The testator acceded to this deed, took payment of dividends, and granted receipts therefor, which bore that he accepted the dividends in terms of the trust deed, and discharged his son-in-law. At the date of the testator's death there was still a balance due to him on the above transactions. **Held** that the balance of the advances, which had not been repaid, but without interest, fell, as at the date of the testator's death, to be imputed as a payment to account of the share of residue falling to the daughter's children.

Smith's Trustees v Sellar, 1894, 21 R. 633; 31 S.L.R. 538; 1 S.L.T. 542.

(859)

Admissibility of parole evidence.

A testator bequeathed to his daughter a sum of £40 and directed his trustees to deliver to her a bill for £15 granted by her and her husband. The will further declared that "the provisions hereby conceived" in favour of children were in full of legitim. During the testator's lifetime the daughter had received payments amounting to £40 for which she and her husband granted a receipt which bore that the payments were in full of the share of her father's estate which would fall to be paid to the daughter on his death. It was proved that when the receipt was granted the daughter was aware of the terms of her father's will. **Held** that the testamentary provision was satisfied by the payments.

M'Laren v Howie, 1869, 8 M. 106; 42 J. 52; 7 S.L.R. 56.

9. SURROGATUM.

(860)

Direction to entail lands—Part of lands sold to pay legacies—Moveable fund subsequently emerging.

A testator directed his trustees after payment of debts and legacies to entail his

estates "or such part thereof as they might not find necessary to dispose of for answering the purposes of this trust" on a series of heirs. The moveable property was insufficient to pay the legacies, and the trustees sold part of the heritage, and entailed the unsold lands. Subsequently it appeared that shares belonging to the estate had been sold below their value in consequence of misrepresentation by the company, and the trustees recovered a sum exceeding the value of the heritage sold. **Held** that a sum equal to that obtained by the sale of the heritage fell to be invested in lands to be entailed as a surrogatum for those sold.

Stanton's Trustees v Dawson, 1868, 6 M. 240; 40 J. 128; 5 S.L.R. 168.

(861)

Legatum rei aliena—Testator in belief that subject belonged to her.

A person who was proprietrix of one pro indiviso half of a house, and had the life-rent of the other half, in the belief that the whole belonged to her disposed it mortis causa to a beneficiary in life-rent. **Held** that the beneficiary was not entitled to a surrogatum out of the deceased's general estate for the pro indiviso half which was not carried by the conveyance.

Traquair v Martin, 1872, 11 M. 22; 45 J. 28; 10 S.L.R. 36.

(862)

Bequest of shares—Shares sold by curator bonis.

Macfarlane's Trustees v Macfarlane, 1910 S.C. 325; 47 S.L.R. 266; 1910, 1 S.L.T. 40, No. 813, supra.

10. RANKING—ABATEMENT.

(863)

Whether legacy payable out of particular or general residue.

A testatrix, after bequeathing a large number of legacies in her trust deed and relative codicils, executed another codicil, dated 2nd January, 1877, whereby she directed her trustee, "after paying and making provision for the whole legacies" in the trust deed and "codicils thereto executed by me prior to the date hereof, to set apart and invest from the free residue thereafter remaining" £1000 for behoof of a legatee named. By subsequent codicils she left, inter alia, additional legacies to legatees named in her codicils prior to 2nd January, 1877. The estate having proved insufficient to pay all the legacies, **held** (1) that the £1000 legacy was not to be paid out of the said free residue preferably to subsequent legacies; and (2) that it was not postponed to subsequent legacies, but fell to be ranked *pari passu* along with them.

Chivas' Trustee v McLeod, 1881, 9 R. 86; 19 S.L.R. 49.

(864)

Legacies bequeathed by will conveying

whole estate—Subsequent will conveying moveable estate to different executors.

A testator, by disposition and settlement, conveyed his whole estate, heritable and moveable, to executors for payment of legacies amounting to £1000, and for payment of the residue to J. H. He subsequently executed a last will and testament, whereby he conveyed his moveable estate to different executors for payment of debts and of legacies to the amount of £600. The residue was directed to be paid to J. H. The heritable estate was not sufficient to pay the legacies left by the first deed, but the whole estate, heritable and moveable, was more than sufficient to pay the legacies left by both deeds. **Held** that the legacies left by the earlier deed were not chargeable against the moveable estate, but only against the heritage, and must suffer a proportional abatement.

Hood's Executors, 1869, 7 M. 774; 41 J. 402; 6 S.L.R. 503.

(865)

Abatement for temporary purpose.

A testator directed his trustees to divide his whole estate equally among his sons and daughters, with the proviso that should his only unmarried daughter's "share of the division not amount to £150 per annum," the trustees were to "invest in good and safe security as much as will realise that amount." The testator gave no directions as to the disposal of the capital so invested. The daughter's share of the estate was not sufficient by itself to provide £150 a year. **Held** that the additional sum which it was necessary to invest for this purpose belonged to the other children, from whose shares it had been taken, subject to the life interest of the daughter.

Mackenzie's Trustees v. Mitchell, 1875, 2 R. 469.

(866)

Express provision for abatement—"Married daughters' shares."

Muir's Trustees, 1869, 8 M. 53; 42 J. 25, 7 S.L.R. 24, No. 752, supra.

(867)

Competition between annuity payable out of capital and legacies payable on death of annuitant.

A testator directed his trustees to pay to his widow an annuity of £1000 a year in lieu of her legal rights and of her claims under an antenuptial marriage contract, and disposed of the rest of his estate in legacies, some of which he directed to be paid within three months after his death, and others after the death of the widow. The income of the trust estate was insufficient to pay the annuity. **Held** that the annuity was preferable to the legacies of which payment had been postponed, and that the widow was entitled to have it paid in full whether the revenue of the estate yielded the full amount or not.

Kinmond's Trustees v Kinmond, 1873, 11 M. 381; 45 J. 255; 10 S.L.R. 244.

(868)

Preference among annuities.

A testator left to his wife an annuity of £400, and to his mother, "if my estate will permit," an annuity of £100. He left no other testamentary provision. **Held** that both annuities were payable out of capital, but that the wife's annuity was preferable to that of the mother.

Adamson's Trustees v Adamson's Executors, 1891, 18 R. 1133; 23 S.L.R. 869.

(869)

Conditional legacy—Effect of fulfilment of condition—Deficiency of funds—Preference.

A testatrix bequeathed a sum of money on condition that the legatee should ratify a settlement executed by a sister of the testatrix. The deed to be ratified did not benefit the testatrix or her estate. In a question between the conditional legatee and other legatees, **held** that implement of the condition did not render the legacy preferable to other legacies in the event of a deficiency of funds.

Cameron's Trustees v Gow, 1874, 1 R. 683; 11 S.L.R. 302.

(870)

Effect of widow claiming legal rights.

Held that the general rule by which special legacies rank preferably to general legacies, and general legacies to bequests of residue, applies in cases where a general settlement of a testator's whole estate has been disturbed by his widow refusing to accept the provisions therein made for her in lieu of her legal rights, and claiming *jus relictæ*.

Tait's Trustees v Lees, 1886, 13 R. 1104; 23 S.L.R. 782.

11. WHETHER LEGACY A REAL BURDEN.

(871)

Declared a real burden—Not entering records—Liability of heir.

A testator, by *mortis causa* settlement, disposed his whole estate to his wife in *lifereit* and to his heirs in fee. By a codicil the testator bequeathed to his wife a legacy of £600, which he declared should form a real burden on his heritable estate, and he also gave her power to sell the heritage. The wife survived, but did not exercise the power of sale, and the legacy was not paid during her life. The testator's heir at law made up a title to the heritage by service passing over the settlement. **Held** that although the legacy was not a real burden which would have been effectual against creditors or singular successors, yet there was conferred on the wife a right to make her legacy effectual out of the heritage, and that the heir at law, having taken up the succession gratuitously, was bound to pay the legacy to the wife's executors.

Storeys v Paxton, 1878, 6 R. 293; 16 S.L.R. 199.

(872)

Annuity—Right of annuitant to have annuity made real burden on heritable subjects.

The right of an annuitant to have his

annuity made a real burden upon heritable subjects depends upon the language employed in the dispositive instrument. Either the term "real burden" itself must be employed, or else by some express words, or by clear implication, the heritable subject itself must be affected. A testator who died possessed of heritable and moveable property directed his trustees to pay to his wife and his son John certain annuities, and, as soon as convenient after his own decease to make over to his son George the whole residue of his estate, heritable and moveable, "but that always with and under the burden of" a certain *lifereit*, "and also under burden of the payment of" the annuities. **Held** that the testator had not created and had not directed the trustees to create the annuities a real burden on the heritable estate.

Buchanan v Eaton, 1911 S.C. (H.L.) 40; [1911] A.C. 253; 48 S.L.R. 481; 1911, 1 S.L.T. 422.

(873)

By a *mortis causa* disposition and settlement, a proprietor conveyed certain lands to his son, "but always with and under the burden of payment to" each of the son's sisters of a certain sum of money on her attaining majority. The son completed his title to the lands by a notarial instrument, which contained no special reference to the burden. **Held** that the burden was not a real burden, on the ground that the words declaring the burden were not directed against the lands themselves so as to leave no room for doubt, and that the omission of the word from the notarial instrument rendered the burden ineffectual as against *bona fide* creditors who had acquired a security title without knowledge of the alleged real burden.

Mackenzie v Clark, (O.H.) 1903, 11 S.L.T. 428.

12. PAYMENT.**(1) GENERALLY.**

(874)

First term day "six months after my death"—Calendar or lunar months.

A testatrix directed her trustees, with all convenient speed, to collect and realise her moveable estate, and "as soon as convenient after my death to deliver, and at the first term of Whitsunday or Martinmas six months after my death," to pay such bequests and legacies as should be directed by any writings under her hand. Lastly, the trustees were directed to pay the interest of the whole residue of the estate to the heir of entail in possession of a particular estate "at the said term of Whitsunday or Martinmas six months after my death"—the first term's payment of said interest to commence "as at the term of Whitsunday or Martinmas twelve months after my death." The testatrix died at nine in the morning of 15th May, 1880. A question having arisen as to whether the legacies became payable at Martinmas, 1880, or not until Whitsunday, 1881, **held**

that on a reasonable construction of the settlement, and in accordance with the evident intention of the testatrix, Martinmas, 1880, was the first term six months after the testatrix's death, and that the legacies became payable then.

Campbell's Trustees v Cazenove, 1880, 8 R. 21; 18 S.L.R. 4.

(875)

When "suitable and convenient."

A testator left legacies to each of his nieces to be paid "when my trustees shall find it suitable and convenient to pay the same." The will also bore that the legacies should be so secured to the nieces as his trustees might consider best for their benefit, that the legacies were given for the alimentary liferent use of the nieces, and that the simple receipt of the nieces without the concurrence of their husbands should be a sufficient discharge to the trustees. **Held** that, although the trust estate was in a condition conveniently to pay the legacies, the trustees were not bound to make immediate payment to the nieces.

Cunninghame's Trustees v Duke, 1873, 11 M. 543; 45 J. 348; 10 S.L.R. 357.

(876)

Liferents to A and B—Fee of one-half to issue of A and of one-half to issue of B—Destination over to testator's heirs—Payment on death of surviving liferenter.

A testatrix directed her trustees to pay the income of the residue of her estate equally to and between A and B in their lifetime respectively, so long as both are alive; on the death of the said A and B to convey one-half of the capital of the said residue to the issue, if any, of the said A, and the other just and equal half to the issue of the said B, declaring that if there should be issue of either of them, who should be under twenty-two years of age, her trustees should have power to delay the division till the child or children should arrive at that age, they paying the child or children the free interests and profits to be drawn in the meantime, with a destination over to her nearest heirs. A and B survived the testatrix, but died, neither leaving issue. **Held** (by a majority of seven judges) that the testatrix intended only one period of distribution, viz., the date of the death of the last survivor of the liferenters.

Haldane's Trustees v Murphy, 1881, 9 R. 269; 19 S.L.R. 217.

(877)

Legacy vesting a morte testatoris — Disappearance of reasons for postponing payment.

A testator directed his trustees to make over his business and whole stock in trade to his son John, subject to "a legacy or debt of £2000 in favour of" his son James, "to be paid to him by his brother John at the first term of Whitsunday, twenty years after my decease (payment of the above legacy or bequest being postponed by me for such a length of time in order that my son

John may not be unduly burdened in conducting the said business); and, in the event of my son James dying before the said legacy of £2000 becomes payable to him, then I direct my trustees to pay and divide the same equally among his lawful children." The testator died in 1876, and his son John in 1885, leaving a widow, but no children. **Held**, in a question between the trustees, James, and James's children, that the legacy to James vested a morte testatoris, and that, as the reasons for postponing the date of payment had disappeared, the payment might be anticipated, under discount, in respect the legacy did not carry interest until the term of Whitsunday, 1896.

Finlay's Trustees v Finlay, 1886, 13 R. 1052; 23 S.L.R. 774.

(878)

Legacies payable on death of liferenter — One legatee desiring payment — Liferenter willing to renounce—Possible insufficiency of funds to pay whole legacies.

A testator conveyed his estate to trustees, and gave the liferent of the residue to his wife. On the death of the survivor of himself and his wife, the testator directed his trustees to pay a sum of £18,000 to his son and a sum of £8000 to each of his four daughters, and to hold the residue for the son. These provisions vested in the children a morte testatoris. The testator was survived by his widow and the five children. The son applied to the trustees for payment of the sum of £18,000. The widow consented to the application, and offered to discharge her liferent in regard to that sum. The trustees held funds at the date of the application which were amply sufficient to meet the children's provisions. **Held** that the trustees were not bound to accede to the son's demand, as the daughters were entitled to *pari passu* payment of their provisions along with the son, and it was possible that when the date of payment arrived the estate might be insufficient to pay the provisions in full.

Haldane's Trustees v Haldane, 1895, 23 R. 276; 33 S.L.R. 206; 3 S.L.T. 199.

(879)

Refusal to pay because of possible claim for legitim.

Held that testamentary trustees who were called on to pay a legacy left by the truster to "J L, my reputed son," were not entitled to require, as a condition precedent to payment, a discharge which would exclude a claim for legitim in the event of the legitimacy of J L being established.

Laing v Laing, 1895, 22 R. 575; 32 S.L.R. 443; 2 S.L.T. 562.

(880)

Direction to invest trust funds in lands and to convey lands to series of heirs—Trustees to be judge of lands to be purchased and date of purchase—Right of beneficiary to payment in cash.

In a trust settlement the trustees were directed to lay out the residue of the trust estate (amounting to £60,000) in the purchase

of lands, and when the whole residue, or within £300 thereof, was so invested, to deliver a disposition of the lands to the brother of the testatrix in liferent, and to his son and the heirs whatsoever of his body in fee, whom failing, to certain other persons. The trustees were declared to be the sole judges of what lands were to be purchased, and of the date at which the purchase should be made. The testatrix was predeceased by her brother, and the nephew took a vested interest a morte testatoris. The trustees having invested the whole residue in lands except a sum of £20,000, **held** that the nephew was entitled to payment of the £20,000 in cash.

Spens v Monypenny's Trustees, 1875, 3 R. 50; 13 S.L.R. 25 and 45.

(881)

Gift of whole or portion of annual income of fund—Gift subject to conditions and restrictions as trustees think fit—Exercise of trustees' discretion.

Train v Clapperton, 1908 S.C. (H.L.) 26; [1908] A.C. 342; 45 S.L.R. 682; 16 S.L.T. 45. **TRUST**, No. 439.

(882)

Repayment—Conditional bequest—Repayment on failure of condition.

Young's Trustee v Deacons of the Eight Incorporated Trades of Perth, 1893, 20 R. 778; 30 S.L.R. 704; 1 S.L.T. 72, No. 1185, *infra*.

(2) INTEREST.

(883)

Right to interest—Postponed payment and vesting.

A testator bequeathed legacies of £10,000 to each of his children, declaring that these should be "payable as at my death, and on" the legatees "respectively attaining twenty-one years of age, or in the case of females on their respective marriages before attaining said age, and the same shall not vest until the period of payment." Power was given to the trustees to make advances of income, and to anticipate the period of vesting and payment. **Held** that the interest accruing on each legacy between the date of the testator's death and the period of payment belonged to the legatee.

M'Lean's Trustees v M'Lean, 1891, 18 R. 892; 28 S.L.R. 707.

Cf. Playfair's Trustees v Hunter, 1890, 17 R. 1241; 27 S.L.R. 991, No. 916, *infra*.

(884)

Date when interest begins to run.

The general rule is that legacies of money bear interest from the date of the testator's death until payment.

May's Trustees v Paul, 1900, 2 F. 657; 37 S.L.R. 470; 7 S.L.T. 402.

(885)

Direction to pay legatees at majority—Interest from date when eldest attained majority.

A testator directed his trustees to pay

the residue of his estate to five persons named, equally, "as they respectively attain the age of twenty-one years." One of the legatees was of age at the testator's death; the others attained majority at subsequent dates. **Held** that the legatee who was major at the death of the testator was entitled to payment at that date, and that each of the other legatees was entitled to payment of one-fifth of the residue at majority with interest from the date when the first mentioned legatee became entitled to payment.

Fergusson v Smith, 1867, 6 M. 83; 40 J. 50; 5 S.L.R. 79.

(886)

Legacies payable from "first and readiest of my saleable estate"—Sale delayed by litigation.

A testator directed his trustees to sell as soon as possible heritable estates, and bequeathed certain legacies to be paid "from the first and readiest of my saleable estate." The sale was delayed by a litigation for about two years after the death of the testator. In a question whether interest was due on the legacies from the date of the testator's death, **held** that the terms of the direction did not take the case out of the ordinary rule, and that interest was due from the date of the testator's death.

Kirkpatrick v Bedford, 1878, 6 R. (H.L.) 4; 4 App.Cas. 96; 16 S.L.R. 315.

(887)

Funds insufficient to pay legacy until after death of liferentrix.

Opinion that the principle underlying all rules for payment of interest on legacies is that the capital is or ought to be in the hands of the executor or trustee as an interest-bearing subject, and consequently that interest can never be due so long as by the act of the testator there is nothing in the hands of the trustee or executor wherewith to pay the capital of the legacy. During the life of a liferentrix trustees had insufficient funds to pay certain legacies. **Held**, after her death, that no interest was due for the period prior to that date.

Ewing v Mathieson, (O.H.) 1904, 41 S.L.R. 594.

[*Cf. Ewing's Trustees v Mathieson*, (O.H.) 1901, 9 S.L.T. 367. **ALIMENTARY PROVISION**, No. 87.]

(888)

Rate of interest.

A testator by partial trust disposition and settlement assigned to trustees £5000 out of the means and estate belonging to him at the date of his death. Quoad ultra he died intestate, and an executor was appointed. **Held** that the trustees under the settlement were entitled to interest on the £5000 at the rate of 3 per cent. per annum from the date of death until payment by the executor.

Campbell's Executor v Campbell's Trustees, 1898, 25 R. 687; 35 S.L.R. 540; 5 S.L.T. 346.

(889)

Rate of interest—Postponement of payment of legacy owing to delay to elect.

Where the payment of a legacy was postponed for several years owing to the delay of the beneficiary to elect between her legal rights and the provisions under the trust settlement, **held** that the legatee could not claim a higher rate of interest than had been actually received by the trustees down to the date of her election.

Observed (per Lord President Inglis and Lord M'Laren), that there is no general rule that the rate of interest payable on legacies is 5 per cent. where the trustees are not in mora.

Inglis' Trustees v Breen, 1891, 18 R. 487.

(890)

Interest—Ultra vires advances.

A trust left his estate to be divided among his family of four daughters, vesting being postponed till the period of payment, viz., the majority of the youngest daughter. He empowered his trustees "to make advances" to his daughters "on their marriage," which advances were to be accounted as part of their shares, and to be deducted from their shares of the residue on the final division taking place. Three of the daughters were married during the subsistence of the trust. The trustees on the occasion of each marriage paid the daughter a sum of £1000, and made her an annual allowance of £300. **Held** (1) that the annual allowances were ultra vires of the trustees; (2) that the allowances so paid to each married daughter, with interest thereon to the date of division, were to be imputed to account of her share of residue; (3) that the interest was to be calculated at the rate which the rest of the trust fund was yielding; and (4) that no interest was chargeable on the sums of £1000.

Baird's Trustees v Duncanson, 1892, 19 R. 1045; 29 S.L.R. 862.

13. PRESCRIPTION.

(891)

Long negative prescription.

Held that the negative prescription applied to a claim against an executor for payment of a legacy.

Jamieson v Clark, 1872, 10 M. 399; 44 J. 225; 9 S.L.R. 235.

14. LAPSE.**(1) WHETHER LEGACY HAS LAPSED.**

(892)

Legacy a burden on gift of heritage—Lapse of gift of heritage.

A trust disposition and settlement contained the following provision:—"Upon my son William attaining the age of thirty years, I direct my trustees to convey over to him my properties of A and T, but he shall be bound immediately on receiving such conveyance to pay to my second son Robert the sum of four thousand

pounds sterling, or to execute a bond and disposition in security for that sum over the said properties in favour of the said Robert." William and Robert survived the testator, but William died before attaining the age of thirty, and consequently the direction to convey the properties of A and T was held to lapse. **Held** that there was a bequest of £4000 to Robert which was not conditional on William taking the properties of A and T.

Graham's Trustees v Graham, 1899, 2 F. 232; 37 S.L.R. 163; 7 S.L.T. 283.

(893)

Funds left to pay debts on family estate—Estate sold.

A died in 1840 leaving a settlement by which he directed his trustees to convey the lands of X in favour of B, his eldest son, whom failing of C, his second son. B died in 1863 without having taken a conveyance to the estates and without issue, leaving a settlement by which he directed his trustees on the death of his widow to pay certain funds to his father's trustees, to be applied by them in liquidation of the debts on the lands of X. On the death of B, C in 1863 obtained a conveyance of the estates from his father's trustees. In 1865 he sold the estates and paid the heritable debts affecting the same. He died in the same year. B's widow died in 1869. **Held** that though the heritable debts had been extinguished before the sum destined by B to be applied in payment thereof had become payable, C's trustees were entitled to the fund.

Sutherland's Trustees v Sutherland, 1870, 8 M. 716; 42 J. 371.

(894)

Legacy to purchase commission in army—Abolition of purchase.

By a trust settlement the trustees were directed to settle £18,000 on the truster's nephew in liferent and his children in fee; and further, "in case of my not having advanced money during my lifetime to purchase a captain's commission in his regiment for the said John Dunbar, I direct my trustees to make payment to him of a further sum of £2000 sterling for that purpose." She did not advance money for the purchase of a commission, and purchase in the army was abolished before the testator's death. **Held** that although a commission could not be purchased, the sum of £2000 was payable.

Dunbar v Scott's Trustees, 1872, 10 M. 982; 44 J. 556; 9 S.L.R. 632.

(895)

Heritage conveyed to trustees for purposes set forth in English will—English will cancelled.

The proprietor of a heritable estate in Scotland, by mortis causa deed disposed the estate to his wife in liferent and to trustees in fee with direction to sell the estate on the expiry of the liferent, and to apply the proceeds to purposes set forth in

a prior English will, which he subsequently cancelled. A subsequent English will revoked "all former wills." **Held** that though the mortis causa conveyance was not thereby revoked, the destination of the fee and the direction to sell had fallen in consequence of the failure of the trust purposes through the cancellation of the first English will, so that the Scots estate fell to the heir at law of the granter.

Thomas v Tennent's Trustees, 1868, 7 M. 114; 41 J. 59; 6 S.L.R. 115.

(896)

Unclaimed legacy—Legacy consigned in Court.

A testator bequeathed £100 to the children of his deceased sister, who had resided abroad. She was believed to have had five children. For upwards of 50 years the legacy was unclaimed, and nothing was known of the beneficiaries. **Held** that the legacy could not be treated as having lapsed, but that it should be consigned in Court under supervision of the Accountant of Court, and the judicial factor on the trust estate discharged.

Guthrie v Wallace, (O.H.) 1920, 2 S.L.T. 399.

(897)

Impossibility of executing trust—Shares in firm to be administered by partners for benefit of employees—Conversion of firm into limited company.

Hedderwick's Trustees v Hedderwick's Executor, 1910 S.C. 333; 47 S.L.R. 238; 1910, 1 S.L.T. 36. TRUST, No. 543.

(2) DISPOSAL OF LAPSED LEGACY.

[See also XII. 1, *infra*.]

(898)

Residue or intestacy.

Terms of settlement under which **held** that a legacy which lapsed by the death of the legatee before it vested did not pass into intestate succession, but was carried by the residuary clause into residue.

Dymock's Trustees, 1873, 45 J. 289; 10 S.L.R. 263.

(899)

Residue to go in supplement of other legacies—Legacy void from uncertainty.

A testator's will contained a declaration that "in case the residue of my estate . . . should realise a sum exceeding in amount the sum sufficient to meet in full" the legacies, these should "all be increased in proportion to the amount by which the said residue shall exceed the amount of the said legacies." **Held** that a legacy which was void from uncertainty did not fall into intestacy, but went to increase the other legacies as provided by the declaration.

McGrouther's Trustees v Lord Advocate (O.H.) 1907, 15 S.L.T. 652.

(900)

Liferent of testator's estate to children, with fee to issue.

A testator directed his trustees to divide

his estate into as many shares as he had children, and to invest his daughters' shares in heritable securities, taking the titles to them in liferent for their liferent use only, and their children in fee. The trustees did not invest the estate in heritable security. One of the daughters, who survived her father, died without issue and intestate. **Held** that her share became intestate succession of her father, and did not fall into residue under his settlement.

Fulton's Trustees v Fulton, 1880, 7 R. 566; 17 S.L.R. 377.

(901)

Lapsed legacy a burden on residue.

A testator, by his holograph will, left his whole estate to his sister and two brothers equally, and the survivor of them, subject to the payment of certain legacies, *inter alia*, a legacy "to the deserving working people in the parish of Annan, five hundred pounds, which sum I desire my brothers to divide amongst them according to their good judgment and discretion." The testator was survived by one of his brothers and by his sister, who were confirmed his executors. Thereafter the sister died, and the surviving brother, having paid away part of the legacy, himself also died. The trust for the deserving working people was held to have lapsed on the death of the surviving brother. **Held** that the remaining part of the legacy did not fall into intestacy, but passed to the representatives of the two disponees who survived the testator, because the trust for the deserving working people was conceived as a burden upon the gift to them.

Laurie v Brown, (O.H.) 1911, 1 S.L.T. 84.

(902)

Lapse of contingent legacy.

Held that contingent legacies were only burdens on the residuary estate, which vested in the residuary legatee at the testator's death, although it was not until several years after that event that the amount was ascertained by the contingencies upon which the legacies depended being purified.

Storie's Trustees v Gray, 1874, 1 R. 953; 11 S.L.R. 552.

(903)

Predecease of term of payment—Liferented share.

A testator directed his trustees to divide the residue of his estate into four shares and pay one to each of three of his children, and to invest the other for behoof of a fourth child in liferent only and his children in fee. He further directed—"If any of my children predecease the term of payment of their provisions, the said provisions shall . . . become part of the residue of my estate." **Held** that the capital of the share liferented by the fourth child was not carried by this clause, but fell into intestacy.

Scott v Gowans, (O.H.) 1916, 1 S.L.T. 404.

(904)

Terms of residue clause.

Terms of a trust settlement which were

held wide enough to cover certain legacies which had lapsed through failure of the fiars, the liferenters of the legacies having died without issue.

Ramsay's Factor v Smith's Trustees,
(O.H.) 1910, 1 S.L.T. 87.

(905)

—Disposal of forfeited share after equitable compensation complete.

Wingate v Wingate's Trustees, 1921 S.C. 857; 58 S.L.R. 604; 1921, 2 S.L.T. 163, No. 1505, *infra*.

(906)

Legacy of residue of particular sum—Lapse of legacy charged on sum.

Brown v M'Lae's Trustees, 1877, 5 R. 37; 15 S.L.R. 27, No. 912, *infra*.

(907)

Legacy a real burden—Relief of heir or benefit of residue.

A father in his settlement conveyed the heritable estate of X to his eldest son under the real burden of £6000, declaring that £1500 thereof should "belong in liferent to each of my daughters, F and M, viz., £3000 betwixt them, and to their children in fee." The father also conveyed the residue of his estates to two of his sons. Held that the death of one of the truster's daughters unmarried relieved the heritable estate of the burden of £1500, and did not benefit the residuary legatees.

Dawson's Trustees v Dawson, 1877, 5 R. 374; 15 S.L.R. 254.

(908)

Mutual settlement—Survivor fiar of whole estate—Heirs of predeceaser or of survivor.

By mutual settlement a husband and wife conveyed to each other the whole estate which should belong to each at his or her death. The survivor was given full power to dispose of the whole estate, and, on the death of the survivor, "the portion of the joint estate which may remain" was to be divided among certain relatives of the spouses. The wife survived, and during her survivorship the value of the estate left by the husband was largely increased by accumulations. One of the relatives of the husband, to whom a portion of the joint estate was destined, predeceased the wife. Held that the predeceaser's share of the estate fell to the wife's heirs in mobilibus as intestate succession.

Berwick's Executor, 1885, 12 R. 565; 22 S.L.R. 357.

XII. RESIDUE.

1. WHETHER GIFT IS GIFT OF RESIDUE.

(909)

"Residue"—Holograph will—Words "any residue" occurring in immediate collocation with a reference to a particular fund.

The presumption is that the word "resi-

due" occurring in a testamentary writing carries the residue of the testator's whole estates, and not merely the balance of a particular fund.

A lady by holograph testamentary paper left legacies amounting in all to £1000, including one of £100 "to my old and valued friend J M," under the declaration that these legacies were to be paid free of legacy duty; and then concluded as follows:—"The £1000 so bequeathed is in the hands of my brother . . . —also £200 which latter, if not expended by me before my decease and still in his hands will be—to be taken for all just and lawful debts to give mournings to J, my servant, to the extent of £2—also mournings to" the wife of a nephew "to the extent of £5—any residue to be given to J M." By later testamentary papers the testator nominated an executor and left a number of legacies of specific articles. Her whole testamentary papers were found after her death in an envelope, on which were the words, holograph of her, "My will," and her subscription. She left property amounting to £1514, without deducting debts, which were of small amount. In a competition between J M and the testator's next of kin claiming ab intestato, held that the words "any residue" in the first testamentary paper carried the residue of the testator's general estate to J M, and not merely the balance of the sum of £200 mentioned in the immediately preceding clause of the paper.

Millar v Morrison, 1894, 21 R. 921; 31 S.L.R. 772; 2 S.L.T. 102.

(910)

Implied bequest of residue—"Residuary legatees"—Any surplus to be applied to payment of legacy duty—Express exclusion of next of kin.

A testator in his last will declared his executors "accountable to the residuary legatees hereinafter named" for their introductions. He bequeathed various sums to certain institutions and individuals, and further directed—"If there is as much money left after all the bequests is fully made, I appoint my executors to pay the Government legacy tax on all these legacies, and if any return ever comes from the Western bank, as I paid all my calls in full, my executors is fully empowered to give in proportional parts to the above-mentioned institutions and persons mentioned." He expressly excluded his next of kin from right or interest in his moveable succession. Held that the legatees named were entitled to the residue.

Robertson v Scoular, 1867, 40 J. 6; 5 S.L.R. 4.

(911)

"Executor" and "universal intromitter"—Right to residue.

By holograph writings a testator appointed one of his nieces to be "executor" and "universal intromitter" with his "goods and money," "except what is otherwise mentioned afterwards," "under the following burdens—to pay my debts and the following legacies." Held that the executor had

been named universal legatary, and was entitled to the residue of the estate.

Jamieson v Clark, 1872, 10 M. 399; 44 J. 225; 9 S.L.R. 233.

(912)

General or particular residue.

A testatrix directed her trustees to pay a sum of £10,000 to two persons in liferent, and a third person and his heirs in fee, and also a large number of other legacies to different persons, and she appointed a residuary legatee. By a codicil, on the narrative that the intended fiar of the £10,000 had predeceased, she recalled the appointment to pay the sum to him and his heirs, and after the expiry of liferents she directed legacies to be paid out of the £10,000 to five different charities (amounting in all to £6700), and to pay "the balance of the fee of said principal sum of £10,000, being £3300, to A B and C D, equally between them, and their respective heirs." A legacy of £1000, one of the five left to charities, lapsed. **Held** that it fell into the general residue of the estate, and was not included in the legacy to A B and C D.

Brown v M'Laë's Trustees, 1877, 5 R. 37; 15 S.L.R. 27.

(913)

Bequest of corporeal moveables—Appointment of residuary legatee—Ejusdem generis.

Terms of a holograph writing disposing of specific articles of jewellery and other corporeal moveables and constituting "my daughter J my residuary legatee," which were **held** not to revoke the residuary bequest contained in a prior general settlement, but to carry only corporeal moveables ejusdem generis with those enumerated in the context.

Gore Booth's Trustee v Gore Booth, 1898, 25 R. 803; 35 S.L.R. 606; 5 S.L.T. 381.

(914)

Residue clause or clause operating on what was not bequeathed—Lapsed legacy.

Held that the words "What there may be over is divided among heirs hereto mentioned" occurring at the end of a holograph will was not a proper residue clause, but was intended only to operate upon what the testator had not already bequeathed, and consequently did not carry lapsed legacies.

M'Crorie's Curator Bonis v M'Crorie, (O.H.) 1909, 1 S.L.T. 544.

(915)

"Whatever more money."

A testatrix directed as to the residue of her estate that her trustees were to make over the same, and any accumulations thereof, in such manner and way as she should direct, and failing any such directions, "then to my own nearest heirs, executors, and successors whomsoever." By codicils to the settlement a number of legacies of sums of money and of specific articles were left to various persons. One of these codicils contained the following

clause:—"Whatever more money I leave after paying my lawful debts to be divided amongst my legatees." Questions having arisen as to who was entitled to the residue of the estate, **held** that on a sound construction of the deeds the trustee intended by the words used in her last codicil to divide the residue of her estate among the legatees to whom pecuniary legacies had been bequeathed.

Keith v Fraser, 1883, 20 S.L.R. 785.

2. SUBJECTS FORMING PART OF RESIDUE.

(916)

Undisposed of income of particular fund.

A testator conveyed his whole estate to trustees, and directed them to divide and pay over to the children of his niece, "after the youngest child has attained the age of twenty-five years complete, but not till then, the sum of £10,000 equally amongst them, share and share, and it is specially provided and declared that said provisions in favour of the children of my niece shall not become vested interests in them until the same shall be absolutely conveyed, paid, or made over to them by my said trustees. (Third) I direct and appoint my said trustees to hold as much of my means and estate as will pay the foresaid sum of £10,000 as aforesaid, and at the first term of Martinmas happening six months after my death, to divide, convey, and make over the whole remainder or residue of my means and estate" to certain persons named. **Held** that the sum of £10,000 fell to be paid from the general estate only on the youngest child attaining twenty-five years, and therefore that any accumulations prior to that date fell into residue.

Playfair's Trustees v Hunter, 1890, 17 R. 1241; 27 S.L.R. 991.

(917)

—Vesting of legacy suspended until legatee twenty-five.

A testator directed his trustees to convey certain estates in India to his eldest son on his attaining the age of twenty-five. The son did not take a vested right until that date. The income accruing between the testator's death and the date when the son attained twenty-five was not expressly disposed of, and the testator directed that until that date arrived the trustees were to expend a sum not exceeding £200 on the son's maintenance and education. A clause in the will dealing with provisions to daughters contained an express direction to accumulate. There was a residue clause whereby the testator directed his trustees to divide and make over the whole residue and remainder of his estate among his children on their respectively attaining twenty-one. **Held** that the income of the Indian estate was not to be accumulated for the eldest son but fell into residue.

Brodie v Brodie's Trustees, 1893, 20 R. 795; 30 S.L.R. 713; 1 S.L.T. 71.

(918)

Legacies payable "as at" testator's death and on legatees attaining majority.

A testator bequeathed legacies of £10,000 to each of his children, declaring that these should be "payable as at my death, and on" the legatees "respectively attaining twenty-one years of age, or, in the case of females, on their respective marriages before attaining said age, and the same shall not vest until the period of payment." Power was given to the trustees to advance the available income of the legacies for the education and maintenance, or otherwise for the benefit of the children respectively, and to anticipate, if they pleased, the period of vesting and payment. **Held** that the interest accruing on each legacy between the date of the testator's death and the period of payment belonged to the legatee.

M'Lean's Trustees v M'Lean, 1891, 18 R. 892; 28 S.L.R. 707.

(919)

Undisposed of rents of heritage.

A testator directed his trustees as soon as convenient after his death to sell his estate of A and apply £4000 of the price in reducing the debt on his estate of B. On the death of his brother the testator directed his trustees to convey B to certain persons subject to the burden of the existing debt on the estate less the £4000 to be paid by the trustees. A was not sold until seventeen years after the testator's death, and when sold it realised less than £2500. **Held** that the rents of A accruing between the testator's death and the date of the sale fell into residue.

Adam's Trustees v Wilson, 1899, 1 F. 1042; 36 S.L.R. 819.

(920)

Undisposed of income of residue—Two residues.

A testatrix directed her trustees, in the fourth place, as soon as they should think expedient after her death, to realise the "whole residue and remainder" of her estate, and to hold the proceeds thereof for behoof of her two sisters in life, and to pay over the annual proceeds to "them equally during their joint lives, and in the event of either of my said sisters predeceasing me, or upon the death of either of them after my decease, my trustees shall pay over one-half of the said free proceeds or income to her children equally, share and share alike, if more than one, during the lifetime of the survivor of my said sisters, and the other half to such survivor." The testatrix then in the fifth place directed that after the death of the longest liver of her sisters "my trustees shall pay over and divide the whole free residue and remainder of my said means and estate" to certain persons specified. After the death of one of the sisters and of her only child, survived by the other sister, **held** that the life interest of one-half of the residue directed to be realised in the fourth purpose did not accrete to the surviving sister, nor fall into intestacy, but

was to be accumulated and divided, as part of the residue, under the fifth purpose.

Stobie's Trustees, 1888, 15 R. 340; 25 S.L.R. 250.

(921)

Gift of fee to issue of marriage, payable at death of husband—Fee vesting in children at wife's death—Disposal of income accruing prior to husband's death.

By an assignation in trust made in contemplation of marriage, the wife conveyed her estate to trustees in trust, inter alia, after her death, if there were no issue of the marriage, for behoof of the husband in life, so long as he remained unmarried, for behoof of the issue, if any, of the marriage "then" surviving, and the issue per stirpes of predeceasing, payable at majority or marriage, whichever of these events should first happen, after the decease of the longer liver of the spouses, if the wife should be the survivor, "but after the decease or second marriage of" the husband "if he shall be the longer liver." The wife died intestate, survived by the husband and by two children of the marriage, who were both major. **Held** that the fee vested in the children on the death of their mother, and that the income until the period of payment did not fall into intestacy, but belonged to the children as an accessory of the fee.

Bate's Trustees v Bate, 1906, 8 F. 861; 43 S.L.R. 660; 14 S.L.T. 95.

(922)

Accumulations of income before fee has vested.

A testator gave a life interest of an equal share of the residue of his estate to each of his children and the fee to the issue of such child, vesting being postponed till the issue should attain majority or be married. The trustees were empowered, in the event of a life tenant dying leaving issue, to apply "the annual proceeds of their presumptive shares," or such part thereof as they might think proper, towards the maintenance and education of such issue till they should attain majority or be married. One of the testator's children died survived by a child, for whose maintenance and education the trustees applied part of the income of the share which the parent would have life-tenanted. They accumulated the remainder of the income until the child's majority. **Held** that the income so accumulated did not accrue to the child's share, but fell into residue.

Wilson's Trustees v Wilson, 1901, 3 F. 967; 38 S.L.R. 706; 9 S.L.T. 102.

(923)

Vesting suspended until death of life tenant—Life tenant restricted to one-third on remarriage—Disposal of remaining two-thirds.

A testatrix directed her trustees to pay the income of her whole estate to her husband, the provision in his favour being restrictable to one-third in the event of his remarriage. The vesting of the fee was suspended until the death of the life tenant. There was no

provision for the disposal of the two-thirds of the income which would be set free in the event of the husband entering into a second marriage. The husband having remarried, **held** that the two-thirds of the income accruing between his second marriage and his death fell into intestacy.

Hunt's Trustees v Hunt, 1906, 8 F. 764; 43 S.L.R. 432; 13 S.L.T. 920.

(924)

Gift to heirs of B's body—B in life at testator's death—Disposal of income accruing prior to B's death.

A testator directed his trustees that the residue of his estate should be made over to the heirs of the body of A, whom failing, to the heirs of the body of B. The income of the residue was not specifically disposed of. The testator was predeceased by A without issue and survived by B, and the heirs of the body of B could not be ascertained until her death. **Held** that there was an implied direction to accumulate the income until the death of B.

Gollan's Trustees v Dallas, (O.H.) 1905, 13 S.L.T. 720.

(925)

Lands of X entailed—Direction to pay off entailor's debts out of proceeds of unentailed lands—Direction to entail unentailed lands so far as unsold—Income of estate extended on formation of streets and drains—Right of heir of entail to repayments by feuars.

A died in 1865, leaving (1) a disposition and deed of entail conveying his estate of X to his nephew B and the heirs of his body; and (2) a trust disposition and settlement whereby he directed that his trustees should, "out of the proceeds" of certain unentailed lands, "pay off the remainder of the said heritable debt affecting the estate of X, and interest thereon," and should have full power to sell or feu for that purpose. He also provided that, if any part of the lands remained unsold after the whole debt should be paid off and discharged, then the trustees should entail the same upon the same series of heirs; but, if they should have sold more than should be necessary to pay the debt, the balance should form part of the general trust estate. The whole free residue of the trust estate, if any, was to be paid to B and his heirs. On A's death his trustees, of whom B was one, continued feuing the unentailed lands, in accordance with a plan used by A himself, and also sold part thereof. They cleared the debt off the entailed estate of X, and in 1880 entailed the remainder of the unentailed lands on the eldest son of B, who had died in 1878. In carrying out the feuing plan they spent nearly the whole income of the unentailed lands and others in making streets, sewers, and drains, the amount spent in such works to be gradually repaid by proportional payments by each feu on taking up his feu. **Held** that the sums received and to be received from time to time from feuars in respect of the said streets, &c., did not form part of the executry estate of B, but belonged to the heir of entail in possession

of the estate of X at the time when the sums became payable.

Cartwright v Stirling-Maxwell, 1882, 9 R. 1009; 19 S.L.R. 755.

(926)

Bequest of whole means and estate—Marriage contract funds held subject to contingent divestiture.

By antenuptial contract of marriage trustees were directed to pay the income of £2500 contributed by the wife to the spouses and the survivor of them, and at the death of the longest liver to hold the capital, and in the event of there being no children or issue of children then alive, to pay the same to the assignees, executors, or nearest of kin of the wife. The wife predeceased her husband, survived by three children of the marriage, leaving a holograph will by which she bequeathed her "whole means and estate, real and personal," to F, one of her three children. All the children of the marriage predeceased the husband. **Held** that by the marriage contract the wife was not divested of her right of property in the fund paid by her to the trustees, but that at the time of her death she held the same subject to a contingent divestiture, and that her right being in bonis of her was carried by her will to F.

Montgomery's Trustees v Montgomery, 1895, 22 R. 824; 32 S.L.R. 628; 3 S.L.T. 62.

(927)

Whole estate—Marriage contract—Date of contract or of death.

Terms of an antenuptial marriage contract on which **held** that a conveyance by the husband of his "whole estate" meant his whole estate as at the date of his death and not as at the date of the contract.

Wilson's Trustees v Wilson, (O.H.) 1907, 15 S.L.T. 162.

(928)

Residue or intestacy — Child claiming legitim—Testamentary provision forfeited—Equitable compensation made.

Macfarlane's Trustees v Oliver, 1882, 9 R. 1138; 19 S.L.R. 850, No. 1502, *infra*.

(929)

Goodwill of business carried on by trustees.

The lessee of a public-house having died at a time when he was under notice from a railway company that they were to take the premises under compulsory powers, his testamentary trustees, on their own responsibility, secured a lease of other premises in the neighbourhood, and obtained a new licence for them, on the representation that the deceased's daughters were unprovided for, and that the new licence would take the place of the old one. The goodwill of the business was of no value. **Held** that the goodwill of the business carried on by the trustees in the new premises was not part of the deceased's estate.

Graham v Graham's Trustees, 1904, 6 F. 1015; 41 S.L.R. 846; 12 S.L.T. 262.

(930)

Residue divisible in proportion to legacies and annuities—Præcipuum out of residue—Right of annuitant.

A testator, having bequeathed a number of legacies, including one to his niece E, directed his trustees to pay the residue of his estate, to the extent of £500, to E, "and the balance thereof above £500 to and among the above-named legatees and annuitants in proportion to the amount of their respective legacies." **Held** that E was entitled to £500 out of the residue as a præcipuum, and also to share in the balance of the residue in proportion to the bequests in her favour other than the said £500; and that an alimentary annuitant was entitled to a share of residue proportional to the capitalised value of her annuity in cash, and was not bound to accept it in the form of an addition to her annuity.

Bryce's Trustee, 1878, 5 R. 722; 15 S.L.R. 412.

3. LIABILITIES TO BE SATISFIED OUT OF RESIDUE.

(931)

General direction to pay debts—Heritable estate excepted from conveyance of residue—Payment of heritable bonds out of residue.

Douglas's Trustees v Douglas, 1868, 6 M. 223; 40 J. 113; 5 S.L.R. 154. **HERRITABLE AND MOVEABLE**, No. 142.

(932)

Gift of heritage—Conveyance to residuary legatee with clause of warrandice—Liability of residue to satisfy warrandice.

In a trust disposition and settlement, executed in 1853, the grantor conveyed his whole estate, heritable and moveable, to trustees, for the purpose, *inter alia*, failing heirs of his body, of conveying his estate of M, and his other lands in the county of L, to his brother, and the heirs of his body, under the fetters of an entail. By the same deed he directed his trustees, failing his own issue, to make over the whole residue of his estate to the person who should succeed to M. By a codicil, dated in 1876, he disposed to his wife, in the event of her surviving him, the lands of B and A (which were among the lands originally directed to be entailed), and bequeathed to her the whole residue of his estate. The disposition of B and A contained a clause of absolute warrandice. In 1882 the truster granted a bond and disposition in security for £250,000 over the estates of M, B, and A. **Held** that the obligation of warrandice was a personal obligation which fell to be satisfied out of the moveable estate before the residue could be ascertained, and that the widow was not entitled to be relieved by the truster's heir.

Duchess of Montrose v Stuart, 1887, 15 R. (H.L.) 19; 13 App.Cas. 81; 25 S.L.R. 454.

(933)

Direction to sell estate A and apply £4000

out of the price in disburdening estate B—Estate not realising £4000—Whether balance payable out of residue.

A testator directed his trustees, as soon as convenient after his death, to sell his estate of A and to apply £4000 of the price in reducing the debt of £14,000 with which his estate of B was burdened, and, after the death of his brother, to convey B to certain persons "subject to the real burden of the bond presently affecting the said lands to the extent of £10,000, part of the principal sum of £14,000 therein contained (the sum of £4000 being payable by my trustees in part of the principal sum as herein provided)." The price received for A was only £2400 or thereby. **Held** that the persons to whom the testator had left B were not entitled to have that estate disburdened of the balance of the £4000 which the price of A did not cover.

Adam's Trustees v Wilson, 1899, 1 F. 1042; 36 S.L.R. 819.

(934)

Legitim—Special destinations in bonds.

By a trust disposition the testator left the residue of his estate to his children. His estate included various sums invested in bonds with destinations in favour of the testator and his wife or the survivor which were not revoked by the trust disposition. **Held** that legitim was payable in the first instance out of the residue, and, the residue being sufficient to meet the claim, that no part thereof fell to be paid out of the sums invested in the bonds.

Farmer's Trustees v Taylor, 1917 S.C. 366; 54 S.L.R. 323; 1917, 1 S.L.T. 166.

4. PAYMENT.

[See TRUST V.]

XIII. DESTINATIONS.

1. INSTITUTION OR CONDITIONAL INSTITUTION.

(935)

"And" equivalent to "whom failing"—Will partly written and partly printed.

A printed form for a will was filled up by a testator to read thus (the words in italics being written)—"Bequeath to and in favour of *M M'L, my spouse*, residing in *22 C Street, Glasgow*, and *my heirs and assignees*" the testator's whole estate. The deed further bore—"But these presents are granted and shall be accepted by the said *M M'L, my spouse* . . . under the burden of the payment of my whole just and lawful debts." The testator was survived by his widow. **Held** that the deed imported a bequest of the testator's whole estate to his widow, and not a joint bequest to her and his own heirs.

M'Lachlan's Trustees v Harvey, 1909 S.C. 201; 46 S.L.R. 156; 16 S.L.T. 538.

(936)

Direction to divide capital equally among liferenter's children and grandchildren per stirpes.

A testator directed his trustees to pay the annual income of a certain share of his estate to R during her life, and on her death to divide the capital "equally among the children and grandchildren of the said R per stirpes." R died survived by (1) a son A, who had no children, (2) a son B, who had children, and (3) certain grandchildren, the children of a deceased daughter C. In a special case brought after R's death B's children contended (1) that they were each entitled to take an equal share along with their father in a third of the capital; or (2) alternatively that they were entitled, equally among them, to one-half, and their father to the other half, of the third of the capital. **Held** that it was the testator's intention to call grandchildren only where their parent had predeceased the liferentrix, R, and that accordingly B was entitled to the whole third.

Mellis' Trustees v Ritchie, 1909 S.C. 626; 46 S.L.R. 479; 1909, 1 S.L.T. 179.

(937)

Destination of residue to brother and sister and their children and the children of predeceasing sister — Whether children took *pari passu* with parents.

A testator directed his trustees to pay over the residue of his estate to his brother and sisters and their children and the children of his deceased sister. **Held** that the children of the testator's surviving brother and sister were not entitled to share *per capita* along with their parents in the distribution of the residue, but were only entitled to share *per stirpes* in the event of the failure of their parents.

Murray, 1873, 45 J. 574.

(938)

Direction to divide equally between A and his children and B and his children.

A testator by the residuary clause of his will provided—"I bequeath the remainder of my estate . . . to be divided equally between my brother P and his children and my brother G and his children, my nephews J and A, sons of my brother P, not to participate in this last bequest." **Held** that the bequest was not one to the brothers with a conditional institution of their respective children, but was a bequest to the brothers and their children (other than the two who had been excluded) concurrently.

Cobban's Executors v Cobban, 1915 S.C. 82; 52 S.L.R. 89; 1914, 2 S.L.T. 357.

(939)

Residuary legatee—Nature of right to contingent legacy on lapse.

Where a testament contains a conditional bequest and a bequest of residue, the residuary legatee does not, on the lapse of the conditional legacy, take the subject as a

conditional institute, but the conditional bequest is to be regarded as a mere burden upon the original gift of residue, which flies off upon the lapse.

Storie's Trustees v Gray, 1874, 1 R. 953; 11 S.L.R. 552.

2. CONDITIONAL INSTITUTION OR SUBSTITUTION.

(1) HERITAGE.

(940)

Destination to A B, whom failing to testatrix's heirs, assignees, and disponees.

The destination to house property purchased by a husband with his own funds was taken to himself and his wife, "and the survivor of them, and to their or the survivor's heirs and assignees whomsoever." The spouses subsequently executed a mutual settlement of their whole estates. The wife also "without prejudice to the foresaid generality," and with consent of her husband, disposed her half of the house property to her husband in liferent *allennary*, "and to and in favour of my said son . . . whom failing, to my own heirs and assignees and disponees whomsoever in fee." The son survived his mother, but predeceased his father intestate. **Held** that the special conveyance by the wife imported not merely a conditional institution, but also a substitution in favour of her own heir whatsoever to her half of the house property, and that the succession opened to him as heir of provision on the son's death.

Watson v Giffen, 1884, 11 R. 444; 21 S.L.R. 299.

(941)

Destination to children of marriage, whom failing to heirs and assignees of wife — Marriage contract.

By a marriage contract heritable subjects belonging to the wife were disposed in fee "to the children of said intended marriage equally among them, share and share alike, whom failing to the heirs and assignees" of the wife. **Held** that the last clause of the destination was a substitution, not merely a conditional institution.

Smith's Trustees v Smith's Trustees, 1905, 7 F. 815; 42 S.L.R. 657; 13 S.L.T. 190.

(942)

Destination to B, and failing B to testator's nearest heirs and to heirs and assignees of "my said disponees."

A, by *mortis causa* deed, disposed certain heritable property to his nephew B, "but always under the express condition of his continuing to profess the Roman Catholic religion, and failing the said B, by death or abandoning his said religion, then to my own nearest heirs professing the Roman Catholic religion, and to the heirs and assignees whomsoever of my said disponees." B, who survived A, throughout his life professed the Roman Catholic religion, and died intestate, leaving issue. **Held** that A's "own nearest

heirs professing the Roman Catholic religion," were conditional institutes, and not substitutes, and that therefore B's heirs were at his death entitled to succeed, and were not affected by the condition.

Hay v Brown, 1883, 10 R. 460; 20 S.L.R. 311.

(943)

Destination over in event of institute's death without issue — Lands to "revert back" to testator's nephew—Vesting—Whether vesting a morte or at death of liferentrix.

A testator by holograph settlement left the liferent of his whole estates, heritable and moveable, to his widow. He then disposed of the fee of his estates, and, inter alia, provided—"I leave to my nephew J F W my estate of B, but I wish it expressly understood that in the event of my said nephew dying without leaving any lawful heir-male of his body, then and in that event my said lands of B are to revert back to my nephew J H." J F W survived the testator, but predeceased the testator's widow unmarried, and was survived by J H. J F W left a general trust disposition and settlement of his whole estate heritable and moveable. In a question between J F W's trustees and J H, held that the fee of the lands of B vested in J F W at the testator's death, with a simple substitution in favour of J H, in the event of J F W dying without leaving an heir-male of his body, and that the substitution had been evacuated by J F W's general disposition.

Hamilton v Ritchie, 1894, 21 R. (H.L.) 35; [1894] A.C. 310; 31 S.L.R. 934; 2 S.L.T. 91.

(944)

Destination to A B and C "or" the survivor or survivors of them.

The granters of a mortis causa disposition disposed a heritable subject to A B and C, "or the survivors or survivor of them." B predeceased the longest liver of the granters. Held that the destination over to survivors was a conditional institution, and that the subject belonged to C and D as the survivors at the death of the longest liver of the granters. Observed that if the word "or" had been "and" the destination would have been a joint fee to the three disponees and the longest liver of them.

Chancellor v Mosman, 1872, 10 M. 995; 44 J. 557; 9 S.L.R. 646.

(945)

Disposition in favour of testator's children and their issue—Survivorship clause.

A person conveyed a heritable subject to his children "equally among them, and the lawful issue of their bodies, and failing any of them by death without lawful issue of their bodies, to the survivors equally." Held that this was a conditional institution of the grandchildren, and not a substitution.

Stiven v Brown's Trustees, 1873, 11 M. 262; 45 J. 193; 10 S.L.R. 169.

(946)

Destination to heirs of granter's body, whom failing to A—Granter leaving no heirs—Whether A takes as disponee or heir.

The granter of a mortis causa settlement disposed his heritable estate "to the heirs of my own body equally among them, share and share alike, whom failing, to A, B, C, and D, equally among them, share and share alike, and their respective heirs in fee." The granter died without leaving any heirs of his body, and the settlement was found in his repositories after his death. Held (by a Court of seven judges) that A, B, C, and D took as conditional institutes, and not substitutes, and acquired right to the property as disponees without service or declarator.

Hutchison v Hutchison, 1872, 11 M. 229; 45 J. 156; 10 S.L.R. 154.

(947)

Lands destined to A and his heirs and assignees — Destination over in event of A dying intestate, without leaving heirs of his body and without otherwise disposing of the lands.

A disposed mortis causa his whole estate to his brother B "and his heirs and assigns whomsoever," declaring that should B die intestate and without heirs of his body the same should devolve upon certain heirs. B made up title as heir at law of A without reference to the disposition. He died without issue but leaving a trust settlement executed on deathbed. Held that, so far as regarded heritage acquired by B from A, B's heir had no title or interest to reduce this settlement ex capite lecti, as A's deed contained a valid substitution excluding him.

Park's Curator v Black, 1868, 6 M. (H.L.) 147; L.R., 1 H.L. Sc. 392; 40 J. 462; 5 S.L.R. 726.

(948)

Direction to trustees to take conveyance in liferent to testator's children with fee to their issue and failing issue to surviving children.

A testator directed his trustees to invest the share of the residue of his estate falling to his daughters, in heritable property or heritable security, and to take the rights in favour of the daughters in liferent allanarly, and to their issue and failing issue to the survivors of the testator's children. Held that the direction to invest the testator's daughters' shares of residue being a direction to invest in heritage, the presumption was for substitution and not merely conditional institution; that there was nothing in the settlement to overcome that presumption; and that therefore the only child of a daughter having died without evacuating the substitution, the share liferented by that daughter passed to the testator's surviving children as substitutes under the destination, and not to the heir of the daughter's child.

Brown's Trustees v Smith, 1900, 2 F. 817; 37 S.L.R. 673.

(949)

Direction to convey to A and the heirs of his body, whom failing to other persons.

In a trust settlement the trustees were directed to lay out the residue of the trust estate (amounting to £60,000) in the purchase of lands, and when the whole residue, or within £300 thereof, was so invested, to deliver a disposition of the lands to the brother of the testatrix (who predeceased her) in liferent and his son and the heirs whatsoever of his body in fee, whom failing to certain other persons. **Held** that the destination to the heirs of the nephew's body and the ulterior destinations were substitutions, not conditional institutions.

Spens v Monypenny's Trustees, 1875, 3 R. 50; 13 S.L.R. 25 and 45.

(950)

Direction to convey heritage to A, whom failing to his issue.

A testator by his trust disposition and settlement conveyed his whole estates, heritable and moveable, to trustees, and directed them, inter alia, at the first term of Whitsunday or Martinmas after his death to convey certain lands named "to Gavin, my youngest son, whom failing to his lawful children equally among them." Gavin survived his father. The trustees, on the narrative of the trust disposition and settlement, conveyed the lands therein specified "to Gavin, whom failing to his children equally among them, whom failing to his heirs and assignees whomsoever." This disposition was recorded "on behalf of Gavin." Gavin died intestate survived by two sons. **Held** (1) that the provisions of the trust disposition and settlement imported a conditional institution and not a substitution; (2) that the destination inserted in the conveyance by the trustees was unauthorised, and had no effect; and consequently (3) that Gavin's elder son as his heir at law was entitled to the whole lands.

Marshall v Marshall, 1900, 2 F. 1023; 37 S.L.R. 775; 8 S.L.T. 64.

(951)

Direction to convey heritable subject on death of liferenters to A, whom failing to the heirs of his body, whom failing to the testator's heirs-male.

Baillie's Trustees v Whiting, 1910 S.C. 891; 47 S.L.R. 684; 1910, 2 S.L.T. 23. VESTING, No. 78.

(952)

Direction to convey residue on daughter attaining majority to daughter in liferent allanarly and to her issue in fee—Failing daughter and her issue to convey fee to trustees for charity.

A testator directed his trustees, after payment of certain annuities and legacies, to convey the liferent of the residue of his estate to his daughter J S for her liferent use allanarly, when she should attain the age of twenty-one, and to the heirs of her body in fee. The deed then proceeded—"And fail-

ing my said daughter . . . and the issue of her body . . . I direct my trustees to convey the fee of the residue" to certain trustees for charitable purposes. The legacies and annuities were all satisfied, and J S attained the age of twenty-one in 1852. The trustees did not execute any conveyance. In a special case presented in 1889, **held** (1) that the trustees were bound to execute a conveyance to J S in liferent for her liferent use allanarly and her children in fee; and (2) that the trustees for the charity were conditional institutes who were entitled to take only in the event of J S dying in minority and without issue.

Simpson's Trustees v Simpson, 1889, 17 R. 248; 27 S.L.R. 175.

(2) MOVEABLE AND MIXED ESTATE.

(953)

Mixed estate.

Observed (per Lord Cowan)—"As regards heritable subjects the presumption of law is in favour of substitution, while as regards moveable, conditional institution. The case we have before us is one of a general succession, and we have to consider the intention of the testatrix, and as the conveyance is of both heritable and moveable estate, under a deed intended to take effect immediately on her death, I think we must hold it to be a case of conditional institution."

Paul v Home, 1872, 10 M. 937; 44 J. 519; 9 S.L.R. 594.

[See also Watson v Giffen, 1884, 11 R. 444; 21 S.L.R. 299, per Lord President Inglis, No. 940, supra.]

(954)

Gift to A in fee—Direction as to disposal of estate on his death.

A testator bequeathed his whole estate to his wife in fee, directing that on her death his said estates, heritable and moveable, which might remain at that date, should be divided and conveyed to certain of his own relatives. The wife made up title to and sold a small part of the heritage and died without having made up a title to the remainder of it. In a question between the assignee of the wife's heir at law and the testator's own relatives, **held** that the destination contained a substitution of the testator's own relatives, and that the testator's own relatives took the remainder of the heritage.

Olipphant v Turnbull, (O.H.) 1895, 2 S.L.T. 536.

(955)

Moveables to be conveyed along with heritage.

A truster directed his trustees to pay over the free yearly income of his estate, heritable and moveable, to his son. In the event of the latter dying without lawful issue, the trustees were directed to dispose and convey the truster's heritage, with his plate and pictures, to J, his nephew, and the lawful heirs of his body, whom failing, to G, a younger nephew, and the lawful heirs of his body. The truster's son survived him, and died without issue, and J survived the latter

about six months, and died unmarried and intestate. **Held** that the plate and pictures fell to be conveyed along with the heritage to G, as substitute heir of provision.

Maclean's Trustees v Maclean, 1889, 16 R. 1095; 26 S.L.R. 777.

(956)

———**Destination to A and B—Destination over to survivor on death of either without heirs of body.**

A testator assigned and disposed to A and B, "equally between them, and in the case of the death of either without heirs of his or her body to the survivor of them, my whole real and personal effects whatsoever." **Held** that this was a conditional institution and not a substitution; and that both A and B having survived the testator, the share of the predeceaser who died intestate without heirs of his body went to his heir at law.

Paul v Home, 1872, 10 M. 937; 44 J. 519; 9 S.L.R. 594.

(957)

———**To A and B and the survivor, whom failing, to C and D.**

A testator disposed his whole heritable and moveable estate to his two sisters "equally between them and to the survivor of them, whom failing, to" his nephews and nieces. He died, survived by his sisters, leaving both heritable and moveable estate. One of the sisters died intestate. **Held** that the destination imported a conditional institution and not a substitution of the survivor, and that the survival of the testator by the deceased sister evacuated the institution of the nephews and nieces to her share.

M'Lay v Chalmers, (O.H.) 1903, 11 S.L.T. 223.

(958)

———**Legacy to A—Gift over in case A die without issue.**

A testatrix, by her holograph will, bequeathed a sum of £8000 to a nephew, "his heirs, executors, and administrators absolutely, provided always, nevertheless, that in case my nephew shall die without issue, I appoint the said sum of £8000" to be divided equally between certain charities. By a later passage in the will she bequeathed to a legatee the interest of £500, and provided that "if my nephew survives me the principal sum of five hundred (is to be placed in trust for him), he receiving the interest only, and this also applies to the eight thousand pounds left him as above." When the will was made the nephew was confined in an asylum, and his affairs were being managed by a curator bonis. He died after the testatrix, intestate and without issue. **Held** (1) that the bequest vested in the nephew in fee, and (2) that there was no substitution of the charities, but merely a conditional institution of them in the event of the nephew predeceasing the testatrix without issue.

Crumpton's Judicial Factor v Barnardo's Homes, 1917 S.C. 713; 54 S.L.R. 596; 1917, 2 S.L.T. 100.

(959)

———**Destination of husband's estate to wife, and on her death before or after him to husband's surviving children — Marriage contract.**

By antenuptial marriage contract the husband conveyed his whole means and estate to the wife in case she should survive him, and failing her by decease either before or after him, to his lawful children surviving at the death of the longest liver of himself and the wife. On her part the wife conveyed her whole property, about £300, to the husband *de præsenti* and renounced her legal rights. The husband predeceased the wife, leaving only moveable estate. There were no children of the marriage, but the husband was survived by children by a previous marriage. The wife was confirmed executor-nominate, and entered on the possession and management of the husband's estate. **Held**, on her death, that the terms of the marriage contract imported a proper substitution in favour of the husband's children.

Dyer v Carruthers, 1874, 1 R. 943; 11 S.L.R. 539.

(960)

———**Destination over failing exercise by wife of power of disposal.**

A testator disposed his whole estate to his wife, and further provided "in the event of the said" wife "predeceasing me, or should I predecease her and she fail to exercise the power of disposal given her by this deed, then I direct my executor after-mentioned to realise the whole of my estate . . . above conveyed" and to pay certain specified legacies. The testator nominated an executor. He was survived by his wife. On the testator's death the executor took out confirmation and obtained possession of the testator's whole estate, which was entirely moveable. The widow died within six months after the testator without doing anything to dispose of his estate, which remained in the possession of the executor. **Held** that, on the death of the testator, the wife became absolute owner of the testator's estate, and that it passed on her death to her next of kin.

Bell's Executor v Borthwick, 1897, 24 R. 1120; 34 S.L.R. 838; 5 S.L.T. 123.

(961)

———**Substitution subject to condition—Destination over unless institute should execute writing declaring that subjects of gift should form part of institute's estate and should go to his own heirs.**

Reid v M'Phedran, 1881, 9 R. 80; 19 S.L.R. 51, No. 1187, *infra*.

(962)

———**Mutual settlement—Destination to surviving grantor, and on her death to H and M—Necessity for service to vest right in substitute.**

By mutual disposition and settlement two sisters disposed their whole estates, heritable and moveable, and specially the pro-

indiviso shares of certain subjects in which they stood infett, to each other and the longest liver, and on the death of the longest liver to their nieces, H and M, declaring that the survivor of the nieces should succeed to the share of her sister predeceasing without issue. M died before the last survivor of the granters, leaving a daughter J, who survived both the granters. **Held** that H and M were substitutes, and not conditional institutes, and that accordingly no right had vested in J without service.

Main v Lamb, 1880, 7 R. 688.

(963)

———**Gift of fee to survivor—Residue left at death of survivor to go equally to A and B.**

Davidson, 1870, 8 M. 807; 42 J. 458; 7 S.L.R. 498, No. 290, *supra*.

Garioch's Trustees v Garioch's Executors, 1917 S.C. 404; 54 S.L.R. 304; 1917, 1 S.L.T. 197, No. 291, *supra*.

(964)

———**Gift of fee to children—Direction to settle daughter's share for them in liferent and their issue in fee—Destination over on failure of issue.**

A testator provided that the residue of his estate should belong to his children equally, declaring that the shares of daughters should be alimentary and not affectable by their acts or deeds and not subject to the *jus mariti* of their husbands, and directing that the shares should be invested by the trustees "taking the writings thereof conceived in favour of my said daughters, to the extent of their interests respectively, in liferent for their liferent use allennarly, and to the child or children lawfully procreated or to be procreated of their bodies, in fee, share and share alike, and failing such child or children, then the same at their death to return in equal proportions to their unmarried sisters, if any, and failing thereof to the surviving married sisters in the like proportions, and in both cases in liferent, for their liferent use allennarly . . . and to the child or children lawfully procreated of their bodies, share and share alike, and failing thereof to their next of kin or assignees in fee." **Held** that each daughter took a fee a morte testatoris in her own share, defeasible only in the event of her having issue, and that all the branches of the destination after that in favour of the daughter and her issue were substitutions merely.

Logan's Trustees v Ellis, 1890, 17 R. 425; 27 S.L.R. 322.

3. DESTINATIONS TO HEIRS AND ASSIGNEES.

[See also VESTING III. 4.]

(965)

———**Bequest to A and his heirs and assignees—Predecease of A.**

A testator, on the narrative that he had

already provided for his daughter in her antenuptial contract, and that it was his wish to provide further for his wife in the event of her surviving him, disposed his whole means and estate in favour of his wife and "her heirs and assignees whomsoever." The wife predeceased the husband. **Held** that the conveyance of residue was intended to be contingent on the wife's survivance, and that her heirs were not named as conditional institutes. **Opinion** (per Lord President Inglis) that as a general rule, where there is a mortis causa disposition to a person, his heirs and assignees, failing the donee his heirs will take.

Findlay v Mackenzie, 1875, 2 R. 909; 12 S.L.R. 597.

(966)

A husband by disposition, on the narrative that it was a duty incumbent on him to settle his affairs in case of his death, and for the love, favour, and affection he bore to E, his wife, disposed to her, "her heirs, executors, and assignees whomsoever," certain heritable property specified, and also his whole other estate, heritable and moveable. The wife predeceased the husband without children. The husband married again and died without issue and without having altered the settlement. In a question between the first wife's heir at law and the husband's heir at law, **held** that the former was entitled to the heritable property as conditional institute.

Cleland v Allan, 1891, 18 R. 377; 28 S.L.R. 264.

(967)

A testator left his whole estate, heritable and moveable, to his wife and "her heirs, executors, and assignees whomsoever." The wife predeceased the testator. **Held** that the destination imported a conditional institution of the wife's heir, who was entitled to the estate in preference to the testator's heirs.

Duncan v Halkett, (O.H.) 1894, 2 S.L.T. 58.

(968)

———**Testator heir to institute—Bequest to testator's mother and mother's "heirs and assignees" whomsoever.**

An only child by mortis causa settlement left her whole estate to her mother, "M S, and her heirs and assignees whomsoever." The mother predeceased the child. **Held** that the settlement was ineffectual, the testator being herself her mother's heir.

Birnie v Simpson's Trustees, 1893, 20 R. 481; 30 S.L.R. 259.

(969)

A testator, by his trust settlement, directed his trustees to convey the residue of his estate to B H, "my youngest surviving daughter, and her heirs and assignees (the whole of the other members of my family having been already provided for by me)." Besides the daughter here named, there were alive of the truster's family at the date of the deed one son and a married daughter by his first marriage, and three married

daughters by his second marriage. The grantee in the above-mentioned provision having predeceased the truster, **held** that her heirs were entitled to the residue as conditional institutes.

Halliburton, 1884, 11 R. 979; 21 S.L.R. 686.

(970)

Provision or legacy—Daughter predeceasing testatrix without issue.

A widow died in 1903, having in 1870 executed a disposition and settlement, whereby "for the settlement of the succession to my means and estate after my decease," she assigned and disposed "to my daughter, Jessie, and her heirs and assignees whomsoever absolutely all and sundry the whole means and estate presently belonging or which shall belong to me at my decease," and she nominated Jessie to be her sole executrix, declaring "that the provision hereby made in favour of the said Jessie shall be exclusive always of the *jus mariti*," &c., of any husband of Jessie. The grantor then reserved her own liferent and dispensed with delivery. Jessie, who was her mother's only child, predeceased her mother and left no issue. Her mother was thus one of Jessie's heirs in *mobilibus ab intestata*. **Held** that the disposition in favour of Jessie and her heirs and assignees was not a provision which had lapsed in consequence of Jessie having predeceased her mother, but was a proper testamentary bequest, and that Jessie's heirs took as conditional institutes.

Macleod v Wilson, 1903, 6 F. 213; 41 S.L.R. 130; 11 S.L.T. 488.

(971)

Marriage contract — Antenuptial marriage contract.

A husband, by his antenuptial marriage contract, made certain provisions for his wife "if she shall survive him," and she on the other part conveyed to him "and his heirs and assignees whomsoever" the whole estate belonging to her at the date of the marriage, or that she might acquire during its subsistence, or that should belong to her at her death, with the exception of the marriage contract provisions in her favour. The marriage was dissolved by the death of the husband, and the wife subsequently acquired considerable funds, and then died intestate. **Held** that the conveyance by the wife in favour of her husband, and his heirs and assignees, was subject to the implied condition that he should survive her.

Russell's Trustees, 1887, 14 R. 849; 24 S.L.R. 610.

(972)

Marriage contract — Heirs and assignees, whom failing, to nearest heir.

In a marriage contract the father of the wife disposed a heritable estate to himself in liferent, for his liferent use alienarily, and to his daughter "and the heirs of her body, or her assignees and disponees, whom all failing," to the nearest heirs whomsoever of the disposer in fee. The daughter, who was an only child, died without disposing and without issue, and was survived by her

father. **Held** that, the father having survived his daughter, the destination to his heirs was ineffectual, and that there being no subsequent destination the succession devolved on him as his daughter's heir at law.

Todd v Mackenzie, 1874, 1 R. 1203; 11 S.L.R. 679.

(973)

Mutual settlement.

A husband and wife executed a mutual settlement, by which the husband, on his part gave, granted, assigned, and disposed to and in favour of his wife "in case she shall survive me, and to her heirs, executors, and assignees whomsoever," the whole estate of which he should die possessed, and in like manner the wife gave, granted, assigned, and disposed to and in favour of her husband, "in case he shall survive me, and to his heirs, executors, and assignees whomsoever," the whole estate of which she should die possessed. The husband predeceased the wife by a few days. The spouses left only moveable property. **Held**, on a construction of the whole deed, that the gift by the wife to her husband and his heirs, executors, and assignees whomsoever, was conditional upon his survivance of her, and that, as he had predeceased, the whole property left by the spouses fell to the wife's heirs in *mobilibus ab intestata*.

Baillie's Executor v Baillie, 1899, 1 F. 974; 36 S.L.R. 739; 7 S.L.T. 54.

(974)

A husband and wife executed a mutual settlement by which, "for the mutual love and affection which we bear to each other," the husband assigned and disposed to his wife, "in case she shall survive me, and to her heirs, executors, and assignees whomsoever," the whole estate of which he should die possessed, and the wife assigned and disposed to her husband, "in case he shall survive me, and to his heirs, executors, and assignees whomsoever," the whole estate of which she should die possessed. The spouses reserved power "to us and each of us during our joint lives to alter or revoke these presents." In exercise of this reserved power the husband made a will, in which, after providing for certain legacies, he bequeathed his whole moveable estate to his wife. The wife made no further testamentary disposition. The husband died first, and after the wife's death a question arose as to the destination of her property, which consisted solely of the estate which she had taken under her husband's will. **Held** that the bequest by the wife in the mutual settlement to her husband, and to his heirs, executors, and assignees, was conditional upon his survivance of her, and that, as he had predeceased, the destination did not take effect, and her property fell to her heirs in *mobilibus ab intestata*.

Garden's Executor v More, 1913 S.C. 285; 50 S.L.R. 249; 1912, 2 S.L.T. 482.

(975)

A mutual will executed by spouses contained the following provisions by the wife:—

"I . . . do hereby . . . dispo[n]e to and in favour of the said R L, my husband, in the event of his surviving me, and to his heirs, executors or assignees whomsoever, all and sundry my whole heritable and moveable means and estate." **Held** that it was not the wife's intention that the husband's heirs, executors or assignees should be conditional institutes, and that, the husband having predeceased the wife, the bequest lapsed.

Ferguson v Lord Advocate, (O.H.) 1906, 13 S.L.T. 724.

(976)

Heirs and assignees of wife—Antenuptial trust deed—Husband's rights under foreign law.

A domiciled Scotswoman, in contemplation of marriage, conveyed her whole means and estate to trustees for payment of the income to herself and of the fee to her children, and failing children, then for behoof of her own "heirs and assignees." She married a domiciled Australian, and died in Australia a few years afterwards without issue and without leaving any other writing disposing of her estate. It appeared from the opinion of Australian counsel that by Australian law the whole moveable estate of a wife predeceasing her husband intestate passed to the husband, but it did not appear that the husband was on that account regarded as an "heir" of his wife by the law of Australia. **Held** (1) that the wife had not died intestate, the destination to her "heirs" being an effectual conditional institution; and (2) that the husband was not entitled to the estate, in respect that he was not an "heir" of his wife either by the law of Scotland or by the law of Australia.

Brown's Trustees v Brown, 1890, 17 R. 1174; 27 S.L.R. 995.

4. CLAUSES OF RETURN OR OF DEVOLUTION.

(977)

Clause of return or substitution.

A, by her settlement, appointed B to be her sole executor and universal legatary under burden of a bequest of £4000 to be paid at the first term after her death to C, but declaring that if C "shall die without lawful issue, then the half of the said sum of £4000 shall return to and belong to" B and his heirs, with power to C to dispose of the other half as she might think proper. A was survived by both B and C, and the legacy was paid to C. **Held** that the provision in favour of B and his heirs was not a clause of return, but a simple substitution.

Buchanan's Trustees v Dalziel's Trustees, 1868, 6 M. 536; 40 J. 273; 5 S.L.R. 325.

(978)

Devolution on heir succeeding to a peerage—Validity—Construction.

A clause in a mortis causa disposition of heritage provided that each of the heirs who

should succeed to the lands should be obliged in all time to use the disponer's name and arms, and that "in case any of the said heirs shall succeed to a peerage, then, when the person so succeeding, or having right to succeed, to my said lands shall also succeed to a peerage, they shall be bound and obliged to denude themselves of all right" in the lands, and the same should devolve on the next heir. **Held** (1) that this clause was not void as against public policy; (2) that it was effectual, although not protected by the fetters of an entail; and (3) that it applied to, and excluded, an heir who, prior to the opening of the succession to the lands, had succeeded to a peerage.

Earl of Caithness v Sinclair, 1912 S.C. 79; 49 S.L.R. 29; 1911, 2 S.L.T. 368.

(979)

Condition excluding child succeeding to heritable estate of father—Heir-apparent predeceasing father—Second son succeeding—Divestiture.

By marriage contract estate belonging to the wife was settled on the children of the marriage in fee excluding the eldest child of the marriage in the event of his succeeding to certain estate from his father. The marriage was dissolved by the death of the wife, survived by four children. By deed of appointment she divided her estate equally among the children surviving the longest liver of the spouses, except the son succeeding to his father's estate, the issue of any child predeceasing taking their parent's share. The eldest son predeceased his father, leaving two daughters, and the second son succeeded to the father's estates. It was **held** that one-fourth of his mother's estate had vested in the second son on her death, but that it suffered defeasance on his succeeding to his father's estates.

Robertson, 1869, 7 M. 1114; 41 J. 621; 6 S.L.R. 709.

(980)

Destination to heirs-male of marriage other than heir-male succeeding to certain estate—Sale of estate before succession opens.

In a marriage contract the wife's father settled the estate of E on the heir-male of the marriage "other than the heir-male . . . succeeding" to the estates of W and B." Both W and B were sold before the succession opened. **Held** that the words the heir-male "other than the heir-male . . . succeeding" meant the heir-male of the marriage other than the heir-male contemplated by the marriage contract as entitled to succeed and that the elder son being the heir so contemplated was excluded from succeeding to E.

Livingstone v Waddell's Trustees, 1899, 1 F. 831; 36 S.L.R. 580; 6 S.L.T. 392.

(981)

Destination to children under exception of heir succeeding to an estate—Failure of heir to take.

By marriage contract the wife's father

provided certain funds which were ultimately to be divided equally among the children of the marriage, "with the exception of the heir succeeding to" a certain estate belonging to the husband. The son of the marriage survived his father by a few months, but although the father left him the estate the terms of the will were such that he died before taking a vested right in it. **Held** that he was not an "heir succeeding to" the estate within the meaning of the marriage contract.

Bell's Trustees v Bell, (O.H.) 1916, 2 S.L.T. 250.

(982)

Condition excluding the heir in heritage of each stirps—Effect where only one of a stirps.

A bequest of residue "to be equally divided among the children then alive of my brothers and sisters, equally per capita," contained the condition "but always secluding the eldest son of each family who may have succeeded to any heritable property of his father's." **Held** that this condition did not apply in the case of a brother or sister having only one child.

Yeats v Paton, 1880, 8 R. 171; 18 S.L.R. 116.

(983)

Heritage disposed to A in liferent and B in fee—Declaration that subjects to transmit to A if granter died before B attained twenty-five—Repugnancy.

Forsyth v Forsyth, 1901, 3 F. 929; 38 S.L.R. 668; 9 S.L.T. 88, No. 1258, *infra*.

5. CONJUNCT DESTINATIONS.

(1) TO SPOUSES.

(984)

Conjunct fee and liferent—Disposition by wife's father—Fee in wife.

A father, by an *inter vivos* deed, gratuitously disposed to himself in liferent for his liferent use allanarly, and to his daughter and her husband "in conjunct fee and liferent, and to the children" of the marriage equally share and share alike, "whom all failing, to the heirs and assignees whomsoever of the longest liver" of the spouses in fee, certain heritable property belonging to him. The husband was the longest liver of the spouses, and he was survived by children of the marriage. **Held** that the fee was in the wife *stante* *matrimonio*, and that no fee ever vested in the husband.

Brough v Adamson, 1887, 14 R. 858; 24 S.L.R. 616.

(985)

—To spouses and survivor in conjunct fee and liferent and issue in fee—Wife's property—Ultior destination to wife's heirs—Fee in wife.

By antenuptial marriage contract the wife conveyed her whole estate *acquisita* and *acquirenda* to the husband, herself, and the

survivor in conjunct fee and liferent, and to the children of the marriage and their issue in fee, whom failing, to the wife's nearest heirs and assignees in fee. Power was conferred on the spouses jointly during their joint lives, and on the survivor, to apportion the fund among the children. **Held** that *stante* *matrimonio* the fee of the fund was in the wife, subject to a liferent to the husband in the event of his survivance, and that the children had a *spes* *successionis* which could not be defeated by gratuitous deed.

Smith Cuninghame v Anstruther's Trustees; Mercer v Anstruther's Trustees, 1872, 10 M. (H.L.) 39; L.R., 2 H.L. Sc. 223; 44 J. 407; 9 S.L.R. 431.

(986)

—To spouses and survivor in conjunct fee and liferent for wife's liferent allanarly and issue in fee—Husband's property—Ultior destination to husband's heirs—Fee in husband.

By antenuptial marriage contract the husband bound himself to invest a sum of £4000, and to take the rights to himself and the wife and the survivor in conjunct fee and liferent for the wife's liferent use only, and to the children of the marriage and their issue in fee, whom failing, to the husband's heirs in fee. **Held** that the fee of £4000 was in the husband *stante* *matrimonio*, subject to a contingent liferent to the wife if she survived, and that the children had a *spes* *successionis* which could not be defeated by gratuitous deed.

Smith Cuninghame v Anstruther's Trustees; Mercer v Anstruther's Trustees, 1872, 10 M. (H.L.) 39; L.R., 2 H.L. Sc. 223; 44 J. 407; 9 S.L.R. 431.

(987)

—To spouses in conjunct fee and liferent for their liferent alimentary use allanarly—Fee in children.

By disposition a husband conveyed certain subjects "to and in favour of myself and my wife, and the longest liver of us, in conjunct fee and liferent, for our liferent alimentary use allanarly," and to the children of the marriage *nominatim* in fee. **Held** that the disposition conferred a fee on the children of the marriage, and that therefore the husband, who survived his wife, had no power to revoke the deed.

Bryson v Munro's Trustees, 1893, 20 R. 986; 30 S.L.R. 903.

(988)

—To spouses in conjunct fee and liferent, for liferent use of wife and to child in fee—Fee in husband.

In 1719 the lands of Blair were disposed to "William Dundas and Elizabeth Elphinstoun, spouses, and to the longest liver of them two in conjunct fee and liferent, for the liferent use of the said Elizabeth Elphinstoun, and to Richard Dundas, their eldest son, and the heirs-male lawfully to be pro-

creat of his body, which failzieing [to certain other persons] in fee." In 1720 infettment was taken on the disposition in favour of William Dundas and Elizabeth Elphinstoun, his spouse, and longest liver of them two, in conjunct fee and liferent for the said Elizabeth Elphinstoun, her liferent use, and the said Richard Dundas, their eldest son, in fee. **Held** that, notwithstanding the apparent intention to limit William's interest to a liferent and to give the fee to Richard, William was the fiar and Richard only a substitute, and that there was no warrant for infetting Richard in the fee, and that the title made up by the latter in 1720 was accordingly defective.

Millar v Marquess of Lansdowne, 1910 S.C. 618; 47 S.L.R. 498; 1910, 1 S.L.T. 224.

(989)

—To spouses in conjunct fee and liferent and longest liver and their heirs—Fee in survivor.

A husband bought heritable property, and took the title to himself and his wife "in conjunct fee and liferent, and to the longest liver of them and their heirs." **Held** that, on the husband's death, the property belonged solely to the wife, to the exclusion of the husband's heirs.

Knox v Knox's Trustees, (O.H.) 1905, 13 S.L.T. 406.

(990)

Conjunct fee—To spouses in conjunct fee, and to the survivor in fee.

A lease for ninety-nine years was assigned to spouses "in conjunct fee and to the survivor of them in fee." **Held** that the fee vested in the spouses jointly, with benefit of survivorship.

Walker v Galbraith, 1895, 23 R. 347; 33 S.L.R. 246; 3 S.L.T. 214.

(991)

—To spouses and the longest liver and their heirs and assignees.

A feu disposition was granted in favour of a husband and wife, "and the longest liver of them, and their heirs and assignees." **Held** that under this destination the fee belonged to the spouses and the survivor.

Wallace v Henderson, 1875, 2 R. 999.

(992)

Conjunct liferent — Conjunct liferent to spouses and survivors.

By a gratuitous disposition A disposed a house to B, his brother, and C, the wife of B, in conjunct liferent, and the survivor of them for their and the survivor's liferent, and to himself, A, and C and the survivor of them in fee. A died and C was sequestrated. C's trustee in bankruptcy claimed half of the rents of the house, whereupon B brought an action of declarator that the whole rents belonged to him. **Held** that B was entitled to no more than one-half of the rents.

Paull v Forbes, (O.H.) 1911, 1 S.L.T. 29.

(993)

—Conjunct liferent of fund to spouses — Husband dying before liferent opened to him—Wife entitled to liferent of whole fund.

Reid's Trustees v Reid, 1879, 6 R. 916; 16 S.L.R. 527, No. 716, supra.

(994)

—On widow's death to grandnieces and their husbands for their, her, or his liferent — Grandniece predeceasing widow.

A testator by his will gave his wife the liferent of his estate, with the fee to certain grandnieces and grandnephews. By a codicil he directed his trustees to pay the grandnieces' shares "to them and their respective husbands only in liferent for their, her, or his liferent allenerly." One of the grandnieces survived the testator but predeceased the widow. **Held** that the husband of the predeceasing grandniece (who survived the testator's widow) was entitled to the liferent of his wife's share of the estate.

Richardson v Macdougall, 1868, 6 M. (H.L.) 18; 40 J. 466; 5 S.L.R. 454.

(995)

—Accumulations.

By antenuptial marriage contract a wife conveyed the whole estate belonging to her or to which she might succeed during the subsistence of the marriage to trustees for the conjunct liferent of her husband and herself during the subsistence of the marriage. On the death of the wife there were accumulations of income on her estate. **Held** that one-half of these accumulations were payable to the wife's executors, subject to the husband's claim for *jus relict*.

Dick's Trustees v Baird, (O.H.) 1909, 1 S.L.T. 101.

(996)

Stock certificate in favour of husband and wife.

On the death of A there was found in his repositories a stock certificate in the following terms:—"This is to certify that" A and Mrs. A "are proprietors of two hundred 10 per cent. preference shares" of a Scottish railway company. **Held** that A and Mrs. A were each proprietors of one-half of the shares, and that on A's death, survived by Mrs. A, his share belonged to his representatives.

Connell's Trustees v Connell's Trustees, 1886, 13 R. 1175; 23 S.L.R. 857.

(997)

—English company.

On the death of A there was found in his repositories a stock certificate in the following terms:—"This is to certify that" A and Mrs. A "is the proprietor of" shares in an English company. **Held** that A and Mrs. A was each proprietor of one-half of the shares, and that, in virtue of the right of survivorship implied by English law, Mrs. A became entitled to the whole on the death of A.

Connell's Trustees v Connell's Trustees, 1886, 13 R. 1175; 23 S.L.R. 857.

(1998)

Assignment by harbour trustees in favour of husband and wife and survivor—Money advanced to trustees by husband—Assignment not delivered.

Walker's Executor v Walker, 1878, 5 R. 965; 15 S.L.R. 636, No. 1020, *infra*.

(2) To PARENTS AND CHILDREN.

[See FEE AND LIFERENT I. 4 (1).]

(3) To STRANGERS.

(1999)

"Jointly and severally"—Destination in share certificate.

Two sisters purchased shares in a railway company taking the title in their names "jointly and severally." Held that on the death of one sister the whole rights in the investment passed to the survivor.

Muir v Snodgrass' Executors, (O.H.) 1901, 9 S.L.T. 338.

(1000)

(1) To A and B in conjunct fee and life-rent and their heirs—(2) To A and B jointly and their heirs—(3) To A and B jointly and the survivor and their heirs.

Observed (per Lord Cowan, quoting Ersk. III., viii. 36) "Where an entail is made or any right conceived in favour of two strangers in conjunct fee and life-rent and their heirs, the two are equal fiars during their joint lives, as if they had contributed equally to the purchase; but after the death of the first the survivor has the life-rent of the whole, and after the survivor's death the fee divides equally between the heirs of both. If the right be taken to two jointly and their heirs, without any mention of life-rent, the conjunct fiars enjoy the subject equally while both are alive, . . . but on the death of the first neither the fee nor even the life-rent of his half accrues to the survivor, but descends to his own heir. . . ."

"In a right taken to two jointly and the longest liver and their heirs, the words 'their heirs' are understood to denote the heirs of the longest liver, and consequently although the several shares belonging to the conjunct fiars are affectable by their several creditors while both are alive, yet upon the death of any one of them the survivor has the fee of the whole, exclusive of the heirs of the predeceased—not only the fee of his own original share, but that of the share belonging to the predeceased in so far as it is not exhausted by his debts."

Paul v Home, 1872, 10 M. 937; 44 J. 519; 9 S.L.R. 594.

(1001)

To A and B jointly and to the survivor and his heirs—Power of predeceaser to revoke.

A testator died leaving a trust disposition and settlement by which he disposed of his whole means and estate, express reference being made to a superiority and certain bonds and dispositions in security. The superiority had been purchased, and

the sums contained in the bonds furnished, out of funds belonging to the testator's wife, and the destinations, inserted on her instructions, were, in the case of the superiority, to her husband and her son by a former marriage "jointly, and to the survivor of them, and his heirs," and, in the case of one of the bonds, to the husband and the son "jointly, and the survivor of them, and their or his executors or assignees whomsoever," and, in the case of the other bonds, to the husband and the son "or the survivor of them, and the executors of such survivor, and to their or his assignees whomsoever." Admittedly under the destinations one-half of the superiority and one-half of the sums contained in the bonds belonged to the son, who survived the testator. With regard to the other halves, held that the testator had no power to evacuate the destinations by his settlement; and that, accordingly, these halves passed to the son as the survivor in the destinations.

Renouf's Trustees v Haining, 1919 S.C. 497; 56 S.L.R. 440; 1919, 2 S.L.T. 15.

(1002)

Conjunct fee and life-rent—Destination to three sisters—Joint or several gift.

A widow who had purchased certain heritable subjects took the title thereto in favour of herself in life-rent, and after her death to her daughters Clara, Jane, and Mary, "in conjunct fee and life-rent, and to the heirs of their bodies, and to their assignees whomsoever, heritably and irredeemably," whom failing, to and in favour of her sons, Alexander and Charles, and their heirs and assignees whomsoever, but reserving always full power to herself at any time of her life to dispose of the subjects onerously or gratuitously, as fully as if she were absolute fiar of the same. Sasine was taken in favour of the various parties named for their respective rights of life-rent and fee. The mother died survived by her daughters Jane and Mary, and predeceased by her daughter Clara, who died unmarried. Held that under the destination Jane and Mary took each a one-third pro indiviso share only of the subjects, and that the one-third share which would have been taken by Clara had she survived her mother passed to Alexander and Charles as conditional institutes under the destination.

Johnston, 1899, 1 F. 720; 36 S.L.R. 529.

(1003)

Fiduciary fee.

Colville's Trustees v Marindin, 1908 S.C. 911; 45 S.L.R. 746; 16 S.L.T. 197.

Devlin v Lowrie, 1922 S.C. 255; 59 S.L.R. 209; 1922 S.L.T. 206. FEE AND LIFERENT, Nos. 53 and 54.

6. PROTECTED RIGHT OF SUCCESSION.

(1004)

Legacy to be settled on legatee and issue

—Power of disposal to legatee in case of no issue—Terms of investment.

A testatrix, in her trust settlement, directed the trustees "to pay" a legacy to a lady, "to be settled by my said trustees on herself and her issue, with power to her of disposal in case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband."

Held, at a date when the legatee was forty-two years of age and had been for several years married and had no children (1) that the legatee was not entitled to have the legacy paid to herself absolutely; and (2) that the trustees were bound to invest the money and to take the securities in the name of the legatee in fee, exclusive of the *ius mariti* of her husband, and after her death to any children she might have, also in fee, subject to the condition that the children's right of succession should not be defeated by any gratuitous act of the legatee, and failing children, to the heirs of the legatee, excluding those of her husband.

Massy v Scott's Trustees, 1872, 11 M. 173; 45 J. 127; 10 S.L.R. 111.

(1005)

Direction to convey residue to daughter and her children—Power of division to daughter—Jus mariti excluded—Provision declared alimentary, &c., to daughter.

A testator directed his trustees to retain the residue of his estate, heritable and moveable, till his only child, a daughter, should be married and a child born of the marriage, and upon a child being born to convey "to her and to the child or children of the marriage, or of any subsequent marriage, . . . equally among them, if she shall not otherwise appoint, but subject always to a power of division by her," and failing children of his daughter, then to the testator's nearest heirs and assignees; and he declared and directed that neither the annual proceeds nor the fee should be subject to the *ius mariti* or right of administration of the daughter's husband, or be subject to his or her debts or deeds, or the diligence of his or her creditors, "but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them." At the truster's death his daughter was married and had issue. **Held** (by a majority of seven judges) that the trustees were bound to convey to the daughter in fee, subject to the condition that the right of succession of her children should not be defeated by any gratuitous act.

Gibson's Trustees v Ross, 1877, 4 R. 1038; 14 S.L.R. 694.

(1006)

Direction to trustees to hold for daughter and issue.

Newall's Trustee v Inglis's Trustees, 1898, 25 R. 1176; 35 S.L.R. 908. *Fee and Liferent*, No. 95.

(1007)

Direction to invest nieces' shares—On marriage to be settled on themselves and their children—Substitution on death without children.

A testatrix left the residue of her estate to the children of her deceased brother J H, two-fifths to her five nephews, equally among them, and the remaining three-fifths to her four nieces, also equally among them. The nephews' shares were to be "at their own disposal" as they reached the age of twenty-one. But as to the nieces' shares, the testatrix provided—"My nieces' shares are to be invested on good security, and in the event of any of them being married to be settled on themselves and their children, . . . and in the event of any of my nieces dying after me without leaving any children the amount settled on her shall revert equally after her death to the remaining branches of the family of my deceased brother J H" equally among them, the children of such of them as may have died succeeding to their parents' share. **Held** that the absolute fee in their shares of residue vested in the nieces of the testatrix a *morte testatoris*, without restriction or qualification, negating the plea on behalf of a grandnephew that a protected succession was conferred on their children, and, failing children, on "the remaining branches of the family" of J H, and their issue.

Mitchell v Mitchell, 1877, 5 R. 154; 15 S.L.R. 102.

(1008)

Gift of fee—Destination over on death without issue—Evacuation of destination by institute.

A testator, in 1841, disposed his whole estates, including heritage, to his two sisters, Ann and Margaret. In 1842 he, by codicil, on the narrative that his sister Ann was at present provided for, in so far altered his disposition as to dispoise his whole property to his sister Margaret should Ann be still provided for at his death, but under condition that if Margaret should "marry or predecease my sister Ann, then, in the first case, she, Ann Lyon, shall receive the half, and in the second, the whole property, &c.; provided always that if both die without marrying, the property shall go in equal shares to my two brothers, George and David, or their heirs and successors." Both sisters survived the testator but died unmarried, Ann being the predeceaser, and Margaret leaving a settlement disposing, *inter alia*, of the whole heritable property of which she might die possessed. **Held** that an absolute and indefeasible fee in the heritable properties left by the testator was conferred on Margaret, with a simple destination in favour of the testator's brothers, George and David, their heirs and successors, which had been evacuated by Margaret's settlement.

Lyon v Lyon, 1888, 15 R. 394; 25 S.L.R. 293.

7. EVACUATION OF SPECIAL DESTINATION BY GENERAL DISPOSITION.

(1) DESTINATIONS MADE BY TESTATOR.

(1009)

Destination of heritage—Subsequent universal settlement — Implied revocation of destination.

In 1898 and 1902 A purchased with moneys belonging to himself certain heritable properties, taking the titles (which were registered), "to and in favour of the said A and B, wife of and residing with the said A, and to the survivor of them, and to their heirs and assignees whomsoever." A died in July, 1904, leaving a trust disposition and settlement, dated April, 1904, by which he conveyed to trustees his whole estate, heritable and moveable, including all means and estate over which he had power of disposal by will or otherwise. The purposes were to pay the liferent of the whole residue to his widow, burdened with an obligation to maintain and educate the children, and the fee to the children on the liferenter's death. Power was given to the trustees (1) to encroach upon capital if the income was insufficient for the maintenance of the widow and children, and (2) to sell and burden heritage. At his death the testator had personal estate of the value of £3337. The heritable properties above-mentioned were valued at £4900. The testator had no other heritable property. He was survived by a widow and by eight children, two in pupillarity and four in minority. **Held** that the settlement, read in the light of the circumstances, showed the testator's intention to evacuate the special destinations of the heritable properties, and that the settlement had this effect.

Morrison's Trustees v Morrison, 1905, 7 F. 810; 42 S.L.R. 640; 13 S.L.T. 174.

(1010)

By disposition executed in implement of a sale, certain lands were conveyed to the purchaser and his wife in conjunct fee and liferent and to their assignees, whom failing, to the children of the marriage equally. A house called Haymount was erected on part of these lands. The purchaser survived his wife, and died leaving a trust disposition and settlement (executed after the date of the disposition and sale), by which he conveyed his whole estate to trustees for certain purposes. He also provided—"I wish my family and their aunt, Miss J H, to reside together at Haymount," and directed his trustees to apply the income of his estate for the maintenance of his daughters and their aunt while residing together. The trust disposition and settlement contained no express revocation of prior testamentary writings. **Held** that, as the testator's desire that his family should occupy the house would be frustrated if the lands were divided among his children at his death in terms of the special destination contained in the prior disposition, the special destination must be

considered as impliedly revoked, and the lands dealt with as part of the general trust estate.

Henderson's Trustees, 1911 S.C. 525; 48 S.L.R. 424; 1911, 1 S.L.T. 109.

(1011)

Terms of a general settlement and averments of facts and circumstances which were **held** insufficient to displace the presumption that a general settlement does not evacuate a special destination taken by the testator. **Question**, whether, in considering whether a special destination had been evacuated by general disposition, it was competent to look at a revoked general disposition by which the special destination was evacuated.

Currie v M'Lennan, 1899, 1 F. 684; 36 S.L.R. 494.

(1012)

Circumstances in which it was **held** that the presumption that a subsequent general disposition does not evacuate a prior special destination taken by the testator had been overcome.

Minto's Trustees v Minto, 1898, 1 F. 62; 36 S.L.R. 50; 6 S.L.T. 177.

(1013)

Two ladies bought a house, and took the title in favour of themselves and the survivor and her heirs and assignees. The ladies subsequently granted a mutual settlement by which they disposed of their whole estate. The settlement contained bequests of legacies to an amount larger than the estate thereby conveyed unless the value of the house was included. **Held** that the special destination was not evacuated by the general settlement.

Fraser v MacKillican, (O.H.) 1905, 13 S.L.T. 81.

(1014)

Circumstances in which **held** that there was not sufficient indication of contrary intention to rebut the presumption that a special destination of heritable property is not evacuated by the general settlement of the person who made the destination.

Knox v Knox's Trustees, (O.H.) 1905, 13 S.L.T. 406.

(1015)

Destination in title to heritage—Settlement disposing property otherwise.

A mother purchased a hotel property with her own money, taking the disposition in favour of herself and her son and his heirs and assignees. The deed was never recorded, and remained in a cupboard in the bar parlour of the hotel, to which she and her son had access. Thereafter the mother died, leaving a trust settlement dealing with the property, the ultimate beneficiary under which was her grand-daughter. **Held** that the substitution of the son and his heirs contained in the disposition had been evacuated by the terms of the trust settlement, and that the trustees were the proprietors of the property.

M'Lurg's Trustees v M'Lurg's Trustees, (O.H.) 1894, 1 S.L.T. 581.

(1016)

Lease—Destination to heirs evacuated.

Terms of holograph trust deed which held to carry by implication right to the lease of a farm, and to evacuate the destination therein in favour of the tenant's heirs.

Hardy's Trustees, &c., 1871, 9 M. 736; 43 J. 406; 8 S.L.R. 499.

(1017)

Long lease — Destination evacuated by subsequent mutual settlement.

A long lease of heritage was assigned to D D and M D, his wife, "in conjunct fee, and to the survivor of them in fee, and at the death of the survivor to the heirs of the said D D and M D, equally between them." The spouses subsequently executed a mutual settlement, by which they conveyed to the survivor of them in liferent for his or her liferent use only, and at the death of the survivor to two sons of the wife by a former marriage, their whole heritable and moveable estate. At the date of the mutual settlement the spouses had no other property than the lease carried by the assignation. **Held** that the destination in the assignation to the heirs of the spouses was evacuated by the mutual settlement.

Walker v Galbraith, 1895, 23 R. 347; 33 S.L.R. 246; 3 S.L.T. 214.

(1018)

Destination in heritable bond evacuated by subsequent settlement.

Three sisters, J, E, and M, invested sums contributed equally by each on bonds and dispositions in security binding the debtors to repay the sums lent "to the said J, E, and M, and the survivors or last survivor of them, and to their or her executors or assignees whomsoever." J died in 1892, leaving a disposition and settlement, by which she revoked all former "dispositions and settlements" made by her, and conveyed her whole estate, heritable and moveable, to E. E died in 1896, leaving a trust disposition and settlement, by which she, without any express revocation of previous deeds, conveyed to trustees her whole estate, heritable and moveable, of every description, and directed them to pay legacies amounting to £1300 to her nephews and nieces, and legacies amounting to £500 to strangers. In a codicil she directed that, in the event of her funds being insufficient to pay all the legacies, the £1300 legacies should be paid in full. If no part of the sums invested on the bonds and dispositions in security was carried by E's settlement, her estate was less than half the amount of the preferable legacies provided by her settlement. If two-thirds of these sums were included, the preferable legacies could be paid in full, and a balance of £261 would be left for the other legacies. **Held** (1) that J's settlement was intended to convey, and did convey, her share of the invested funds to E, and (2) that E's settlement, having regard to the circumstances in which it was executed, was to be

held as conveying her own and J's share of the funds.

Brydon's Curator Bonis v Brydon's Trustees, 1898, 25 R. 708; 35 S.L.R. 545; 5 S.L.T. 355.

(1019)

Two sisters, who lived in family together and held their estates jointly, each being owner of a pro indiviso half thereof, executed a mutual trust disposition and settlement whereby they conveyed to trustees for the liferent of the survivor, and on her death for charitable purposes, their whole estates, heritable and moveable, owing and belonging to them at their respective deaths. On the death of the predeceasing sister the joint estate amounted to £8000, of which the sum of £5000 was contained in a bond and disposition in security (dated before, but recorded after, the date of the mutual settlement) in favour of the sisters, or the survivor of them, or the executors or assignees whomsoever of the survivor. **Held** that the destination in the bond and disposition in security was not evacuated by the mutual settlement, and conferred a right of fee on the surviving sister.

Lang's Trustees v Lang, 1885, 12 R. 1265; 22 S.L.R. 866.

(1020)

Destination in bond by harbour trustees.

A husband, having lent £500 to harbour trustees, took the assignation from them in the name of himself and his wife, "equally between them, and to the survivor of them, and to the heirs, executors, administrators, and assignees of the survivor." He afterwards executed a testament conveying his whole estate to an executor for division among his relatives, and giving his widow one-third of the whole. **Held** that the general disposition in the testament did not interfere with the special destination in the assignation, and that the widow was entitled to the £500, in addition to her share of the executry funds.

Walker's Executor v Walker, 1878, 5 R. 965; 15 S.L.R. 636.

(1021)

Destination in stock certificate.

A testator who died in February, 1884, left a trust disposition and settlement whereby he conveyed his whole estate to trustees, to be held for his wife in liferent, after her death for his children in liferent and for their issue in fee. The testator revoked all former settlements executed by him. In addition to £200,000 of moveable estate and valuable heritage, he left stock certificates, bonds, and certificates of debt of public trusts and public companies, some of which were prior, and others subsequent, in date to the trust disposition and settlement. Each of these documents was in favour of the testator and one of his children and the survivor. The children were all equally favoured as regards the number and value of the bonds, &c., thus appropriated to them. **Held** that the destinations in favour of the children in the stock certificates were operative as destina-

tions, and were not affected by the general settlement.

Connell's Trustees v Connell's Trustees, 1886, 13 R. 1175; 23 S.L.R. 857.

(1022)

A testator who had purchased shares took the certificates therefor in name of himself and his wife and the survivor. He left a trust disposition and settlement by which he, *inter alia*, granted a liferent of his estate in favour of his wife. **Held** that the shares did not form part of the trust estate.

Oliver v Oliver's Trustees, (O.H.) 1915, 2 S.L.T. 262.

(1023)

Clause expressly revoking deeds of settlement—Destination in moveable bond—General settlement.

Held that a will revoking all deeds of settlement, and declaring the testator's wish that her estate should go to her heirs whomsoever, was not to be construed as revoking the special destination in a moveable bond taken by the testator, although its effect was testamentary.

Paterson's Judicial Factor v Paterson's Trustees, 1897, 24 R. 499; 34 S.L.R. 376; 4 S.L.T. 313.

(1024)

Destination of heritage and in insurance policies—General clause of revocation.

Circumstances in which the presumption that general words of disposition in a mortis causa deed will not operate as a revocation of a special destination made by the testator himself was held to be redargued. **Question** (per Lord Kinnear) whether a general clause of revocation in a general settlement may not in itself afford ground for displacing the presumption.

Turnbull's Trustees v Robertson, 1911 S.C. 1288; 48 S.L.R. 1033; 1911, 2 S.L.T. 202.

(1025)

Special destinations in deeds prior and subsequent to general disposition.

By a trust disposition and settlement a testator revoked all settlements of a testamentary nature made by him "at any time heretofore," and conveyed the residue of his estate to trustees. The trustees were directed to pay the annual income thereof to the testator's widow, and in the event of the income being less than £156, to make up the balance so that the income should be of that amount, and, if necessary, to encroach for that purpose on capital. The testator died possessed of heritable securities and bonds of companies taken in favour of the testator and his wife or the survivor of them. Some of these were dated before and some after the date of the trust disposition and settlement, and one, the debenture of a company, had been taken before that date, but bore a minute of renewal of a date subsequent thereto. The securities and bonds were acquired with money belonging solely to the testa-

tor, and they formed substantially the whole of his moveable estate. Apart from these investments the testator's estate was not sufficient to produce an income of £156.

Held (1) that the destinations in the investments made before the date of the trust disposition and settlement were revoked, as otherwise the purposes of the trust disposition and settlement could not receive effect; (2) that the destinations in the investments made after the date of the trust disposition and settlement, being the last expression of the testator's will, were not revoked; and (3) that the debenture was to be regarded as an investment made before the date of the trust disposition and settlement, and therefore that the destination therein was revoked.

Perrett's Trustees v Perrett, 1909 S.C. 522; 46 S.L.R. 453; 1909, 1 S.L.T. 302.

(1026)

By his trust disposition and settlement a testator conveyed to trustees the whole means and estate which should belong to him at the time of his death, "including all means and estate held by me at my death under special destinations," and he revoked "all former testamentary writings made by me." Some time before the date of the trust disposition and settlement the testator had instructed his banker to invest a sum of money, belonging to himself, in National War Bonds in favour of his three children, to the extent of one-third each, to place the interest on the bonds to the credit of a current account kept in the joint names of himself and his wife, and to hold the bonds themselves for safe custody. The children were all in minority, and, as the requirements of the Bank of England would not permit of the bonds being registered in the names of the children alone, each block of bonds was, on the testator's instructions, taken in the names of his wife and one of his children, the application forms and a mandate requesting that the interest should be paid into the joint current account, being signed by his wife. The bonds were dated before the date of the trust disposition and settlement. Subsequently to the date of the trust disposition and settlement the testator invested further sums in War Loan Registered Stock in the names of each of his children, and he also invested two sums in the same stock, taking the titles in the names of himself and his wife, but without words of survivorship. **Held** (1) that the children had not acquired an irrevocable *jus quæsitum* in the National War Bonds, and that, as *ex concessu*, in these circumstances the destinations in the bonds were revoked by the clause of revocation in the trust disposition and settlement, the bonds formed part of the trust estate; and (2) that, in the case of the War Loan Registered Stock, the presumption in favour of the destinations in the titles receiving testamentary effect, arising from the fact that they were later in date than the trust disposition and settlement, had not been redargued, and, accordingly, that the stock standing in the names

of the testator's children belonged to the children, and that the stock standing in the names of the testator and his wife belonged to the extent of one-half to the trust estate, and to the extent of the other half to the testator's widow.

Drysdale's Trustees v Drysdale, 1922 S.C. 741; 59 S.L.R. 558; 1922 S.L.T. 556.

(1027)

A husband and wife, by mutual settlement, disposed the whole property which he or she might be entitled to at death in favour of the other spouse in *lifereit* and their children in fee. They subsequently executed a codicil, whereby the husband disposed certain heritable subjects which he had since acquired in the same terms as those of the mutual will; the codicil gave to the survivor power to make advances to the children, upon which interest was to be calculated "to the final division of the free capital or stock of our said means and estates under this settlement." Certain moveable investments were made after the date of the settlement in the name of the husband and wife and the survivor. Certain of these were of a later date than the date of the codicil; one of the latter was in the names of the husband and wife jointly. **Held** that all the investments fell to be dealt with under the mutual settlement, and that the wife's interest in them was limited to a *lifereit*.

Inland Revenue v Paterson's Executors, 1909, 46 S.L.R. 930; 1909, 2 S.L.T. 123.

(1028)

Destination in receipt, mortgage, and share certificate.

Circumstances where **held** that the trust settlement of a testator expressly revoking "all prior wills and testamentary writings," revoked the destinations in a receipt for a loan of money, seven mortgages and a share certificate.

Campbell v Campbell's Trustees, (O.H.) 1903, 11 S.L.T. 441.

(1029)

Circumstances where **held** that the general settlement of a testator did not evacuate the destinations in certain mortgages found in the deceased's repositories after his death.

Currie's Trustees v Currie, (O.H.) 1895, 3 S.L.T. 58.

(1030)

Insurance policy on life of wife—Payable to wife's heirs, executors, and assignees—Premiums paid by husband—Donation inter virum et uxorem.

A policy of insurance was effected by a husband on the life of his wife, payable to "her heirs, executors, or assignees," six months after her death. During his life the husband used the policy as a fund of credit to obtain advances from the insurance company, but these advances had been repaid prior to his death. By antenuptial marriage contract the wife had conveyed all *acquenda* during the subsistence of the marriage to the husband. By general mortis

causa settlement the husband conveyed his whole estate to trustees. The husband predeceased. **Held** that the policy, including right to bonus additions, was not carried by the husband's settlement, but belonged to the widow.

Thomson's Trustees v Thomson, 1879, 6 R. 1227; 16 S.L.R. 727.

(1031)

Destination subsequent to general disposition—Mutual disposition by spouses.

By mutual disposition spouses settled their respective estates on the survivor, reserving power to each to alter. Many years afterwards the husband acquired certain heritable subjects, and took the title to himself and his wife in conjunct fee and *lifereit*, for her *lifereit* use *alienarily*, and to his heirs and assignees whomsoever. He afterwards acquired other heritable subjects, the title to which he took to himself and his heirs and assignees whomsoever. In a question between the surviving wife and the husband's heirs, **opinions** (1) (per Lord Justice-Clerk Moncreiff and Lord Young) that the terms of the special destination of the heritable subjects first acquired by the husband altered and evacuated the mutual disposition so far as these subjects were concerned; and (2) (per Lord Justice-Clerk Moncreiff) that the special destination of the heritable subjects last acquired by the husband had the same effect.

Farquharson v Farquharson, &c., 1883, 10 R. 1253; 20 S.L.R. 836.

(1032)

A testator left a trust disposition and settlement by which he conveyed to trustees his whole estate, heritable and moveable, which should belong to him at the time of his death. Subsequent to the date of his settlement he purchased certain heritable subjects, and took the disposition in favour of himself and his assignees and disponees, whom failing to his sister and her heirs and assignees whomsoever. **Held** that the subjects belonged to the sister as heir of provision, and were not carried to the trustees by the general disposition in their favour.

Webster's Trustees v Webster, 1876, 4 R. 101; 14 S.L.R. 51.

(1033)

Heirs and assignees — General disposition.

A general disposition will carry subjects subsequently acquired by the granter, although the title be taken in favour of himself and his heirs and assignees whomsoever.

Philip v Philip, 1885, 13 R. 329; 23 S.L.R. 210.

(1034)

Special destination — Share certificate.

A husband and wife acquired shares in a limited company, the shares being registered and the share certificate bearing that the shares were transferred "to R L (the husband) . . . and J H or L, his wife, and

the survivor of them." Ten years prior to the acquisition of the shares the spouses had made a mutual will containing a different destination. **Held** that the destination in the share certificate prevailed over the destination in the will in respect of the presumptions (a) that a special destination is not evacuated by a general disposition in the absence of indications of contrary intention, and (b) that a later deed derogates from a prior deed.

Ferguson v Lord Advocate, (O.H.) 1906, 13 S.L.T. 724.

(2) DESTINATIONS MADE BY A THIRD PARTY.

(1035)

Destination made under contractual arrangement — Husband and wife — Destination to spouses jointly and survivor in fee.

The destination in a disposition of heritable property purchased by spouses, each paying one-half of the price, was taken in favour of them jointly and the survivor of them, and the heirs of the survivor and their assignees whomsoever. **Held** that on the death of one of the spouses, the survivor became under the destination sole fiar in the subjects, and that the terms of the destination could not be affected by the testamentary settlement of the predeceasing spouse.

Perrett's Trustees v Perrett, 1909 S.C. 522; 46 S.L.R. 453; 1909, 1 S.L.T. 302.

(1036)

Destination of heritage — Subsequent general disposition.

A testator held a heritable estate under a disposition granted by a third party with a special destination in favour of heirs substitute. **Held** that general words of disposition in the testator's mortis causa deed evacuated the special destination.

Campbell v Campbell, 1880, 7 R. (H.L.) 100; 5 App.Cas. 787; 17 S.L.R. 807.

(1037)

The estate of T was destined, under a disposition and settlement, to A and the heirs-male of his body, whom failing to B (brother of A) and the heirs-male of his body. A left a general settlement of his whole estate in favour of his two brothers, "but expressly excepting from this conveyance the lands of T to which I obtained right by" the trust disposition and settlement, "and which I wish to descend and transmit to" B "in terms of said trust disposition and settlement." **Held** that as the estate of T was excepted from the conveyance, B succeeded to it under the destination contained in the trust disposition and settlement.

Love's Trustees v Love, 1879, 7 R. 410; 17 S.L.R. 260.

(1038)

Destination in entail—Subsequent general settlement — Testator institute of entail and not bound by fetters — Admissibility of extrinsic evidence.

An institute under an entail (which had

been granted by the institute's father) to whom the fetters did not apply, made up titles and possessed until his death under the tailzie. He left a general disposition and settlement conveying his estates, heritable and moveable, to a natural daughter. **Held** (by a majority of the whole Court) that the general conveyance carried the entailed estate.

Opinions on the competency of a proof of facts and circumstances tending to show that the granter did not intend to include the entailed estate in the conveyance.

Thoms v Thoms, 1868, 6 M. 704; 40 J. 364; 5 S.L.R. 418.

(1039)

A lady in possession of an entailed estate, to which she had succeeded as institute, executed a disposition and settlement whereby she conveyed to her nephew her whole estates heritable and moveable, and in particular certain lands of which she was the fee simple proprietrix. After her death it was ascertained that the fettering clauses of the entail were directed merely against "the heirs of entail or substitutes," and that she was absolute fiar of the entailed estate. **Held** that as fiar she had power to dispose of the estate; but that the general conveyance in her settlement did not carry the entailed lands.

Observations (per Lord Chancellor Selborne) on the admissibility of extrinsic evidence by the law of Scotland in the construction of testamentary deeds.

Observed (per Lord Colonsay) that in dealing with such cases the Court has taken into consideration circumstances calculated to throw light on the intention or purpose of the testator, whether found within the deed or collected from external sources.

Question (per Lord Colonsay), whether a letter written by a testator after the date of his settlement may be referred to as extrinsic evidence in its construction.

Glendonwyn v Gordon, 1873, 11 M. (H.L.) 33; 45 J. 183; L.R., 2 H.L. Sc. 317; 10 S.L.R. 451.

(1040)

Testator heir of entail in possession under invalid entail.

An heir of entail in possession not only of the entailed estate but also of an estate held in fee-simple, left a general disposition and settlement conveying to trustees his fee-simple estate nominatim, as also his whole property, heritable and moveable. **Held**, assuming the entail to be invalid, that on a construction of the whole terms of the general disposition, and on a consideration of the actings of the testator, the general disposition was not intended to convey, and did not convey, the lands embraced in the entail.

Catton v Mackenzie, 1870, 8 M. 1049; 42 J. 618; 7 S.L.R. 687.

[Note.—On appeal the House of Lords decided the case on the ground that the entail was valid—1872, 10 M. (H.L.) 12; L.R., 2 H.L. Sc. 202; 44 J. 191; 9 S.L.R. 425.]

(1041)

Disentail followed by general disposition.

An heiress of entail in possession disentailed the estate, and two months afterwards executed a general trust disposition of all her property, heritable and moveable, containing very special directions for the administration of heritable estate. The purposes of the trust were payment of an annuity of £1000 to her second husband, of £4500 to the children of her second marriage, and for division of the residue among all her children, including her eldest son by her first marriage, the heir-apparent under the entail. At the date of this deed the granter had no heritable property other than the entailed estate, and she was very deeply in debt. **Held** that it was a question of intention whether the disentailed estate was included in the general conveyance, in ascertaining which the circumstances of the granter ought to be looked at, and that under the circumstances the intention to convey the estate must be presumed.

Gray v Gray's Trustees, 1878, 5 R. 820; 15 S.L.R. 571.

(1042)

Substitution in moveables—Marriage contract—Destination of husband's estate to wife with substitution in favour of his children—Husband survived by wife and by children of earlier marriages—General settlement by wife.

By an antenuptial contract of marriage the husband conveyed his whole means and estate to the wife, in case she should survive him, and failing her by decease either before or after him, to his lawful children surviving at the death of the longest liver of himself and his wife. The wife conveyed to the husband *de præsenti* her whole property, about £300, and renounced her legal rights. The husband predeceased the wife, leaving about £600, entirely moveable. There were no children of the marriage, but the husband was survived by children of two previous marriages. The widow was confirmed executrix nominate, and entered upon the possession and management of her husband's estate. **Held**, upon the death of the widow, (1) that the terms of the marriage contract imported a proper substitution; but (2) that the widow was entitled to alter and evacuate it gratuitously; and (3) that the substitution was evacuated by her general settlement.

Dyer v Carruthers, 1874, 1 R. 943; 11 S.L.R. 539.

(1043)

Money legacy—Legacy paid to legatee—General settlement by legatee.

A, by her settlement, appointed B to be her sole executor and universal legatary, under burden of a bequest of £4000 to be paid at the first term after her death to C, but declaring that if C "shall die without lawful issue, then the half of the said sum of £4000 shall return to and belong to" B, his heirs, successors, or assignees whomsoever, with power to C to dispose of the other

half of the £4000 as she might think proper. A was survived by both B and C, and the legacy was paid to C, who survived B and died without issue, leaving a general settlement conveying her whole property to trustees. **Held** that the provision in A's settlement in favour of B, his heirs, &c., was not a clause of return, but was simply a substitution which had been evacuated by C receiving payment of the whole of the money during her life, and disposing of it by her mortis causa settlement. **Opinion** (per Lord Curriehill) that even if part of the money had not been paid to C the substitution would have been evacuated by her settlement.

Buchanan's Trustees v Dalziel's Trustees, 1868, 6 M. 536; 40 J. 273; 5 S.L.R. 325.

(3) ADMISSIBILITY OF EXTRINSIC EVIDENCE.

[See X. 3, *supra*.]

XIV. CONDITIO SI INSTITUTUS SINE LIBERIS DECESSERIT.**1. GENERALLY.**

(1044)

Application to inter vivos deeds.

Question, whether the *conditio si* is applicable to an inter vivos deed.

Crichton's Trustee v Howat's Tutor, 1890, 18 R. 260; 23 S.L.R. 207.

(1045)

—Marriage contract.

Held that the *conditio si sine liberis* is applicable to provisions to children in marriage contracts.

Hughes v Edwardes, 1892, 19 R. (H.L.) 33; [1892] A.C. 583; 29 S.L.R. 911.

(1046)

A husband by antenuptial marriage contract made a provision in favour of the children of the marriage. The only child of the marriage predeceased the date of vesting, leaving issue who survived that date. **Held** that the issue were entitled to the provision.

Arthur and Seymour v Lamb, 1870, 8 M. 928; 42 J. 542; 7 S.L.R. 592.

(1047)

—Long lease containing destination.

Certain subjects were leased for 950 years to A P, "and his heirs as after mentioned," and failing him "then the whole subjects to and in liferent only to the present wife of the said A P . . . and after the death of the said spouses . . . then to the children of their marriage equally between them, share and share alike, in fee." A P was survived by his wife. Three children of their marriage were alive at the date of the lease, of whom two survived their father. **Held** that the right to the lease, subject to the widow's liferent, had vested on the death of the father in the two children then alive to the extent of one-half each, and that a

daughter of the third child who had predeceased that date had no right, as the *conditio si sine liberis* did not apply, the lease having been granted by a stranger to the family, and not as a parental provision.

Marquis v Prentice, 1896, 23 R. 595; 33 S.L.R. 415; 3 S.L.T. 314.

(1048)

Application to legacies — Provisions of legacies.

Opinions (per Lord Justice-Clerk Patton, Lord Cowan, and Lord Neaves) that the *conditio si sine liberis* applies only to provisions and not to simple legacies.

Opinion (per Lord Benholme) that in the case of every legacy by one in *loco parentis* to the legatee, there is a presumption that the *conditio* applies, but the presumption may be overcome.

Douglas's Executors, 1869, 7 M. 504; 41 J. 268; 6 S.L.R. 324.

(1049)

Specific legacy.

By her general trust disposition and settlement a testatrix, who had no children, but had three sets of nephews and nieces, directed her trustees, *inter alia*, to invest £2500 for behoof of her niece Christina Black in *liferent* and her children in fee, and failing such children to pay it as follows:—To her own nephew George Black £1000, to her niece Jane Black £750, and to her nephew Charles Boswell Black £750: "Declaring that if the said Christina Black shall predecease me the said sum of £2500 shall form part of the residue of my estate." The Blacks mentioned were 'the whole family of a sister of the testatrix. To each of the testatrix's nephews and nieces was bequeathed a share of the residue. Christina Black survived the testatrix and died without issue. Jane Black predeceased the testatrix, leaving a son, who survived the testatrix and Christina, the *liferentrix*. **Held** that the conditional bequest of £750 to Jane Black could not be regarded as a family provision, and therefore that the *conditio si institutus sine liberis* decederit did not apply.

Allan v Thomson's Trustees, 1908 S.C. 483; 45 S.L.R. 358; 15 S.L.T. 780.

(1050)

Pecuniary legacies—Bequest of residue.

A testatrix, by a universal trust disposition and settlement, in the fourth place, after bequeathing certain specific articles, left legacies of definite sums of money to each of all her nephews and nieces *nominatim*, with the exception of one niece, and also to other relatives, and to strangers, "all as mementos of me." The residue of the estate was directed to be divided equally among a brother-in-law of the testatrix and all her nephews and nieces *nominatim*. **Held** that the *conditio si institutus sine liberis* decederit did not apply to the legacies to nephews and nieces under the fourth purpose, but that it did apply to

the residuary bequest to the nephews and nieces.

Allan v Thomson's Trustees, 1893, 20 R. 733; 30 S.L.R. 654; 1 S.L.T. 40.

(1051)

Plate, pictures, &c.

The *conditio si sine liberis* decederit does not apply in the case of a bequest of silver plate, furniture, linen, books, &c.

M'Alpine, 1883, 10 R. 837; 20 S.L.R. 551.

(1052)

A mother bequeathed her plate and pictures to four children, *nominatim*. **Held** that the *conditio si sine liberis* was not implied.

Brown's Trustees, 1882, 10 R. 441; 20 S.L.R. 557.

(1053)

Isolated subject—Heritage.

Crichton's Trustee v Howat's Tutor, 1890, 18 R. 260; 23 S.L.R. 207, No. 1097, *infra*.

(1054)

Conditional institutes.

Question, whether the *conditio si sine liberis* can be implied in favour of the issue of a conditional institute.

Carter's Trustees v Carter, 1892, 19 R. 408; 29 S.L.R. 347.

Blair's Executors v Taylor, 1876, 3 R. 362; 13 S.L.R. 217.

(1055)

Testamentary trustees were directed on the death of the last of three *liferentrices* "to divide the whole estates and effects hereby conveyed, and to pay the free proceeds thereof among and to the whole of my sons and daughters that may then be in life, and failing any of them by death, to any child or children they may respectively have left, also in equal portions." All the testator's children predeceased the last *liferentrix*, three of them leaving issue, some of whom also predeceased the last *liferentrix*. The gift to the testator's grandchildren vested in them on survival of their parents. **Held** that where grandchildren had predeceased their parents their children took under the *conditio* the original shares which would have fallen to their parents.

Campbell's Trustee v Dick, 1915 S.C. 100; 52 S.L.R. 78; 1914, 2 S.L.T. 326.

(1056)

Class called as conditional institutes—Survivorship clause.

A testator directed his trustees to pay a share of the residue of his estate to a married sister, "whom failing, to her lawful children surviving at my death, equally among them." The sister predeceased the testator and one of her children also predeceased him leaving issue. **Held** that neither the fact that the sister's children were called only as conditional institutes, nor the fact that the bequest was limited to survivors, was sufficient to prevent the *conditio si institutus sine liberis* decederit from applying; and accordingly that the issue of the predeceasing

child of the testator's sister were entitled to their parent's share.

Greig's Trustees v Simpson, 1918 S.C. 321; 55 S.L.R. 284; 1918, 1 S.L.T. 139.

(1057)

Gift to surviving issue of conditional institute.

Under a direction failing daughters of the testator and their issue to make over a share to A, whom failing to his surviving issue, **held** that the *conditio* did not place grandchildren of A in the position of their predeceasing parents.

M'Donald's Trustees v Gordon, (O.H.) 1909, 2 S.L.T. 321.

Accreting shares — Right of children to participate under *conditio*.

[See XV. 5, *infra*.]

(1058)

Parent dead at date of will.

Where one member of a class which has been instituted to a bequest has died before the date of the settlement, the *conditio* will not apply in favour of the children of that member.

A testator died leaving a settlement in which he bequeathed a legacy "to the lawful children of my now deceased sister Mary." The residue of his estate he directed to be divided among his brothers and sisters by name, the children of his deceased sister Mary, and two nephews by name, sons of another deceased sister. The settlement was dated four months before the testator's death, and one of his sister Mary's children had died fifteen years previously leaving children. **Held** that these children were not entitled to any share of the legacy or of the residue bequeathed to Mary's children.

Morrison's Trustees v Macdonald, 1890, 18 R. 181; 28 S.L.R. 137.

(1059)

A testator directed one-half of the residue of his estate to be paid to "the families of my two sisters." Both sisters left children who survived the testator, but one of the children of the elder sister had predeceased the date at which the testament was made, leaving issue. **Held** that the issue did not take any part of the residue.

Low's Trustees v Whitworth, 1892, 19 R. 431; 29 S.L.R. 389.

(1060)

Opinion (per Lord McLaren) that where a *liferent* interest is given to children with a provision that the *liferent* interest of each child who is instituted is to pass to his or her descendants, the children of a child who has predeceased the date of the will will not be entitled to a share.

Downie's Trustees, 1901, 38 S.L.R. 755; 9 S.L.T. 142.

(1061)

Parent excluded by acceptance of special provision.

A testator by his trust disposition and settlement left the residue of his estate to

his sister and her husband in *liferent* and to those of their children who should be in life at the death of the survivor of their parents in fee. He also directed that certain farm leases should be made over to his sister and her husband successively in *liferent* and to such of her sons as his sister should appoint by any writing under her hand in fee. The testator further provided that the child who should succeed to the leases should be debarred from participating in any other portion of his estate. After the testator's death a family arrangement was made under which one of the sons of the testator's sister entered into possession of the farms, renouncing all right to any share in the residue. This son died in his mother's lifetime, thus predeceasing the date at which the residue of the estate vested in her children. **Held** that the son, having "succeeded to" the leases within the meaning of the settlement, was debarred from participating in the residue; and that, as he was thus excluded from being an institute with regard to the residue, his children could not claim any portion thereof under the *conditio si institutus sine liberis decesserit*.

M'Dougal's Trustee v Heinemann, 1918 S.C. (H.L.) 6; 55 S.L.R. 80; 1917, 2 S.L.T. 221.

(1062)

Vesting of children's right under *conditio* — Vesting in parent conditional on survival.

Marriage contract trustees were directed to hold the funds provided by the wife for her *liferent* use *allenerly*, and, should the husband survive her, then for his *liferent* use *allenerly*, and to hold the fee for behoof of the children of the marriage, under the declaration that the fee should not vest in them until the death of the wife. The wife survived her husband, and also survived her son, the only child of the marriage. The son had married and left issue. The son's issue claimed that the *conditio si sine liberis decesserit* applied, and that the fee of the funds, subject to their grandmother's *liferent*, had vested in them.

Held that the son's issue, claiming in virtue of the *conditio*, had no higher right than their father, and, as he could have taken no vested right during the lifetime of his mother, vesting had not taken place in them.

Dixon's Trustees v Duneher, 1918 S.C. 90; 55 S.L.R. 131; 1917, 2 S.L.T. 243.

2. RELATIONSHIP BETWEEN TESTATOR AND INSTITUTE.

(1063)

Descendants of testator.

Held that the *conditio* applied where the institutes were the great grandchildren of the testator. **Opinion** (per Lord Shand) that the *conditio* applies in favour of descendants of the testator in the direct line, however remote.

Grant v Brooke, 1882, 10 R. 92; 20 S.L.R. 69.

(1064)

Opinion (per Lord Cowan) that the *conditio si sine liberis*, when applicable, embraces all the descendants of the parties called to the succession towards whom the testator stands in *loco parentis*.

Irvine v Irvine, 1873, 11 M. 892; 45 J. 546; 10 S.L.R. 625.

[See also *Campbell's Trustee v Dick*, 1915 S.C. 100; 52 S.L.R. 78; 1914, 2 S.L.T. 326, per Lord Mackenzie, No. 1055, *supra*.]

(1065)

Illegitimate child.

Held that the *conditio si institutus sine liberis decesserit* did not apply to a legacy left by a mother to her illegitimate child.

Farquharson v Kelly, 1900, 2 F. 863; 37 S.L.R. 574; 7 S.L.T. 442.

(1066)

Children of brothers uterine.

Circumstances in which *conditio* applied.

Nicol v Nicol's Executor, 1876, 3 R. 374.

(1067)

Brothers and sisters of testator.

Held (by a majority of the whole Court) that the *conditio si institutus sine liberis decesserit* does not apply to provisions by a testator in favour of his brothers and sisters.

Hall v Hall, 1891, 18 R. 690; 28 S.L.R. 476.

(1068)

The estate of a widow fell to be distributed in terms of a mutual will executed by her and her husband. The will directed two-thirds "to be set aside for the relations of C T," the wife, "after named," and the remaining third for those of H B, the husband, "also after named;" and of the relations on the side of C T, Mrs. S, her sister, "and her children shall receive two-fifths of the sum set apart for them, and her brothers and their children the other three-fifths; of the relations on the side of the said H B, his sister, Jean, shall have two-fifths, and his brothers, David and George, and their children, the other three-fifths. In neither case are children to participate while the parent is alive." George was married at the date of the settlement; Jean was married shortly afterwards, and before H B's death; David not until long subsequently. By the terms of the deed the bequests did not vest until the death of the wife, who was the survivor of the spouses. Jean predeceased her, leaving a child. **Held** (1) that the *conditio si sine liberis decesserit* did not apply in favour of Jean's child; and (2) that the lapsed share neither reverted to the general fund for division nor to the portion appropriated to the husband's relatives, but fell to the heirs in *mobilibus* of the widow as intestate succession.

Berwick's Executor, 1885, 12 R. 565; 22 S.L.R. 357.

(1069)

A testator bequeathed his whole estate to his father, who predeceased him, whom failing to the testator's whole brothers and sisters *nominatim*. **Held** that the *conditio si*

sine liberis did not apply in favour of the issue of a brother who predeceased the testator.

Blair's Executors, &c. v Taylor, 1876, 3 R. 362; 13 S.L.R. 217.

3. WHETHER CONditio CONSISTENT WITH TERMS OF DEED.

(1) GENERALLY.

(1070)

Express conditional institution of issue to other legacies.

Where the terms of a testamentary deed showed that the testator had contemplated the contingency of legatees dying and leaving issue by making certain legacies payable to the issue of legatees in the event of their predecease, **held** that the *conditio si sine liberis* was not to be implied in the case of a legacy where he had made no such provision.

Carter's Trustees v Carter, 1892, 19 R. 408; 29 S.L.R. 347.

(1071)

A testator left the fee of the residue of his estate to his grandchildren, to be paid to them on the expiry of certain liferents and on the grandchildren respectively attaining majority. There was an express conditional institution of the children of any grandchildren who should predecease the testator. By another clause of the deed it was expressly declared that vesting should take place at the terms of payment. **Held** that the express conditional institution of children excluded the implied *conditio si sine liberis decesserit*.

Neville v Shepherd, 1895, 23 R. 351; 33 S.L.R. 248; 3 S.L.T. 226.

(1072)

Codicil referring to death of institute and revoking other legacies.

A mother in her settlement bequeathed one-third of her silver-plate to her daughter, M, and small keepsakes to M's daughters, and by a subsequent clause bequeathed to each of her children an equal share of residue. By a codicil, the testator, on the narrative of M's death, revoked the bequest of silver-plate, and directed it to be divided among the testator's family. **Held** that the *conditio si sine liberis* was to be implied in the settlement with regard to the bequest of residue, and was not displaced by the codicil.

Forrester's Trustees v Forrester, 1894, 21 R. 971; 31 S.L.R. 807; 2 S.L.T. 148.

(1073)

A testator left two legacies to a niece. The niece predeceased the testator, who thereupon revoked by codicil one of the legacies. In a question of the distribution of the testator's estate, **held** that the unrevoked legacy to the niece went to her children in virtue of the *conditio si sine liberis decesserit*.

Stewart's Trustees v Stewart, (O.H.) 1917, 2 S.L.T. 267.

(1074)

Testator aware of predecease of legatee when executing codicil.

A testator by his settlement left legacies of £100 each to his nephews and niece, A, B, C, and D. By a codicil he left "to the family of my nephew A," who had died between the date of the settlement and the codicil, £1200; to B, who survived the execution of the codicil, but predeceased the testator, £500; to C, who likewise survived the execution of the codicil, but predeceased the testator, £500 in liferent allenary and to her children in fee; and "to the family of the late" D, who died between the date of the settlement and codicil, £500 equally among them. **Held** that the *conditio si sine liberis decesserit* applied to the four legacies in the settlement.

Bryce's Trustee, 1878, 5 R. 722; 15 S.L.R. 412.

(1075)

Express disposal of share of institute.

A testator directed her trustees to pay a sum of money to A, to be held "in trust for behoof of the children procreated or to be procreated of the marriage between him and his present wife . . . to whom he shall account on the dissolution of the marriage equally between them, but with this qualification, that in the event of B or C (two of the said children) predeceasing said period, the survivor of them shall have a double share, as coming of room of such predeceaser." B predeceased the term of payment, leaving children. **Held** that the *conditio si institutus sine liberis decesserit* did not apply.

Robertson v Robertson, (O.H.) 1894, 1 S.L.T. 549.

(1076)

Legacy to daughter—Separate legacy to daughter's child.

Held that a legacy bequeathed by a testator to his daughter "for her own uses," and a legacy of £12,000 bequeathed "as a legacy to her over and above any sum or sums for which I may have become bound in the settlement to be executed with reference to her intended marriage," lapsed by her predeceasing the testator, and did not pass to her marriage contract trustees or to her only son, to whom a separate legacy of £10,000 was left by a codicil executed after his mother's death.

Douglas' Executors, 1869, 7 M. 504; 41 J. 268; 6 S.L.R. 324.

(1077)

Gift over to issue "left" by children—Right of issue predeceasing children.

Testamentary trustees were directed on the death of the last of three liferentrics, "to divide the whole estates and effects hereby conveyed, and to pay the free proceeds thereof among and to the whole of my sons and daughters that may then be in life, share and share alike, and failing any of them by death, to any child or children they may have respectively left, also in

equal portions." All the testator's children predeceased the last liferentrix, three of them leaving issue, some of whom also predeceased the last liferentrix. The gift to the testator's grandchildren vested in them on their survivance of their parents. **Held** that where grandchildren had predeceased their parents, their children took, by virtue of the *conditio si sine liberis*, the original shares which would have fallen to their parents.

Campbell's Trustee v Dick, 1915 S.C. 100; 52 S.L.R. 78; 1914, 2 S.L.T. 326.

(1078)

Gift to surviving residuary beneficiaries—Children of son included among residuary beneficiaries.

A testator directed his trustees to divide the residue of his estate into four shares; to pay one share to each of his sons William and Patrick, and to hold one of the remaining shares for behoof of the children of his son Henry, and to pay the same, share and share alike, to his children when they respectively attained majority or were married, the survivors being entitled, equally among them, to the shares of predeceasers. He directed the last share to be held for his daughter Agnes in alimentary liferent and her children in fee, and in the event of Agnes dying without issue the share that would have fallen to them was to "be divided amongst the surviving residuary beneficiaries above named equally." Agnes died without issue. One of the children of Henry predeceased Agnes, leaving a daughter J. **Held** that the *conditio* applied, and that J was entitled to participate in Agnes' share.

Taylor, 1884, 11 R. 423; 21 S.L.R. 298.

(1079)

Gift to grandchildren—Gift over in event of grandchild not leaving issue.

A person conveyed an estate to his son under burden of payment of a provision of £500, to be equally divided among the children of the granter's daughter, and payable six months after her death, with interest from the date of her death, to such of them as might then have attained majority, and to the others on their attaining majority; and declaring that if the daughter should die "without leaving any living child, then the said provision shall fall and belong to" the granter's son, "and his heirs and assignees." The daughter had two children, who predeceased her, but one of them left issue. **Held** that the provision did not vest in the daughter's children during her life, but that her grandchildren at her death were entitled to it in virtue of the *conditio si sine liberis decesserit*.

Halliday, &c., 1869, 8 M. 112; 42 J. 65; 7 S.L.R. 60.

(1080)

Gift to surviving children of grandchildren.

A testatrix directed that a certain sum should be vested in trustees for behoof of her two grandchildren, A and B, "or the

survivor in *liferent*, and to such of their children as may be in life at the death of the survivor, equally among them, and failing children, to my own nearest heirs in fee." A predeceased B without leaving issue. B had issue, of whom two daughters predeceased her, both leaving issue. **Held** that the *conditio si sine liberis* applied in favour of the issue of B's predeceasing children (the great-great-grandchildren of the testatrix), and that therefore they were entitled to participate in the succession to the extent to which their respective mothers would have participated, had they survived their mother.

Grant v Brooke, 1882, 10 R. 92; 20 S.L.R. 69.

(2) COLLATERAL RELATIONS.

(1081)

Whether testator "in loco parentis."

Per Lord President Inglis—"It is necessary to consider what is meant by placing themselves in *loco parentis*. It does not mean that the uncle has during his life occupied such a position, or treated his nephews and nieces with that kindness which a parent would show to his children; what is meant is, that in his settlement he has placed himself in a position like that of a parent toward the legatees—that is to say, that he has made a settlement in their favour similar to what a parent might have been presumed to make."

Bogie's Trustees v Christie, 1882, 9 R. 453; 19 S.L.R. 363.

(1082)

—Whole class of nephews and nieces not included.

A testatrix, in her trust disposition and settlement, directed her trustees to divide the whole of her estate "equally between the children of my late brother A and the children of my late sister B." No mention was made of the children of C, a deceased brother of the testatrix. **Held** that the testatrix had placed herself in *loco parentis* to the children of A and B, notwithstanding the omission of the children of C, that the *conditio si sine liberis* applied, and the children of a daughter of B, who predeceased the testatrix, were entitled to the share which would have fallen to their mother had she survived.

Bogie's Trustees v Christie, 1882, 9 R. 453; 19 S.L.R. 363.

(1083)

An aunt who had nine nephews and nieces and certain grand nephews and nieces, the children of a deceased niece, made a will in their favour. **Held** that in so doing she had placed herself in *loco parentis* to the beneficiaries to the effect that the *conditio si sine liberis* decederit applied to the provisions under the said will, and that notwithstanding one nephew was altogether excluded while of the others some got legacies only, some shares of residue only, and some both.

Weir v Young, (O.H.) 1897, 5 S.L.T. 233.

(1084)

Gift to children of sister.

A testator directed his trustees to hold one-half of the residue of his estate for one of his sisters in *liferent*, and on her death to pay the interest to her children equally until the majority of the youngest, when the capital was to be divided among them, or the survivors of them then alive. **Held** that in virtue of the implied *conditio si sine liberis* decederit, the issue of those children who survived the testator, but predeceased the *liferentrix*, were entitled *per stirpes* to the shares which would have fallen to their parents had they survived the term of payment.

Aitken's Trustees v Wright, 1871, 10 M. 275; 44 J. 164; 9 S.L.R. 180.

(1085)

Gift to children of brothers uterine.

Circumstances in which the *conditio si sine liberis* was applied to a bequest by a person to the children of his brothers uterine in respect of the terms of the testament.

Nicol v Nicol's Executor, 1876, 3 R. 374.

(1086)

Gift to children of sisters who might be alive at period of division.

A testator bequeathed to his only brother, who died without issue, the *liferent* of the residue of his estate, and directed that such residue should "after his death be divided equally among the lawful children of my living and deceased sisters who may be alive at the time, share and share alike, namely, the children of the late Mrs. P, the children of Mrs. G," &c. The whole children of his sisters survived the testator, but some of them predeceased the *liferenter* leaving issue. **Held** that the *conditio si sine liberis* decederit applied, and that the issue of the testator's nephews and nieces predeceasing the date of vesting were entitled to their parents' share of the residue of the estate.

Gauld's Trustees v Duncan, 1877, 4 R. 691; 14 S.L.R. 446.

(1087)

Gift to each of children of sister who should "be alive" at period of division.

A testator bequeathed £1000 "to each of the children" of a deceased sister who should "be alive" at the death of his wife, or of himself if the longest lived. He was survived by his wife and by all the legatees, but some of them predeceased the widow leaving issue. **Held** that the bequest being conditional upon the legatees surviving the widow, there was no room for the application of the *conditio si sine liberis* in favour of the issue of those who predeceased her.

McCall v Dennistoun, 1871, 10 M. 281; 44 J. 160; 9 S.L.R. 176.

(1088)

Gift to children of A "surviving at my death"—Class called as conditional institutes—Survivorship clause.

A testator directed his trustees to pay a share of the residue of his estate to a married sister, "whom failing, to her law-

ful children surviving at my death, equally among them." The sister predeceased the testator, and one of her children also predeceased him leaving issue. **Held** that neither the fact that the sister's children were called only as conditional institutes, nor the fact that the bequest was limited to survivors, was sufficient to prevent the *conditio si institutus sine liberis decesserit* from applying; and accordingly that the issue of the predeceasing child of the testator's sister were entitled to their parent's share.

Greig's Trustees v Simpson, 1918 S.C. 321; 55 S.L.R. 284; 1918, 1 S.L.T. 189.

(1089)

Gift to nephew or niece nominatim.

Held that the *conditio si sine liberis* applied to a legacy to a nephew, there being nothing in the settlement to show that the testator was moved to select his nephews and nieces as objects of his bounty by any other consideration than their relationship to him.

Waddell's Trustees v Waddell, 1896, 24 R. 189; 34 S.L.R. 142; 4 S.L.T. 176.

(1090)

Gift to nephew.

Two testators in their joint settlement directed their trustees to hold during the subsistence of a liferent a sixth share of the residue of their estate "for behoof of the daughters of our deceased sister . . . equally among them, or the issue of such as may predecease the survivor of us in fee, but failing daughters or their issue, then the sixth part or share shall belong to their surviving brothers, equally among them in fee." One of the nieces having died unmarried, and the other being married, the testators by a codicil directed the share of the one sister to be paid to her brother A, and the share of the other to her brother B. One of the brothers predeceased the surviving testator leaving a child. **Held** that the child was entitled to her father's share under the *conditio si sine liberis*.

MacGown's Trustees v Robertson, 1869, 8 M. 356; 42 J. 161; 7 S.L.R. 197.

(1091)

Gift to niece.

Circumstances where **held** that the *conditio si institutus sine liberis decesserit* did not apply in the case of a bequest by an uncle to a niece.

Johnstone's Executors v Johnstone, (O.H.) 1902, 10 S.L.T. 42.

(1092)

Gift to two nephews — Testatrix having eight nephews.

A testatrix left her whole estate to trustees for one sister, whom failing, another sister successively in liferent, the fee being destined equally between two nephews, one of whom predeceased the testatrix leaving children. Including these two nephews the testatrix had eight nephews and nieces. **Held** that the will was in the nature of a family settlement,

although the testatrix had exercised to some extent a *delectus personarum* and that the *conditio si sine liberis* applied.

Hare's Executor v Larken, (O.H.) 1905, 13 S.L.T. 519.

(1093)

Gift to nephews, nieces, and grandnieces.

Terms of a will making bequests in favour of nephews, nieces, and grandnieces of the testator on which **held** that the *conditio si institutus sine liberis decesserit* fell to be implied in favour of the children of one of the beneficiaries, a niece, who had predeceased the testator.

Keith's Trustees v Keith, (O.H.) 1908, 16 S.L.T. 390.

(1094)

Gift of heritage.

Circumstances under which **held** that the *conditio si institutus sine liberis decesserit* applied in the case of a bequest by an uncle to a nephew.

Hamilton v Hamilton's Trustee, (O.H.) 1902, 10 S.L.T. 463.

(1095)

Gift to children nominatim of nephew.

A testatrix bequeathed the liferent of her estate to her grandson A, with power to the trustees to make payments to him out of capital, and on his death the fee of the estate, or of so much as should remain, to A's issue, whom failing to one of her nephews W, whom failing to his two children X and Y, "and to the survivor of them, and failing both to my own nearest heirs and assignees whomsoever." A died without issue. W and his children predeceased A, but W's children were survived by issue. **Held** that the *conditio si sine liberis* did not apply.

Gillespie v Mercer, 1876, 3 R. 561; 13 S.L.R. 350.

(1096)

To niece and her children nominatim or survivors—Direct conveyance of heritage.

The granters of a *mortis causa* disposition disposed certain subjects "to C" (their niece), "D and E" (C's daughters), "or the survivor or survivors of them." D predeceased the granters leaving a daughter. C and E survived the granters. **Held** that the fee vested in C and E at the death of the last of the granters, as the survivors at that date of the three disponees, and that D's child had no claim under the *conditio si sine liberis*.

Chancellor v Mosman, 1872, 10 M. 995; 44 J. 557; 9 S.L.R. 646.

(1097)

Gift to nieces nominatim and survivors or survivor.

By *inter vivos* deed two sisters conveyed certain heritable subjects to themselves and another sister in liferent, and to their nieces nominatim, and the survivors or survivor of them, in fee, and infertment followed for these respective rights. One of the nieces having thereafter died without having altered the destination, her son

claimed a third of the fee, pleading the condition. **Held** that he was not entitled to it. *Crichton's Trustee v Howat's Tutor*, 1890, 18 R. 260; 28 S.L.R. 207.

XV. ACCRETION.

1. GENERAL RULE.

(1098)

When a legacy is given to a plurality of persons, named or sufficiently described for identification, "equally among them," or "in equal shares," or "share and share alike," or in any other language of the same import, there is (in the absence of expressions by the testator importing a contrary intention) no room for accretion in the event of the predecease of one or more of the legatees, and this, whether the gift is in *liferent* or in fee to the whole equally, or whether the subject of the gift be residue, or a sum of fixed amount, or corporeal moveables.

Paxton's Trustees v Cowie, 1886, 13 R. 1191; 23 S.L.R. 830.

(1099)

Observed (per Lord Kinnear) (with reference to the rule in *Paxton's Trustees v Cowie*)—"I rather think that in stating the condition that the persons favoured must be named or sufficiently described for identification, the Lord President meant individually named or identified. For he cannot have intended merely the condition common to all legacies and indispensable for their validity that the legatee must be capable of identification; and, on the other hand, the purpose of his statement was to distinguish between legacies of shares to individuals, and a legacy of a common fund to a class. But, however that may be, the rule is in my opinion, applicable only to cases where the testator's intention is to give a separate legacy, payable out of a certain fund to each of a plurality of persons."

Roberts' Trustees v Roberts, 1903, 5 F. 541; 40 S.L.R. 387; 10 S.L.T. 642.

(1100)

Class gift—Effect of vesting.

Observed (per Lord McLaren)—"It is settled that a bequest to persons as a class—e.g., to the children of A—is a joint bequest whether the children be named or not, and that nothing lapses by the predecease of one of the class, the legacy being divided among the survivors. An exception is admitted in the case where the testator has used such expressions as 'equally and proportionally' among them. But when the legacy vests, its joint character necessarily disappears, because it is then the right of each legatee to receive in money his proportional share of the subject of the gift."

Macpherson v Macpherson's Curator Bonis, 1894, 21 R. 386; 31 S.L.R. 271; 1 S.L.T. 449.

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2. ACCRETION IN GIFTS OF FEE.

(1) GIFTS TO PERSONS NAMED.

(1101)

Direction to pay and divide in certain proportions.

A testatrix directed her trustees to pay to each of three daughters, whom she named, the annual produce of one-third of the residue of her estate, and upon the death of each to pay, divide, and convey the principal of the one-third part of the residue so *liferented* "in the proportions following," viz.:—To four sons and another daughter (each of whom she named) "each two shares," and to a grand-daughter (also named) "one share," with a provision that, in the event of any of them dying before the period of payment leaving issue, such issue should take their parent's share. There then followed declarations that the interests of the residuary legatees should not vest until the terms of payment, and that the interests "conferred on or accruing" to females should belong to them exclusive of the *jus mariti*. There was no clause of survivorship. One of the *liferenters* having died predeceased by certain of the residuary legatees who left no issue, **held** (by a majority of seven judges) that the testatrix had made a series of separate bequests to individuals, and not a joint bequest, and that consequently the shares of the predeceasers did not accresce to the survivors, but fell into intestacy.

Cochrane's Trustees v Cochrane, 1914 S.C. 403; 51 S.L.R. 382; 1914, 1 S.L.T. 270.

(1102)

Direction to divide into shares.

A testator directed his trustees to hold the residue of his estate and to apply the same for behoof of his sister, Mrs. M'A, and her children, in manner following:—"That is to say, the said residue and remainder of my said estate shall be divided into eight equal parts or shares, and the said Mrs. M'A shall be entitled to one of said shares, and her children," two sons and two daughters *nominatim*, "shall each be entitled to one of said shares, and" two other daughters *nominatim* "shall be entitled equally between them to three of said shares." **Held** that the share set free by the death of one of the daughters who survived the testator but predeceased the date of vesting did not accresce to Mrs. M'A and the surviving children, but became intestate succession of the testator.

McLaren v McAlpine, 1907 S.C. 1192; 44 S.L.R. 900; 15 S.L.T. 238.

(1103)

Direction to divide equally.

A testator directed his trustees to divide his whole estate into two parts, and to divide one of these parts as follows:—"£200 to my late wife's sister Margaret; in the event of her predeceasing me, said sum of £200 to be paid to my sister Jane; the remaining portion to be equally divided between my late

wife's sisters Jane and Mary, my late wife's brother Robert, and my late wife's niece Jeannie." The testator was predeceased by Robert, but survived by Mary, Jane, and Jeannie. **Held** that Robert's share did not accresce to the shares of the survivors, but went to the heirs in mobilibus of the testator.

Paxton's Trustees v Cowie, 1886, 13 R. 1191; 23 S.L.R. 830.

(1104)

———**Specific legacy.**

Where "plate and pictures" were left to be "equally divided," among the testator's daughter and her brothers Robert, Samuel, and William, **held** that the share of a legatee predeceasing the testator did not accresce to the survivors, but fell into residue.

Brown's Trustees, 1882, 10 R. 441; 20 S.L.R. 557.

(1105)

Disposition to children—Equally among them, share and share alike.

A testatrix disposed her whole estate to her children, A, B, C, and D, "equally among them, share and share alike." The disposition contained no clause of survivorship. Certain of the children predeceased the testatrix without issue. **Held** that the gift to the children was several and not joint, and that no accretion took place.

Farquharson v Kelly, 1900, 2 F. 863; 37 S.L.R. 574; 7 S.L.T. 442.

(1106)

Gift of residue to children equally—Daughters restricted to liferent—Disposal of daughter's share.

A testator directed his trustees to hold the residue of his estate "in trust for behoof of such of my children as shall survive me . . . equally, share and share alike, subject to the conditions following, viz.:— . . . In the case of my daughters, I direct my trustees to retain and hold their shares, original and accrescing, for their liferent alimentary use allenarly . . . and for the issue of their bodies, equally among such issue in fee . . ." Power was given to the trustees to make advances to any daughter out of the capital liferented by her. A daughter who survived the testator died unmarried and intestate. **Held** (1) that the share of residue of the testator's estate liferented by the daughter did not accresce to the remaining residuary legatees, but fell to the testator's heirs ab intestato.

MacGregor's Trustees v MacGregor, 1909 S.C. 362; 46 S.L.R. 296; 1909, 1 S.L.T. 73.

(1107)

Gift of one share of residue to A and of another to B.

Two testators who by joint settlement had bequeathed a share of the residue of their estate, on the expiry of a liferent, for behoof of their nieces equally among them, directed by codicil that their niece S's share should be paid to her brother G, and that their niece R's share should be paid to her brother A. G predeceased the survivor of the two

testators, leaving a child. **Held** that his share did not accresce to A.

MacGown's Trustees v Robertson, 1869, 8 M. 356; 42 J. 161; 7 S.L.R. 197.

(1108)

Direction to deliver to A and B—Specific legacy.

A testator directed his trustees, upon his son William attaining the age of thirty, to deliver over "to my sons William and Robert" the stock and cropping on two farms. The two sons survived their father, but William died before attaining the age of thirty. **Held** (1) that the gift to William was conditional on his attaining the age of thirty, but that the gift to Robert was not conditional on William attaining that age; (2) that the gift was not a joint gift; and, consequently (3) that one-half of the stock and cropping fell to be delivered to Robert, and that the remaining half fell into residue.

Graham's Trustees v Graham, 1899, 2 F. 232; 37 S.L.R. 163; 7 S.L.T. 283.

(1109)

Destination of heritage to A, B, and C in conjunct fee and liferent, and to the heirs of their bodies.

A widow who had purchased heritable subjects took the title to herself in liferent, and, after her death, to her daughters Clara, Jane, and Mary "in conjunct fee and liferent, and to the heirs of their bodies, and to their assignees whomsoever," whom failing, to her sons Alexander and Charles. The widow reserved full power to dispose of the subjects as if she were absolute fiar. Sasine was taken in favour of the various parties named for their respective rights of liferent and fee. Jane and Mary survived their mother, but Clara predeceased her unmarried. **Held** that the share which Clara would have taken had she survived her mother did not accresce to Jane and Mary, but passed to Alexander and Charles under the destination.

Johnston, 1899, 1 F. 720; 36 S.L.R. 529.

(1110)

Gift to A and B in liferent and their issue equally among them in fee—Accretion as between families of A and B—Direct disposition of heritage.

The proprietor of certain lands died in 1837, leaving a mortis causa disposition of these lands to and in favour of his sons William and Alexander "equally between them, and failing either of them without lawful issue, to the survivor of them, the lawful issue of the predeceaser always coming in place of their parent, in liferent, and for their liferent use allenarly, and to their lawful children equally among them, share and share alike, in fee." The granter was survived by his sons William and Alexander, who were respectively his second and third sons. Alexander died in 1891 without having had issue. He was predeceased by his brother William, and also by all William's children, but was survived by several grandchildren of William. **Held** that Alexander had under the disposition a liferent

allenarly in one-half of the subjects thereby conveyed, together with a fiduciary fee thereof for his own children, and that on his death without issue the fee of that share was in effect undisposed of, and belonged to the heir at law of the granter of the disposition.

Tristram v M'Haffies, 1894, 22 R. 121; 32 S.L.R. 114; 2 S.L.T. 334.

(1111)

Stock certificates in favour of spouses—Scottish companies—English companies.

Bonds and stock certificates in favour of two spouses without a clause of survivorship belong to them jointly, so that each is proprietor of one-half, and on the death of either his or her share passes to his or her representatives. But similar documents of English companies, belong, on the death of one of the spouses, to the survivor solely, in respect of the right of survivorship presumed by English law.

Connell's Trustees v Connell's Trustees, 1886, 13 R. 1175; 23 S.L.R. 857.

(1112)

Bequest to A for behoof of herself and B.

A testator bequeathed the residue of her estate to A for behoof of herself and B. The bequest vested a morte testatoris. **Held** that this was not a joint bequest, but a bequest in severalty, and that on the death of A or B the predeceaser's share would not accresce to the survivor.

Macpherson v Macpherson's Curator Bonis, 1894, 21 R. 386; 31 S.L.R. 271; 1 S.L.T. 449.

(1113)

Apportionment to children equally among them—Marriage contract provision to children of former marriage—One child predeceasing date of vesting.

By antenuptial marriage contract the husband directed the trustees to pay the income of a certain fund to his widow, and to pay the capital to the children of his former marriage. The vesting of the children's right was suspended until the death of the widow, and a power of apportionment was reserved to the spouses. By deed of apportionment the spouses apportioned the fund, except £10, to the children of the former marriage except I, and they apportioned the sum of £10 to I. There were at that date three children of the former marriage in existence, I, J, and R. R predeceased the date of vesting. **Held** that under the deed of apportionment the share which R would have taken on survivorship did not accresce to J, but that it fell to be equally divided between I and J under the marriage contract.

Stirling's Trustees v Stirling, 1898, 1 F. 215; 36 S.L.R. 194; 6 S.L.T. 223.

(2) CLASS GIFTS.

(1114)

Sons born or to be born—Reference to a son's "third share."

A testator by his second codicil directed

the trustees under his settlement, "upon the youngest of my sons now born or that may be born to me reaching the age of twenty-one years, to convey and make over to them, equally among them," certain heritable estate belonging to the testator. By his third codicil the testator declared with reference to the above bequest that his eldest son, after reaching twenty-five, should be entitled to "his third share of the rents" of the heritable property in question. The testator was survived by three sons. The youngest died before reaching twenty-one, but after his immediate elder brother had attained majority and his eldest brother the age of twenty-five. **Held** (1) that the direction in the second codicil was to be construed as a joint bequest to a class to be ascertained at the period of payment, and that this construction was not displaced by the description in the third codicil of the eldest son's interest in the subject of the bequest as a "third share"; (2) that on the death of the youngest brother before reaching majority, his surviving brothers took his share by accretion; and (3) that their shares original and accresced vested in them on the death of their younger brother.

Roberts' Trustees v Roberts, 1903, 5 F. 541; 40 S.L.R. 387; 10 S.L.T. 642.

(1115)

Brothers and sisters of A—Destination over to issue—No survivorship clause.

White's Trustees v Chrystal's Trustees, 1893, 20 R. 460; 30 S.L.R. 463, No. 1138, *infra*.

(1116)

Members of class also mentioned by name.

A testatrix in her settlement made the following bequest:—"To the grandchildren of my brother, William Menzies, who are" (then followed the names and addresses of the grandchildren, who were all resident abroad) "the sum of £2000, equally among them, share and share alike." The testatrix also left a legacy of £330 to the only daughter of a nephew, and one of £670 to the two sons nominatim of a niece, daughter of her brother, Kenneth Menzies, equally between them, and to the survivor. She further directed that a sum of £3000 Consols, over which she had a power of appointment, should be applied in paying the legacies of £2000 and £1000 "bequeathed to the grandchildren of William Menzies and the grandchildren of Kenneth Menzies." **Held** that the legacy to the grandchildren of William Menzies was a joint bequest, and therefore that the share of a grandchild who predeceased the testatrix accresced to the survivors.

Menzies' Factor v Menzies, 1898, 1 F. 128; 36 S.L.R. 116; 6 S.L.T. 225.

(1117)

A testator bequeathed his whole estate to his father, whom failing, to A, B, C, D, E, F, and G, his whole brothers and sisters, equally among them, share and share alike. The testator was predeceased by his father and by two of his brothers. **Held** that the

shares of the predeceasing brothers accresced to the survivors.

Blair's Executors v Taylor, 1876, 3 R. 362; 13 S.L.R. 217.

(1118)

Gift to three children named and "any other children I may leave."

A testator directed his trustees, upon the death of the liferenter, to hold the free residue of his estate for three named children, and "any other child or children I may leave, equally among them, share and share alike." Vesting was postponed till the death of the liferenter. A posthumous child and two of the named children survived the liferenter, while the other named child predeceased her. **Held** that the residue fell to be divided equally among the three surviving children, and that the share destined to the deceased child did not fall into intestacy.

Warden's Factor v Warden, (O.H.) 1905, 12 S.L.T. 670.

(1119)

Gift to sons named and all daughters.

A testator by his trust settlement bequeathed the residue of his estate on the death of a liferentrix to his three sons (named) and "all my daughters, equally among them and the survivors and survivor of them, share and share alike; the issue, however, of such of them as may predecease always succeeding equally among them to their respective parent's share." The trustees were directed to hold the shares of the daughters for them in liferent for their respective liferent alimentary uses and their issue in fee. A daughter survived the date of death of the liferentrix, which was held to be the date of vesting, but died unmarried. **Held** that the daughter's share did not fall into intestacy, but was carried by the residuary clause.

Collins' Trustees v Collins, (O.H.) 1910, 2 S.L.T. 193.

(1120)

Gift of residue to nine persons named and issue of predeceasers—Gift confined to survivors of residuary legatees.

Sword's Trustees v Main, 1902, 4 F. 1005; 39 S.L.R. 846; 10 S.L.T. 209. VESTING, No. 44.

(1121)

Gift equally among children of A—Daughters' shares to be set apart on their attaining twenty-five and held for them in liferent and their issue in fee—Daughter surviving testator but dying a minor and unmarried.

A testator directed his trustees to hold the whole residue of his moveable estate "for behoof of and equally among the children" of his only child, W C M. The shares of sons were made payable to them on attaining the age of twenty-five, while daughters' shares, on their respectively attaining that age or being married, were to be set apart and held for the daughters in liferent and their children in fee. There was a clause of survivorship in the event of any son of W C M dying without issue before the period of payment, but there was no such clause with reference to daughters' shares. At the date of the

testator's death W C M had two sons and four daughters, and two daughters were born after that date. The second daughter survived the testator, but died intestate and unmarried before attaining the age of twenty-five. **Held** that the fee of the daughter's share had not vested in her, and that it was not intestate succession of the testator, but that it fell to be divided among the other children of W C M as part of the residue of the testator's estate.

Muir's Trustees v Muir, 1889, 16 R. 954; 26 S.L.R. 672.

(1122)

Gift to nieces and survivors in liferent and their children in fee—Niece dying without children—Another niece dying leaving children—Accretion as between families of children.

Strachan's Trustees v Williamson, 1889, 16 R. 735; 26 S.L.R. 570. FEE AND LIFE-RENT, No. 82.

(1123)

Gift to trustees.

A testator conveyed his whole means and estate to A, B, C and D "and to the acceptors or acceptor, survivor or survivors of them to be my trustees." He then directed "my said trustees" to pay the income to his sister, and on her death "I direct my said trustees, the said" A, B, C and D (naming them) "to divide the free residue or remainder of my said means and estate equally amongst themselves." In the event of "any of my said trustees" dying before the residue became payable there was a destination over to "their several heirs, executors, and successors." A predeceased the testator, and accordingly neither he nor his heirs were entitled to a share of the fund. The three survivors accepted the trust. **Held** that the whole residue fell to be divided among the three accepting trustees, and that no part of it fell into intestacy.

Mellis' Trustees v Legge's Executrix, 1898, 25 R. 954; 35 S.L.R. 763.

3. ACCRETION IN GIFTS OF LIFE-RENT, &c.

[See FEE AND LIFE-RENT IV.]

4. CLAUSE OF SURVIVORSHIP.

[See VESTING II.]

5. CHILDREN COMING IN PLACE OF PARENTS.

(1124)

Express provision—*Conditio si sine liberis*.

Where, by express provision, or by the operation of the *conditio si sine liberis decesserit*, children of a predeceasing legatee take their parent's share, that share is merely the original share provided to the parent, and does not cover part of a legacy, which by virtue of another clause in the deed would have accrued, on the failure

of the person first instituted to it, to the parent, if he or she had survived.

Henderson v Henderson, 1890, 17 R. 293; 27 S.L.R. 247.

(1125)

Distinction between implied conditio and express conditional institution of issue.

Observed (per Lord M'Laren)—“It is settled as matter of legal implication, as distinguished from construction, that a child under the conditio never takes more than what is described as the parent's original share, that is the share which the parent would take supposing every one in the destination to survive the period of payment. . . . When, on the contrary, the substitution is contained in a will or deed the language used in the deed determines the extent of the right of the substituted legatee.”

Neville v Shepherd, 1895, 23 R. 351; 33 S.L.R. 248; 3 S.L.T. 226.

(1126)

Lapsed shares.

Opinions that where a beneficiary under a settlement has predeceased the testator or the term of vesting his issue are not entitled in virtue of the conditio si sine liberis decesserit to participate in a lapsed share which would have accresced to the parent had he survived.

Graham's Trustee v Graham, 1868, 6 M. 820; 40 J. 452; 5 S.L.R. 402.

(1127)

Survivorship clause—Conditional institution of issue.

A testator directed his trustees to pay one-sixth of the residue of his estate to A, B, C, D and E, the children of his sister X, and to F, the child of his sister Y. The testator further provided that the issue of nephews and nieces who predeceased him should have right to the share which would have fallen to their parent had he survived, and that in the event of any of the children of X predeceasing him without leaving issue the share provided to the decessor should be divided equally among his brothers and sisters. A predeceased the testator, leaving issue who survived; B also predeceased, leaving no issue who survived the testator. **Held** that the issue of A were entitled only to the share originally destined to their parent, and were not entitled to any part of the share originally destined to B.

Henderson v Henderson, 1890, 17 R. 293; 27 S.L.R. 247.

(1128)

A testator by his trust disposition and settlement directed his trustees after the death of his wife to hold the residue of his heritable property in trust for the liferent use of his three children, A, B and C, “equally between them, share and share alike,” declaring that “on the death of any of my said children without leaving lawful issue, the whole foresaid several provisions,

in so far as not paid over, such children so dying without leaving lawful issue, shall be wholly paid to my surviving child or children equally between them, share and share alike.” **Held** that the liferent formerly enjoyed by a deceased child did not accresce to a surviving child.

Reid's Trustees v Reid, (O.H.) 1903, 11 S.L.T. 139.

(1129)

Conditional institution of issue—Issue to take in the same manner and as fully as if parent had survived.

A testator directed her trustees to hold the residue of her estate in trust for behoof of her grandniece, Janet, and she directed the trustees to apply the annual proceeds for the benefit of Janet during her lifetime, with fee to her lawful children. She declared that in the event of Janet dying without lawful children, the whole residue provided to her should belong to Janet's sister and four brothers, nominatim, “equally” amongst them; and in the event of any of them dying without leaving lawful issue the share of the predeceaser should “go to and be equally divided among the survivors,” but should the predeceaser leave issue, “then such issue shall be entitled to succeed to their parent's share equally among them, in the same manner and as fully as if such parent had survived.” Janet, her sister, and brothers all survived the testator. Janet died unmarried, being predeceased by one brother who left no issue, and by two brothers who left issue. Until the death of the liferentrix no share of residue vested in her brothers or sister. **Held** that the share of the brother who left no issue fell to the brother and sister who survived the liferentrix, and that the issue of predeceasing brothers were not entitled to any part thereof.

Cumming's Trustees v White, 1893, 20 R. 454; 30 S.L.R. 459.

(1130)

Conditional institution of issue—Legatees predeceasing date of payment without issue.

A testator bequeathed certain subjects to his four daughters nominatim, the subjects or the price thereof to be divided equally among them upon the youngest attaining majority. He also provided that in the event of any of the daughters predeceasing the period of payment without issue her share should fall to her surviving sisters equally among them, but if the predeceaser left issue, such issue were to be “entitled to the share of their mother as if she had been in life.” Two daughters survived the testator, but predeceased the period of payment, the first decessor leaving issue, but the second being childless. **Held** that the issue of the predeceasing daughter were not entitled to participate in the share of the daughter who had died without issue.

M'Nish v Donald's Trustees, 1879, 7 R. 96; 17 S.L.R. 25.

(1131)

Survivorship clause as to both original and accreting shares on failure of issue.

By her trust settlement a testator provided as follows:—"Declaring that in case any of my said nephews and nieces shall predecease the term of payment (the death of a life-rentrix) without leaving issue, then both his or her original share or shares, and the share or shares accreting to him or her by virtue of the present clause, shall accrete to the survivor or survivors of my said nephews and nieces equally amongst them, if more than one, share and share alike." Held that the interest of the issue of nephews and nieces who predeceased the life-rentrix was confined to the share of their parent.

Crichton's Trustees v Bell, (O.H.) 1900, 8 S.L.T. 177.

(1132)

—A testator directed his trustees to convey his estate to his children on the youngest attaining majority or the death of the testator's wife, whichever event should happen last. After providing that the issue of children who predeceased the period of division should take the share which would have fallen to their parent, the testator further provided—"In the event of any of my children predeceasing such period of division, without leaving lawful issue, then the share which would have fallen to such predeceasing child shall accrete . . . to . . . the survivors or survivor of them equally; and, failing all my children by predeceasing such period of division without leaving lawful issue," then over to the nearest of kin. Held that the shares of such of the testator's children as predeceased the period of division without leaving issue accreted to the surviving children of the testator, to the exclusion of the surviving issue of predeceasing children.

Matthew's Trustees v Matthew, (O.H.) 1905, 13 S.L.T. 470.

(1133)

Destination over to brothers and sisters of institutes failing issue.

A testator directed his trustees, twelve months after the death of the survivor of himself and his wife, to convert his estate into cash, to divide the proceeds into twenty-four equal parts, and to pay three parts or shares to the children of his son A, which three shares were not to be paid to the grandchildren, but to be invested by the trustees and the income paid to A, his wife, and the survivor. On the death of the survivor the trustees were directed to divide the three shares equally among A's children. The testator further provided—"In the event of the decease of any of my said grandchildren before the period of payment of their shares, without leaving issue . . . I direct my trustees to pay and divide the share of such deceiver or deceasers equally among his, her, or their brothers and sisters, but should

such grandchild or grandchildren leave lawful issue, . . . then such issue shall be entitled to their parent's share." The testator died in 1863, his wife in 1871, his son A in 1871, and A's wife in 1904, and vesting did not take place in A's children until 1904. Of A's children, John died unmarried in 1883, and Jane died in 1895, leaving issue. Held that Jane's issue were entitled to the share originally destined to Jane, but not to the proportion of John's share which would have accreted to her had she survived her mother.

Macfarlane's Trustees v Macfarlane, 1906, 8 F. 787; 43 S.L.R. 494; 13 S.L.T. 915.

(1134)

Gift to children and survivors—Children of predeceaser to take parent's share.

A testator left a legacy to his cousin A in life-rent, and to the children procreated of her body, and the survivor or survivors of them equally in fee. The period of vesting of the legacy was declared to be the death of A; and the testator further provided that the issue of any legatee who might predecease the date of vesting leaving lawful issue should be entitled to the share their parent would have been entitled to if alive. Held that the share of a child of A who survived the testator, but predeceased A without issue, did not accrete to the issue of three children of A who predeceased A.

Baxter's Trustees v Bell, (O.H.) 1900, 8 S.L.T. 176.

(1135)

Conditio si sine liberis—Legatee predeceasing testator without issue.

A testator directed that on the expiry of a life-rent the residue of his estate should be paid over to his thirteen nephews and nieces, whom he named, and he further provided that, in the event of any of his nephews and nieces predeceasing the life-renter, the predeceasers' shares of residue should "go and accrete to the survivors," and that the shares should not vest until the death of the life-renter. A, a nephew, predeceased the testator without issue, and B, a niece, survived the testator but predeceased the life-renter, leaving a daughter. Held that B's daughter was entitled to B's original share in virtue of the *conditio*, but that she was not entitled to participate in A's share.

Bowman v Richter, 1900, 2 F. 624; 37 S.L.R. 424; 7 S.L.T. 382.

(1136)

No survivorship clause—Legatee predeceasing testator without issue.

A testatrix conveyed her whole estate to A, B, C, and D. She was predeceased by C, who left no issue, and by D, who left a child. Held that D's child was entitled under the *conditio* to the share originally destined to her parent, but was not entitled to any part of the share originally destined to C.

Farquharson v Kelly, 1900, 2 F. 863; 37 S.L.R. 574; 7 S.L.T. 442.

(1137)

Gift to children of sister—Children predeceasing testator without issue—Child surviving testator but predeceasing date of payment, without issue.

A testator directed his trustees to hold one-half of the residue of his estate for one of his sisters in life, and on her death to pay the interest to her children equally until the majority of the youngest, when the capital was to be divided among them or the survivors of them then alive. The testator's sister had ten children, two of whom predeceased the testator, without issue. One child, A, survived the testator, but predeceased the life, without issue, dying in July, 1870. Three children survived the testator, but predeceased the life, leaving issue, dying respectively in 1862, 1866, and April, 1870, and thus predeceasing A. Held that the issue of predeceasing children were not entitled to any portion of A's share, but that they were entitled to one-eighth of the fund in virtue of the *conditio si institutus sine liberis decesserit*.

Aitken's Trustees v Wright, 1871, 10 M. 275; 44 J. 164; 9 S.L.R. 180.

(1138)

No survivorship clause — Destination over to issue.

A testator directed his trustees to set aside and hold £7000 for behoof of his daughter Janet in life, and on her death to pay the interest to her children equally until the majority of the youngest, when the capital was to be divided among them or the survivors of them then alive. The testator's daughter had ten children, two of whom predeceased the testator, without issue. One child, A, survived the testator, but predeceased the life, without issue, dying in July, 1870. Three children survived the testator, but predeceased the life, leaving issue, dying respectively in 1862, 1866, and April, 1870, and thus predeceasing A. Held that the issue of predeceasing children were not entitled to any portion of A's share, but that they were entitled to one-eighth of the fund in virtue of the *conditio si institutus sine liberis decesserit*.

White's Trustees v Chrystal's Trustees, 1893, 20 R. 460; 30 S.L.R. 463.

(1139)

A testator bequeathed the residue of his whole estate to his brothers and sisters equally, the issue of predeceasing brothers and sisters to take the share of their parents' share. None of the shares were to vest until the death of his widow. Some of the testator's brothers and sisters predeceased him leaving issue, and some, who survived the testator, died before the date of vesting leaving issue. There were others who died without leaving issue. There was no clause in the will giving the share of a predeceasing brother or sister to

the survivors. Held that the issue of a predeceasing legatee were entitled not only to the share which their parent would have taken had he survived, but also to any accretion thereto through the predecease of brothers and sisters without issue.

M'Meehan's Trustees v M'Clelland, (O.H.) 1918, 56 S.L.R. 280; 1918, 1 S.L.T. 193.

(1140)

Gift to children—No provision for their predeceasing life.

By trust disposition and settlement a testator directed that his whole free estate should, after payment of debts, be held for his widow in life, and at her death should be divided into seven shares, of which three of the five children of the marriage should have one each and the other two children two each, declaring that the trustees might alter this apportionment if they chose, and that none of the shares should vest until they became payable. The widow was predeceased by four of the five children, of whom two left issue. Held that the issue of the children who predeceased the widow were entitled to their respective shares under the *conditio si sine liberis decesserit*, but that the shares of those who predeceased her without issue did not fall to the child who survived her, but lapsed and fell into intestacy.

Crawford's Trustees v Crawford, 1886, 23 S.L.R. 787.

(1141)

Revocation of bequest to member of class — Gift of revoked "share" to member's family—Right of family to take jure accrescendi.

A testator by trust disposition directed that the residue of his estate should be divided among his brothers and sisters who might survive him, jointly with the legal issue of any of them who might predecease him. He further restricted the share of A, one of his sisters, to an alimentary life, giving her children the fee, and in the event of her dying without lawful issue he destined her share to her brothers and sisters who might be surviving at the date of her decease, jointly with the lawful issue of such of them as might have deceased. By codicil the trustor revoked "all share" that a brother R would have been entitled to under the will, and left "that share" to R's family. On A's death, without issue, held that R's family were entitled to participate in the accreting share, just as their father would have been had he not been disinherited.

M'Culloch's Trustees, 1892, 19 R. 777; 29 S.L.R. 645.

XVI. ANNUITIES.

1. GENERALLY.

(1142)

Heritable or moveable.

An annuity is heritable; the termly payments thereof as they fall due, moveable.

Reid v M'Walter, 1878, 5 R. 630; 15 S.L.R. 380.

(1143)

Payment out of rents of heritage.

Held that annuities bequeathed by the proprietor of heritable and moveable estate were after his death payable out of the rents of the heritage.

Marquis of Breadalbane's Trustees v Jamieson, 1873, 11 M. 912; 45 J. 556; 10 S.L.R. 647.

(1144)

Payment out of income of heritage and moveable estate proportionally.

A testator directed his trustees to expend from the income of the trust estate, and, if necessary, from capital, a sum of not less than £36 per annum in the maintenance of his widow. The fee of the trust estate fell into intestacy in consequence of the beneficiary, who survived the testator, predeceasing the date of vesting. The trust estate consisted partly of heritage and partly of moveable estate. **Held** that the provision in favour of the widow fell to be paid rateably out of the heritable and the moveable estate.

Smith v Wighton's Trustees, 1874, 1 R. 358; 11 S.L.R. 177.

(1145)

Contribution of separate estates to common burden.

Where two heritable estates, which were both subject to the common burden of an annuity, passed into the possession of separate proprietors, **held**, in a question between these proprietors, that each estate was bound to contribute to the annuity from year to year, in proportion to the amount of its free rental after deduction of the interest on prior burdens.

Ferrier v Cowan, 1896, 23 R. 703; 33 S.L.R. 508; 3 S.L.T. 322.

(1146)

Annuity as real burden.

Buchanan v Eaton, 1911 S.C. (H.L.) 40; [1911] A.C. 253; 48 S.L.R. 481; 1911, 1 S.L.T. 422, No 872, supra.

(1147)

Permanent or liferent annuity—Lands disposed under real burden of yearly sum payable to disponers' younger children born and to be born — Power to donee to redeem yearly payment — Accretion — Annuity to class.

By mutual mortis causa disposition and settlement a husband and wife disposed certain lands to their eldest son and the heirs-male of his body, with destinations over to their other sons and daughters, under burden of a yearly sum to be paid to such of the disponers' younger children, born and to be born, as should not succeed to the lands, equally between or among them; declaring that it should be in the power of the "heir in possession" of the lands to disburden the same of the said yearly payment by payment of a fixed capital sum to the "parties in right of said yearly payment at the time." At the date when the succession opened there were three younger children entitled

to share in the yearly payment. The eldest son, who succeeded to the lands, did not redeem the yearly payment, but paid one-third of the yearly sum to each of the younger children. Thereafter, while the yearly payment was still unredeemed, one of the younger children died. **Held** that the yearly sum constituted a permanent burden on the lands unless and until redeemed by the heir in possession, and, accordingly, that the share thereof enjoyed by the deceased child did not accrete to the survivors of the younger children, but was carried by the deceased child's will. **Opinion** (per Lord Sker-rington) that there is no presumption in the law of Scotland that a testamentary gift of an annuity or rent charge, indefinite as to duration, is for the life only of the annuitant or creditor.

Fleming v Reuther's Executors, 1921 S.C. 593; 58 S.L.R. 340; 1921, 1 S.L.T. 316.

(1148)

Amount—Rent of lands to "form part of" annuity—Additional or in security merely.

A testator by his trust disposition and settlement directed his trustees to pay an annuity of £500 to his widow, with power to her to bequeath the amount of the annuity to any one or more of the children she might choose, and failing her exercising this power, the sum retained to meet the annuity was to be divided among the children equally. The estate beyond what was retained to meet the annuity was to be realised and divided among the children equally. By holograph codicil the testator directed that the free rental of certain heritage should "form part of the annuity bequeathed to my wife during her life . . . after the death of my wife the free rental to be divided equally among my children." **Held** that the rental of the heritage was not intended to be given in addition to the £500 annuity already bequeathed, but merely that the heritage was to be part of the estate retained to meet the annuity.

Chivas' Trustees v Chivas, 1893, 21 R. 1; 31 S.L.R. 1; 1 S.L.T. 257.

(1149)

—Annuity of one-half of rental of entailed estate—Deduction of burdens.

A marriage contract provided for payment to the husband, in the event of his survival, of an annuity equal in amount to "one-half of the rental of" an entailed estate belonging to his wife, "after deduction of all public and parochial burdens." The contract further declared that "the remaining half of the said rental" should be applied in maintaining and educating the children of the marriage. **Held** that the husband was not entitled to an annuity equal to one-half of the gross rental under deduction of public and parochial burdens only, but that his provision consisted of one-half of the free yearly rents of the estate, after deduction of all burdens and expenses.

Bell's Trustee v Bell, 1886, 13 R. 1188; 23 S.L.R. 833.

(1150)

Terms of payment.

An heir of entail granted a bond of provision in favour of his wife, whereby he directed that an annuity therein provided to her should be uplifted at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first of these terms which should happen after his decease for the half-year following. The granter died in January, 1893. **Held** that the annuity fell to be paid to the extent of one-half thereof at Whitsunday, 1893.

Lamont-Campbell v Carter-Campbell,
1895, 22 R. 260; 32 S.L.R. 203; 2
S.L.T. 430.

(1151)

Right of annuitant's representatives to proportion for half-year current at her death.

A testator left an annuity of £200 to his sister "during all the days and years of her life," payable in equal portions at Whitsunday and Martinmas, "commencing the first year's payment" at the first term after his death. He died on 9th November, 1866. She survived till 27th October, 1871, having received five years' payment of the annuity during the four years and eleven months of her survivance. Her representatives maintained that the testator's direction to make a year's payment at the first term after his death was intended to cover the half-year current at the date of his death, and that the annuitant had thus only received four and a half-years' payment of the annuity, and was entitled to a proportion for the half-year current at the date of her death. **Held** that the testator's intention was that the sister should receive payment for the period during which she should survive him at the rate of £200 per annum, and that she had received full payment.

Cuninghame's Trustees v Duke, 1873, 11
M. 543; 45 J. 348; 10 S.L.R. 357.

(1152)

Power to trustees to retain and apply—Right of annuitant.

Held that a bequest of a free liferent annuity for the personal support and subsistence of the annuitant, power being given to the trustees of the testator to retain the annuity in their hands, and apply the same, or such part thereof as they might consider necessary, to and for behoof of the annuitant in whatever way they should think best, gave the beneficiary a right to demand that the whole of each year's annuity should be either paid to him or expended for his behoof within the year.

Webster v Webster's Trustees, 1882, 10
R. 169; 20 S.L.R. 118.

(1153)

Power to sink capital in annuity.

Simson, 1883, 10 R. 540; 20 S.L.R. 359.
Trust, No. 580.

Graham's Trustees v Graham's Trustees,

1898, 1 F. 357; 36 S.L.R. 273; 6 S.L.T.
257. Trust, No. 579.

Parlane's Trustees v Parlane, 1902, 4 F.
805; 39 S.L.R. 632; 10 S.L.T. 48.
Trust, No. 578.

(1154)

Bona fide percepta et consumpta—Testamentary annuity to widow of such amount as would, with Government annuity, make up certain sum—Increase of Government annuity after death of testator.

In an antenuptial contract of marriage a husband bound himself to make such contributions as were necessary to secure to his widow the usual annuity from the Bombay Civil Fund, and in the event of his widow not being entitled from any cause to such annuity, he bound himself and his heirs to pay to her an annuity of £300. The husband predeceased his wife, and left a trust disposition and settlement by which he, inter alia, directed his trustees to pay to his widow an annuity of £300 "in addition to what she is entitled to under" the contract of marriage, "my intention being that the said" widow "shall have a free annuity of £600 under the said marriage contract and these presents, any annuity she may receive from the Bombay Civil Fund being imputed to account thereof"; under the declaration that in the event of his widow "from any cause losing or not receiving from the Bombay Civil Fund the usual annuity of Indian civil servants, she shall only be entitled to a free annuity of £500 from my own proper funds, to which sum her annuity under said marriage contract and these presents shall in that event be restricted." The amount of the annuity payable from the Bombay Civil Fund to the widow at her husband's death in 1876 was £300, and she accordingly received £300 a year more from her husband's testamentary trustees. In 1882 the Bombay Civil Fund annuity was by Act of Parliament increased by a pension of £60 a year. The husband's representatives continued to pay to the widow an additional £300 a year until 1894, when the question arose whether the additional sum ought to be £240 a year only in respect that she was receiving the additional pension of £60 a year. A special case was presented by the widow and her husband's representatives, in which it was admitted that they had paid and she had received the full £300 a year from her husband's estates in bona fide ignorance of any doubt as to her right to do so. **Held** (1) that from the time the widow became entitled to the additional annuity of £60 she was only entitled to receive an annuity of £240 from her husband's estate; but (2) that she was not bound to repay the over-payments.

Hunter's Trustees v Hunter, 1894, 21 R.
949; 31 S.L.R. 837; 2 S.L.T. 134.

(1155)

Sum retained to meet annuity—Amount—Discretion of trustees.

Chivas's Trustees v Stewart, 1907 S.C. 701;
44 S.L.R. 15; 14 S.L.T. 357, No. 1272,
infra.

(1156)

Surplus revenue.

Terms of settlement under which held that any surplus revenue arising year by year over and above the sum requisite to meet the annuities might be divided as it arose.

Henderson's Factor, 1874, 11 S.L.R. 507.

(1157)

Entail—Annuity payable to heir entitled to succeed to lands under a tailzied destination until direction to entail carried out—Effect of clause of devolution.

Robertson v Robertson, 1875, 3 R. 274; 13 S.L.R. 166. ENTAIL, No. 61.

2. WHETHER PAYABLE OUT OF CAPITAL.

(1158)

General rule—Interests of annuitant and of liferenter—Encroachment on capital.

In the absence of expressions indicating a contrary intention, a bequest of an "annuity" is, *primo loco*, an annual charge upon income preferable to the interests of a liferenter of the residue, and, if the income should prove insufficient to meet the annuity, a charge upon capital as a special legacy preferable to residuary or reversionary interests in the capital. Circumstances in which held that, in the absence of any clear indication of a testator's intention that "a free yearly annuity" bequeathed by him should be met solely out of income, his trustees were bound to pay the annuity out of the capital of the trust estate to the extent to which the income was insufficient.

Colquhoun's Trustees v Colquhoun, 1922 S.C. 32; 59 S.L.R. 40; 1921, 2 S.L.T. 249.

(1159)

Income of trust estate insufficient to meet annuity.

A testator appointed his trustees to pay to his widow an annuity of £1000 a year in lieu of her legal rights and of her claims under an antenuptial marriage contract, and disposed of the rest of his estate in legacies, some of which he directed to be paid within three months after his death, and others after the death of his widow. The income of the trust estate was not sufficient to pay the annuity. Held that the annuity was preferable to the legacies of which payment had been postponed, and that the widow was entitled to have it paid in full, whether the revenue of the trust estate yielded that amount or not.

Kinmond's Trustees v Kinmond, 1873, 11 M. 381; 45 J. 255; 10 S.L.R. 244.

(1160)

A testator by a codicil directed his trustees to pay an annuity of £200 per annum to his brother and sister and the survivor. By a later codicil the testator bequeathed one-half of the residue of his estate to his granddaughter in liferent and her issue in fee. The income of the estate was insufficient to pay the annuity. Held

that the annuitants were entitled to have the annuity paid out of capital.

Knox's Trustees v Knox, 1869, 7 M. 873; 41 J. 470; 6 S.L.R. 557.

(1161)

It is a general rule that an annuity provided by trust disposition falls to be made up out of capital if the income of the estate be insufficient to meet it. Terms of a settlement held not to indicate an intention that the payment should be limited to income so as to elide the general rule.

Stewart v Stewart's Trustee, (O.H.) 1898, 36 S.L.R. 625; 6 S.L.T. 174.

(1162)

Terms of an antenuptial contract of marriage in which an annuity to the wife held to form a first charge on the husband's estate, payable out of capital, the income being insufficient to meet it.

Kennedy v Kennedy's Trustees, (O.H.) 1897, 5 S.L.T. 70.

(1163)

By antenuptial marriage contract husband settled on his wife an annuity of £200 a year in the event of her surviving him. By his will he left his property in trust for the purposes (1) of paying his widow an annuity of £400 a year; (2) of paying annuities to the testator's brothers and sisters (which were to suffer a proportionate abatement in case of there being a shortcoming of funds to pay them in full); and (3) on the widow's death of dividing the trust funds among the brothers and sisters. Held that if the income of the trust funds were insufficient to pay the widow's annuity of £400 a year in full the deficit must be made up out of capital.

Thomson v Thomson's Trustees, 1868, 5 S.L.R. 742.

(1164)

—Payment out of arrears of rents.

Held that a certain annuity was exigible out of arrears and not merely out of current rents of a property.

Ferrier v Cowan, (O.H.) 1897, 5 S.L.T. 297.

(1165)

—Direction to convey specific subjects on death of annuitant.

A testator directed his trustees to pay to his widow an annuity, and after her death to divide the residue of his estate equally among his children. To secure the annuity the trustees were empowered to retain such a portion of the heritage as would yield a rental sufficient for the purpose, or to sell and invest such a sum from the proceeds as might be necessary to yield the annuity. By a codicil the testator directed his trustees, upon the death of the survivor of himself and his wife, to convey to each of his children certain specified heritable subjects, thereby disposing of his whole heritable estate. The executry funds and the income of the trust estate were not sufficient to pay the annuity, and the trustees made advances from time to time

to make good the deficiency. After the widow's death, one of the beneficiaries brought an action against the trustees for decree ordaining them to deliver to him a disposition of the heritable subjects bequeathed to him by the testator. **Held** that the annuity was a preferable charge upon the corpus of the trust estate, and that the trustees were not bound to convey to the pursuer the heritable subjects bequeathed to him, except upon condition of receiving payment from him of his share of the advances made by them.

Peat v Peat's Trustees, 1901, 38 S.L.R. 269.

(1166)

Preference among annuities.

A testator left to his wife an annuity of £400, and to his mother, "if my estate will permit," an annuity of £100. He left no other testamentary provision. **Held** that both annuities were payable out of capital, but that the annuity to the wife was preferable to that of the mother.

Adamson's Trustees v Adamson's Executors, 1891, 18 R. 1133; 28 S.L.R. 869.

(1167)

Conveyance of policy in security—Annuitant's right to policy limited to life-rent.

In an antenuptial contract of marriage a husband provided his wife in an annuity of £100 a year, with £30 for mournings, and in security and implement pro tanto of that obligation conveyed to the trustees a policy on his life for £500, with power to them to uplift it and to re-invest it in trust for behoof of his wife in life-rent alienably and his children in fee. On the death of the husband, survived by his wife and children, it turned out that he had no funds other than the proceeds of this policy. The widow claimed from the trustees payment of £30 for mournings, and of her annuity of £100 so long as any funds remained in their hands. **Held** that her right over the proceeds of the policy was limited to a life-rent, and that the trustees could not pay any part of the capital to her.

Hutcheson's Trustees v Hutcheson, 1886, 13 R. 915; 23 S.L.R. 653.

(1168)

Gift of income of three-fifths of estate to widow—Claim of legitim exhausting one-half of estate—Whether wife entitled to compensation out of capital.

M'Leod v Love, 1914 S.C. 983; 51 S.L.R. 779; 1914, 2 S.L.T. 165, No. 1518, infra.

3. INCIDENCE OF INCOME TAX.

(1169)

"Free of income tax"—Whether income tax includes super tax.

By antenuptial contract of marriage a husband bound himself, and his heirs, executors, and representatives, to pay his wife during her widowhood a free life-rent annuity of

£1000 "free of income tax." **Held** that income tax included super tax.

Wordie's Trustees v Wordie, 1922 S.C. 28; 59 S.L.R. 39; 1921, 2 S.L.T. 282.

(1170)

Specified annuities payable out of "the free income and proceeds."

A testatrix directed her trustees to pay to her brother and sister, "from the free income and proceeds" of her estate, a sum of £250 each per annum, and to divide any surplus income among certain other beneficiaries, "or to retain and accumulate such surplus income or any part thereof with capital as my trustees shall determine."

Held on a consideration of the terms of the settlement, that it contained nothing which displaced the ordinary rule that annuitants must bear the income tax exigible in respect of their annuities, and, accordingly, that income tax fell to be deducted from the annuities to the brother and sister. **Opinion** (per Lord Salvesen) that "free income" means nothing more than "revenue."

Hudson's Trustees v M'Intosh, 1920 S.C. 725; 57 S.L.R. 571; 1920, 2 S.L.T. 211.

(1171)

Bequest of "free yearly income up to" sum specified.

A testator left his whole estate to trustees in trust "to pay to my wife . . . the free yearly income thereof . . . up to if possible the sum of six hundred pounds per annum as an alimentary provision . . . to cover all rent rates and taxes. . . . Any remaining annual income from the estate above six hundred pounds to be paid (failing my leaving any lawful issue) to or for the benefit of my nephews and nieces." The free annual income exceeded £600. **Held** that the £600 fell to be paid to the widow subject to, and not free of, income tax.

Wilson's Trustees v Wilson, 1919 S.C. 359; 56 S.L.R. 256; 1919, 1 S.L.T. 165.

(1172)

A testator directed his testamentary trustees to pay out of the income of his means and estate an alimentary life-rent provision of £2500, and that if the income was not sufficient to meet the provision the life-rent was to be correspondingly reduced so as not to exceed the free income of his estate after paying all other charges payable out of income. Circumstances in which **held** that income tax fell to be deducted from the sum payable to the life-rentrix.

Menzies v Menzies' Trustees, (O.H.) 1919, 2 S.L.T. 43.

(1173)

"Exempted from all burdens and deductions whatsoever"—Whether free of income tax.

Held that a widow, to whom her husband had bequeathed an annuity "exempted from all burdens and deductions whatsoever," was only entitled to payment of her annuity, less income tax, that tax not being a "burden"

or "deduction" intended by the testator to be borne by the trust estate. **Opinions** that a testamentary bequest of an annuity in full of legal rights, free of income tax, was not an agreement or contract struck at by the 103rd section of the Income Tax Act, 1842.

Kinloch's Trustees v Kinloch, 1880, 7 R. 596; 17 S.L.R. 444.

(1174)

Testamentary annuity payable "in addition to" annuity provided in marriage contract—Marriage contract annuity payable free of income tax.

By antenuptial contract of marriage, executed in 1902, a husband bound himself, and his heirs, executors, and representatives, to pay to his wife during her widowhood a free liferent annuity of £1000 "free of income tax." By his trust disposition and settlement, executed in 1911, he directed his trustees to implement this provision, and he further directed them to pay to his wife during her widowhood, "and that in addition to the annuity conceived in her favour under said marriage contract" an annuity of £500, which by codicil he subsequently increased to £1000. **Held** that the mere declaration in the trust disposition and settlement that the annuity thereby provided was "in addition to" the marriage contract annuity did not import into the trust disposition the condition attaching to the previous annuity that it should be paid free of income tax.

Wordie's Trustees v Wordie, 1922 S.C. 28; 59 S.L.R. 39; 1921, 2 S.L.T. 282.

(1175)

Bequest of "free" revenue of residue—Subsequent restriction to specific sum.

A testator directed his trustees to hold the whole of the free residue of his estate for behoof of his wife in liferent "and to pay to her the free revenue and proceeds thereof." By a codicil the trust directed that "in the event of the income of the free residue of my estate which . . . is to be paid to my wife . . . exceeding in any year the sum of £2000, my trustees shall restrict the payment to my wife out of said income to the sum of £2000 per annum." The annual income of the trust estate, after deduction of all outlays, including income tax, always largely exceeded the sum of £2000. **Held** that the widow was entitled to an annual payment of £2000 free from any deduction on account of income tax.

Murdoch's Trustees v Murdoch, 1918 S.C. 738; 55 S.L.R. 664; 1918, 2 S.L.T. 142.

(1176)

Specified annuity payable out of "net annual proceeds."

A testator directed his trustees to pay out of the "net annual proceeds" of one-half of the residue of his estate the sum of £750 yearly to his niece for her liferent alimentary use. **Held**, on a consideration of

the settlement as a whole, that the niece was entitled to an annual payment of the sum of £750, without any deduction on account of income tax.

Smith's Trustees v Gaydon, 1919 S.C. 95; 56 S.L.R. 92; 1918, 2 S.L.T. 289.

XVII. CONDITIONS.

1. VALIDITY.

(1177)

Public policy—Condition that legatee should not reside with parents.

Held that a condition attached by a testator to a legacy in favour of his grand-niece that she should not reside with her parents, who were of good character, was contra bonos mores and null, and that the legacy was unconditional.

Grant's Trustees v Grant, 1898, 25 R. 929; 35 S.L.R. 718.

(1178)

Condition that beneficiary should not allow his mother to reside on his estate.

A testator by his settlement allowed his widow to occupy his mansion-house and policies, with a discretion to her to relinquish the occupancy in favour of his son on his attaining the age of twenty-five. The son was the child of the testator's first wife, who had divorced him. The testator further provided that, after the death of his widow or after her relinquishment of her occupation of the mansion-house, his trustees should hold the mansion-house and policies for the liferent use of his son so long as the testator's first wife remained alive; and declared that it was his express wish that his son should never allow the testator's first wife or any member of her family "to reside at" the mansion-house or on any part of the testator's estates, and that, if his son contravened this condition, he should forfeit his liferent right. By the last purpose of the settlement the trustees were directed, after the death of the testator's first wife and after the son had attained twenty-five, to convey the testator's whole estates to the son, provided that he had not at any time contravened the foregoing condition. The testator was survived by his first wife and by his second wife and by his son. After his son had attained the age of twenty-five the testator's second wife relinquished her occupancy of the mansion-house in his favour. In an action of declarator at the instance of the son, **held** that the condition as to not allowing his mother to reside on the estate was not null and void, either as being a condition contra bonos mores, or from uncertainty. **Opinions** that, if the son were merely to allow his mother to visit him at the mansion-house for short periods as an ordinary guest, he would not thereby commit a contravention of the condition.

Wemyss v Wemyss's Trustees, 1921 S.C. 30; 58 S.L.R. 116; 1920, 2 S.L.T. 333.

(1179)

Condition in restraint of marriage.

A testator directed that a part of the profits of his business, which was to be carried on by his trustees after his death, should be paid to his daughters, "but in the event of any of my said daughters being married her share of said profits shall lapse and fall into the residue of my estate," in which all his children were to participate. **Held** that the bequest was intended as a provision for the testator's unmarried daughters so long as they remained unmarried, that the limitation was not invalid as a condition in restraint of marriage, and that a daughter who was married at the date of the settlement had no interest in the bequest.

Observation as to the English rules as to conditions in restraint of marriage attached to bequests.

Sturrock v Rankin's Trustees, 1875, 2 R. 850.

(1180)

Condition that legatee should not marry a person named.

Forbes v Forbes' Trustees, 1882, 9 R. 675; 19 S.L.R. 453, No. 1192, *infra*.

(1181)

Clause of devolution—Lands to devolve on heir in possession succeeding to a peerage.

A clause in a mortis causa disposition of heritage provided that each of the heirs, who should succeed to the lands, should be obliged in all time to use the disponent's name and arms, and that "in case any of the said heirs shall succeed to a peerage, then, when the person so succeeding or having right to succeed, to my said lands shall also succeed to a peerage, they shall be bound and obliged to denude themselves" of all right in the lands, and the same should devolve on the next heir. **Held** that this clause was not void as being contrary to public policy.

Earl of Caithness v Sinclair, 1912 S.C. 79; 49 S.L.R. 29; 1911, 2 S.L.T. 368.

(1182)

Impossible conditions—Bequest on condition that spouses were "living together as man and wife"—Spouse addicted to drugs—Observation on possible and impossible conditions.

Barker v Watson's Trustees, 1919 S.C. 109; 56 S.L.R. 63; 1918, 2 S.L.T. 308, No. 1197, *infra*.

(1183)

Conditions impossible of fulfilment.

A testator directed his trustees to expend two sums of £20,000 each upon the erection of two Roman Catholic churches, or "such smaller sum or sums as may be necessary . . . my intention being merely to have such church . . . completed although it may be at a less cost than £20,000 each"; any unexpended balance to revert to the residue of his estate. Except for a provi-

sion of £10,000 for the endowment of one of the two churches, the trust disposition and settlement contained no provision for endowment. Upon the completion of the buildings the trustees were directed to convey them, on certain specified conditions, to trustees to be appointed respectively by the bishops of the Roman Catholic Dioceses in which the churches were to be situated. In a multiplepointing raised after the death of the testator the bishops stated they were unable to accept the bequests under the conditions specified, on the ground that owing to want of endowment the conditions could not be implemented. They proposed that the testamentary trustees should either accumulate the funds till they amounted to a sum sufficient to build and endow the churches or that the fund should be applied in accordance with a scheme to be approved by the Court. **Held** that either proposal was contrary to the testator's intention, and that the bequests having lapsed owing to the refusal of the bishops to accept them on the conditions specified by the testator the sums in question fell into residue.

Marquess of Bute's Trustees v Marquess of Bute, 1904, 7 F. 49; 42 S.L.R. 66; 12 S.L.T. 418.

(1184)

Impossibility supervening after date of will.

A testatrix in her trust disposition and settlement provided—"In case of my not having advanced money during my lifetime to purchase a captain's commission in his regiment for" J D, "I direct my trustees to make payment to him of a . . . sum of £2000 for that purpose." The testatrix did not advance a sum of money for the purchase of a commission, and purchase in the army was abolished before her death. **Held** that although a commission could not be purchased the sum of £2000 was payable.

Dunbar v Scott's Trustees, 1872, 10 M. 982; 44 J. 556; 9 S.L.R. 632.

(1185)

Impossibility supervening after testator's death—Repayment of legacy.

A testator directed his trustees to make over to the trustees of a particular school certain funds of which the interest was to be applied in supplementing the schoolmaster's salary, "declaring that the fore-said provision shall be paid to and accepted by the said trustees . . . only on condition of their undertaking to retain the management of said school in their own hands, and that in the event of their declining to accept payment of said provision on this condition, the amount thereof" should fall into residue. The bequest was paid over; and the trustees of the school applied the yearly interest in the manner prescribed by the testator for sixteen years, when the school was closed. **Held** that the bequest to the trustees was conditional on their retaining the management of the school, and that condition having become-

impossible of fulfilment the amount of the bequest fell to the residuary legatees.

Young's Trustee v Deacons of the Eight Incorporated Trades of Perth, 1893, 20 R. 778; 30 S.L.R. 704; 1 S.L.T. 72.

(1186)

Impossibility of literal fulfilment—Direction to settle daughters' shares by antenuptial contract—Daughters married at date of will.

Fyfe's Trustees v Duthie, 1903 S.C. 520; 45 S.L.R. 368; 15 S.L.T. 803, No. 730, *supra*.

(1187)

Condition within power of legatee—Purification.

A testator conveyed his whole estate to a "beloved friend," subject to the condition that, unless by a writing under his hand he should expressly declare that whatever he took under the will was to form part of his own means and estate, and belong to his own heirs and disponees, the children of one of the testator's brothers who should survive the donee should receive the full amount of the estate conveyed out of the donee's estate. The donee executed a declaration in the terms prescribed. Thirty years after his death one of the children of the testator's brother raised an action of reduction of this declaration, and for payment of her share. **Held** that the bequest by the testator was valid, being a bequest under a condition within the donee's power, and that the condition had been purified.

Reid v M'Phedran, 1881, 9 R. 80; 19 S.L.R. 51.

(1188)

Direction to purchase lands.

A testatrix directed her trustees to lay out the residue of her estate (which amounted to £60,000) in the purchase of lands, and when the whole residue or within £300 thereof was so invested to deliver a disposition to her brother in liferent, and to his son and the heirs whatsoever of his body in fee, whom failing certain other persons—the trustees being declared to be "the sole and exclusive judges of the lands which and the period when these should be purchased, free from the control of any of the heirs who should be interested." The testatrix was predeceased by her brother. The trustees invested the residue except £20,000 in the purchase of lands. **Held** that the nephew of the testatrix took a vested right in the fee of the residue a *morte testatoris*, and was entitled to payment of the sum of £20,000.

Spens v Monypenny's Trustees, 1875, 3 R. 50; 13 S.L.R. 25, 45.

(1189)

Uncertainty — Resolutive condition — Suspensive condition.

A testator directed his trustees to allow his son the liferent use of a heritable estate. He attached to the provision a condition that his son should not allow certain persons "to reside" on the estate, and declared that, if he contravened the condition, he

should forfeit the liferent. The testator further directed his trustees, when certain trust purposes had been fulfilled, to convey the fee of the estate to his son, provided that he had not at any time contravened the condition. **Held** that, although it was impossible to specify *ab ante* the precise acts which would infer forfeiture, the condition was not void from uncertainty either as a suspensive or as a resolutive condition, and that there was no distinction, in the law of Scotland, between the degree of specification necessary in the two classes of conditions.

Wemyss v Wemyss's Trustees, 1921 S.C. 30; 58 S.L.R. 116; 1920, 2 S.L.T. 333.

(1190)

Purpose of bequest.

A testatrix bequeathed to "A, son of B and C, one hundred pounds, to help him to come out for a doctor if he choose that profession." **Held** that A was entitled to the legacy free of the condition.

Ross v Thomson, (O.H.) 1896, 4 S.L.T. 155.

(1191)

A testatrix bequeathed "to A B £300, and if she would take her portion and invest it to buy the surface of Easter Haugh Head, I leave her the residue of mine after paying all my just debts." **Held** that A B was entitled to the legacy of £300 free of the condition.

Ross v Thomson, (O.H.) 1896, 4 S.L.T. 155.

2. CONSTRUCTION.

(1192)

Intention of testator—Carrying out executory condition.

A testator adjetted to a legacy bequeathed by him to a young lady the following condition:—"This bequest I, however, make contingent upon her declaring in writing that she shall not renew her engagement of marriage with Mr. J. M." His trustees refused to pay the legacy except upon the further statement being added that no engagement of marriage subsisted between the legatee and J M at the date of the declaration. The legatee refused to make this additional statement, and raised an action against the trustees for payment. **Held** that the trustees were entitled to have the declaration expressed in such terms as would best carry out the testator's intention, and that the legatee was not entitled to insist that the declaration should be in the precise terms used by the testator.

Forbes v Forbes' Trustees, 1882, 9 R. 675; 19 S.L.R. 453.

(1193)

Surrogatum — Whether condition affecting original provision applied to surrogatum — Alimentary provision.

By an *inter vivos* trust deed granted by A and B spouses the liferenters, and C, their son, the fiar of the lands of X, the lands of X were conveyed to trustees for behoof of A and B in liferent *allanarly*

and after their deaths for behoof of C in alimentary liferent. A, the husband, predeceased B, the wife, and C. By his trust disposition and settlement he bequeathed the liferent of the residue of the estate to B and recommended that she should not exact from C her liferent of the lands of X. B elected to take her liferent of the lands of X, and C was found entitled to a compensating provision out of the annual proceeds of the residue. **Held** that the compensating provision was not alimentary.

Johnston v Johnston, 1875, 2 R. 986.

(1194)

Condition affecting original share—Whether applicable to accreting shares—Direction to accumulate beneficiary's share of income.

Paris' Trustees v Gow, 1870, 8 S.L.R. 184, No 1401, *infra*.

(1195)

Name and arms clause—Use of testator's name—Testator's name prefixed to original name.

A deed of entail provided that the heirs succeeding under the entail should be obliged to "use, bear, and constantly retain, in all time coming after their succession, the surname" of H. **Held** that this condition was sufficiently complied with if the surname of H were assumed along with one or more others, and that it need not necessarily be the last in order.

Hunter v Weston, 1882, 9 R. 492; 19 S.L.R. 416.

(1196)

A testator, by his trust disposition and settlement, destined his estate of Teaninch in liferent and fee to a series of heirs, under the condition that the heirs taking benefit under the destination should "assume and constantly thereafter use as their surname, arms, and designation the surname, arms, and designation of Munro of Teaninch as their proper surname, arms, and designation in addition to their own surname, arms, and designation"; with a clause of forfeiture in the event of a contravention of the condition. **Held** that, in the absence of express direction that the assumed surname should be the last, a beneficiary was entitled to prefix the surname Munro to his own surname of Spencer, and to design himself "Munro-Spencer of Teaninch."

Munro's Trustees v Spencer, 1912 S.C. 933; 49 S.L.R. 601; 1912, 1 S.L.T. 395.

(1197)

Bequest on condition that spouses were "living together as man and wife."

A testator, who in his settlement had made a provision for his daughters in liferent and their issue in fee, by a codicil, executed in March, 1900, declared with regard to his daughter B "that if at the time of my death she should not be reconciled to her husband," F, the provision to her children was to be reduced. A subsequent codicil executed in July, 1900, contained this clause—"I don't consider F and B reconciled as referred to in codicil to my settle-

ment unless they are living together as man and wife." At the date of the first codicil, B, who was then addicted to drugs, was residing with her father in Glasgow and not in her husband's house in London. The husband was urging her to enter a home for treatment and had written that her return to him was impossible until the drug habit was broken. Between the dates of the two codicils it was arranged, owing mainly to the husband's insistence, that she should enter a home; and as the husband could not meet this expense the testator agreed to do so. At the date both of the second codicil and of the testator's death in 1901 his daughter was an inmate of the home. **Held** that there was no ground in law for refusing effect to the condition; that the spouses were not, in the sense of the codicil, "living together as man and wife" at the date of the testator's death; and, accordingly, that the daughter's children were entitled only to the reduced provision.

Barker v Watson's Trustees, 1919 S.C. 109; 56 S.L.R. 63; 1918, 2 S.L.T. 308.

(1198)

Bequest to lunatic conditional on his recovering his reason.

Smith's Trustees v Smith's Trustees, 1908, 46 S.L.R. 19; 16 S.L.T. 403. VESTING, No. 183.

(1199)

Clause of forfeiture in the event of gift being impugned—Impugning—Statement of contentions in special case that conditions of gift invalid.

A deed of appointment containing both valid and invalid provisions concluded with a forfeiture clause, which declared that any of the appointees who impugned the appointment "in any manner of way" should forfeit all interest, "to the same effect" as if they had been expressly excluded from any share in the appointed fund. **Held** that parties to a special case, brought to determine the validity of the deed, who were appointees under the deed, and who had stated contentions questioning the validity of provisions and conditions affecting their shares, would not thereby, under the forfeiture clause, have forfeited their right to benefit under the deed had the deed been valid.

Collins's Trustees v Collins, 1913 S.C. 588; 50 S.L.R. 421; 1913, 1 S.L.T. 185.

(1200)

Prohibition against altering a specified succession to or selling a heritable estate—Condition that if prohibition violated a specified sum of money should be paid to persons named or their heirs.

The proprietrix of a heritable estate died leaving a mortis causa disposition of the estate to A and the heirs of his body, whom failing, to B and the heirs of her body, whom failing, &c., "under this declaration, burden, and condition, that in the event of any part of the said lands and estate . . . that may remain unsold at the time of my death being thereafter sold or dis-

posed of or exembled by any proprietor or possessor of the same, or adjudged, or attempted to be adjudged, or carried away in any manner of way for his or her debt, that then and in any of these events there shall be paid out of the price of the lands . . . if and when sold, or created a real lien and burden upon the same if they shall remain unsold, to and in favour of such of the children of F as may then be in existence, or to their heirs, equally to and among them, the sum of £10,000." A, the institute, after succeeding under the destination, died, without heirs of his body, leaving a disposition of the estate to B for her liferent alimentary use only, and the heirs of her body in fee, whom failing, to C, a stranger to the original destination, and the heirs of his body, also strangers. When B, who was a married woman, and had no heirs of her body, was sixty-three years of age, one of the children of F brought an action against C for declarator that in consequence of A's disposition the provision in the original settlement in favour of the children of F had come into operation. **Held** (1) that the action was not premature; (2) that the provision in favour of the children of F was effectual as a condition of the gift to A; (3) on a construction of the whole deed of the testatrix, that A had "disposed of" the estate and so had come under an obligation to create a real burden over it for £10,000 in favour of the children of F; and (4) that C and his heirs, as A's gratuitous disponees, were, on succeeding to the estate, under the same obligation.

Falconar Stewart v Wilkie, 1892, 19 R. 630; 29 S.L.R. 534.

(1201)

Condition of sale of heritage—Amount of price.

A testator provided, inter alia, regarding certain heritable subjects "If they are sold my trustees are to expend £3500 in an annuity for my said sister so as to bring up the full sum expended in the annuity to £6000." The house was sold for £2500. **Held** that the application of the £3500 to the annuity was not conditional on the price reaching that amount.

Cunningham's Trustees v Cunningham, (O.H.) 1901, 9 S.L.T. 130.

3. FULFILMENT.

(1202)

Condition in favour of third party—Performance rendered impossible by third party.

When a bequest is made subject to a condition in favour of a third party, the condition is held to be fulfilled when the third party voluntarily renders its fulfilment impossible.

Pirie v Pirie, 1873, 11 M. 941; 45 J. 134; 10 S.L.R. 127.

(1203)

A father in his testament gave a direction that a sum of money due to him by one of

his sons should be allowed to remain in his hands for eight years, on condition that the executor and residuary legatee should remain a director of the company in which the sum was invested. The executor voluntarily resigned his office as director. **Held** that the condition must be held to have been satisfied, and that the son was entitled to retain the loan.

Pirie v Pirie, 1873, 11 M. 941; 45 J. 134; 10 S.L.R. 127.

(1204)

Undertaking to satisfy condition.

A testator bequeathed the liferent of the residue of his estate to his widow, and directed the payment of certain legacies on her death. He further provided that his widow might consent to the payment of any or all of the legacies during her life, and that, should she surrender her liferent, his trustees might make payment of the legacies, in whole or in part, on such surrender. One of the legacies was to the University of Glasgow, for the endowment of a chair, and was made subject to the declaration that, "should either I or my wife endow any chair in the Glasgow or other University before the death of the survivor, then this bequest shall fall." The testator's widow surrendered the liferent and other provisions of the settlement, elected to take her legal rights, and executed a formal deed in which she confirmed this election and surrender, and consented, so far as she competently could, to the immediate payment of the whole legacies, and further bound herself "not to endow any chair in the Glasgow or other University now or at any time hereafter." **Held** that the condition attached to the legacy had not been satisfied, and that payment thereof could not be made until after the death of the widow.

Jacks's Trustees v Jacks, 1913 S.C. 815; 50 S.L.R. 536; 1913, 1 S.L.T. 341.

(1205)

Intention of testator—Executory conditions—Bequest contingent on legatee declaring that she would not renew an engagement to marry A.

Forbes v Forbes's Trustees, 1882, 9 R. 675; 19 S.L.R. 453, No. 1192, supra.

(1206)

Opportunity of implementing condition—Intimation by trustees to beneficiaries.

A testator, in bequeathing a portion of his estate to nephews and nieces who were in America, added a declaration that the provisions in their favour should only take effect in the event of their returning to Scotland within a period of three years from the date of his death. No intimation was made to the nephews and nieces by the trustees, and they did not return within the three years. **Held** that, as the beneficiaries had not had an opportunity of electing, and had therefore made no election, they had not forfeited their provisions by failing to return within the prescribed period.

Rodger's Trustees v Allfrey, 1910 S.C. 1015; 47 S.L.R. 869; 1910, 2 S.L.T. 157.

(1207)

Fulfillment during life.

A testatrix bequeathed a fifth share of the residue of her estate to A B, then residing with C D, "but which fifth share shall only be paid to the said A B in the event of her continuing to reside with the said C D during C D's widowhood." A B continued to reside with C D, but predeceased her. **Opinion** that the condition had been purified by A B's residing with C D so long as A B lived.

Robertson's Trustees v White, (O.H.)
1903, 11 S.L.T. 566.

(1208)

Effect of fulfilling condition—Deficiency of funds—Preference.

Cameron's Trustees v Gow, 1874, 1 R.
683; 11 S.L.R. 302, No 869, *supra*.

(1209)

Prohibition of sale or mortgaging by liferenter—Clauses of irritancy and forfeiture.

In respect of a prohibition in a settlement, under which a bankrupt had a contingent right of liferent in heritable estate against the sale, mortgage, or other disposal of any interest under it, coupled with a declaration of irritancy and forfeiture against any person signing a deed for that purpose, the Court refused to require the bankrupt to execute a deed for the conveyance of his interest to the trustee as a condition of granting his discharge.

Kirkland v Kirkland's Trustee, 1886, 13 R.
798; 23 S.L.R. 546.

(1210)

Forfeiture—Validity—Construction.

In a direct disposition of landed estate there was a destination of the subjects to one person in liferent and his issue in fee, whom failing, to certain other persons in liferent and fee respectively. The disposition also declared that all who took a beneficial right under it were "prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars"; such sales or mortgages were declared void, and parties signing them were to lose all their rights under the settlement, and give place to the next in succession. **Held** that the clauses of prohibition and forfeiture were valid and effectual to prevent a sale by the liferenter of his liferent right.

Chaplin's Trustees v Hoile, 1890, 18 R. 27;
28 S.L.R. 51.

(1211)

Forfeiture of liferent on sale or mortgage by liferenter—Trust deed for creditors with power of sale—Sequestration.

By disposition and settlement an estate was conveyed to certain persons in liferent and certain other persons in fee under a declaration prohibiting the liferenters from "selling, mortgaging, or otherwise disposing of" their interest, and further declaring that "such sales and mortgages" should be void, that "all deeds or instruments purporting to be a sale or mortgage of such interest or part

thereof" should be null and void, and that "all parties signing such deeds or instruments" should forfeit their rights in favour of the person next in succession. The liferenter in possession under this disposition granted a trust disposition for behoof of his creditors, conveying the liferent to the trustees with a power of sale; subsequently his estates were sequestrated. **Held** (1) that the trust disposition was neither a sale nor a mortgage, and, consequently, was not struck at by the clause of forfeiture; and (2) that as that clause did not strike at the diligence of creditors, the liferent was vested in the trustee by the sequestration; and that the trustee was entitled to sell the liferent interest without incurring the forfeiture.

Chaplin's Trustee v Hoile, 1891, 19 R.
237; 29 S.L.R. 190.

(1212)

No continuing trust.

A testator directed his trustees that, "so soon as they may find it convenient, they shall deliver and pay the following legacies to the parties after named:—To my nephew A in liferent and his children in fee, failing children, to his own nearest heirs equally, the sum of £3000." In a codicil he provided that A should have no power to sell his liferent, and that if he attempted to do so his liferent should be null and void. **Held** that the testator had not made provision for a continuing trust, and that the trustees were bound to pay the sum of £3000 to A upon a receipt or discharge bearing that the payment had been made and received subject to the conditions and provisions of the settlement.

Beveridge v Beveridge's Trustees, 1878, 5
R. 1116; 15 S.L.R. 414.

(1213)

Legacies payable on death of liferenter—Liferenter willing to renounce liferent—Possible insufficiency of funds to pay all legacies—Right of one legatee to demand payment.

Haldane's Trustees v Haldane, 1895, 23
R. 276; 33 S.L.R. 206; 3 S.L.T. 199,
No. 878, *supra*.

(1214)

Contingent rights of liferenter—Accumulation for equitable compensation—Possibility of surplus available for liferenter—Right of fiar to demand immediate payment.

Lee's Trustees v Fingzies, (O.H.) 1897, 34
S.L.R. 613; 4 S.L.T. 227, No. 1526, *infra*.

XVIII. REPUGNANCY.**1. DIRECTIONS AND POWERS TO TRUSTEES TO RETAIN.**

(1215)

Beneficiary's right to immediate conveyance of vested share.

A testator directed his trustees to hold and manage, "as absolute proprietors," certain heritable property for behoof of his second son until the latter attained the age

of twenty-five, when they were to denude in his favour, declaring that the property should not vest in him till he attained the age of twenty-five, or married, with the consent of the trustees, after attaining the age of twenty-one. The testator also directed his trustees to hold the whole residue of his moveable estate in certain shares for his children. The vesting clause was in similar terms to the vesting clause regarding the heritage, but there was no similar direction as to management. The trustees were, however, given an unlimited discretion as to the application of the annual interest of the shares of residue, and it was declared that on the sons attaining the age of twenty-five, and the daughters attaining that age or being married, they were to be entitled absolutely to any accumulations of interest on their respective shares, and the trustees were directed to pay over the same to them accordingly. The son, after attaining the age of twenty-one, but before attaining the age of twenty-five, married, with the approval of the trustees. **Held** (by a majority of seven judges) that the son's right to the heritage and to his share of the moveable estate having vested in him upon his marriage, with the consent of the trustees, he became then entitled to call upon the trustees to denude in his favour.

Miller's Trustees v Miller, 1890, 18 R. 301; 28 S.L.R. 236.

(1216)

A testator directed his trustees on the expiry of a liferent, in the events which happened, to divide his estate among the children of his brothers and sisters. By a codicil he directed his trustees to retain in their own hands the shares destined to the children of his sisters, and to pay to them neither the capital nor the revenues (which meantime were to be accumulated) so long as their fathers were alive. The liferent expired at a date more than twenty-one years after the testator's death, and at that date the fathers of the children were still in life. **Held** (by a majority of the whole Court) that the sisters' children had an unqualified right of fee in their shares and were entitled to demand immediate payment thereof.

Yuill's Trustees v Thomson, 1902, 4 F. 815; 39 S.L.R. 668; 10 S.L.T. 169.

(1217)

Direction to trustees to hold for administration.

A testatrix directed her trustees to divide the residue of her estate equally between her two daughters, who were married, "and to their respective heirs and assignees, declaring that the provision hereby made . . . is an alimentary provision for their own separate use and behoof, and shall not be subject to the jus mariti or right of administration or management of their husbands, . . . but my trustees shall be bound to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give

effect to the foresaid declarations and conditions." **Held** that the fee of the residue was vested in the daughters, and that they were entitled to have the residue paid over to them upon their own receipts, the receipts to bear the exclusion of the jus mariti and right of administration.

Jamieson v Lesslie's Trustees, 1889, 16 R. 807; 26 S.L.R. 538.

(1218)

A testatrix, in her trust disposition and settlement, left the residue of her estate to certain persons named, equally, the said shares of residue to vest at the death of the testatrix, "declaring that the share falling to any of the said residuary legatees who are females and may be married at the time of my death shall be held by my said trustees, or invested for their behoof, exclusive of the jus mariti of their then or any other husband they may afterwards marry, and the annual produce of said share of residue paid to said legatee during her life, and at her death the principal sum shall be paid to her heirs or executors." **Held** that the fee of the shares of females who were married at the death of the testatrix vested in them at her death, and that they were entitled to immediate payment thereof.

Duthie's Trustees v Forlong, 1889, 16 R. 1002; 26 S.L.R. 709.

(1219)

A testator appointed trustees, and left his property to be divided equally among his three children, two daughters and a son, providing that "any share that my daughter M may receive to go direct to her and her children. Failing the above-mentioned, her share to return to her nearest of kin, except her husband shall have the liferent. My daughter H's share I settle in like manner, excepting in the event of her decease without issue her share shall return to her nearest of kin. Also, my trustees shall retain charge of her share. It is not to go into her hands. The same with reference to my son C, his share to remain in the hands of my trustees for his behoof. In the event of his demise, his share to return to his nearest of kin." **Held** that the fee of each of the shares vested at the testator's death in his three children respectively; that the trustees were bound to pay over M's share to her at once; but that they were bound to retain the shares of H and C for their behoof.

Christie's Trustees v Murray's Trustees, 1889, 16 R. 913; 26 S.L.R. 611.

(1220)

A testator directed his trustees to "divide, apply, pay, or convey, or hold, as after-mentioned," the residue of his estate, "to and equally among or for behoof of" all his children nominatim. He directed the trustees to hold the shares of residue falling to each of his daughters respectively in trust for behoof of the daughters or their children, and to pay the annual proceeds thereof to them, but subject always to full powers of disposal on the part of the daughters of their

shares by any deed to be executed by them in the way of family settlements. Power was given to the trustees to make advances out of the capital to the daughters, and there was a destination over of the daughters' shares applicable to the event of their predeceasing the date of division, i.e., the death of the testator. There was no further disposal of the daughters' shares. A right to the fee of their respective shares of the residue having been held to vest in the daughters a *morte testatoris*, **held** further that the daughters were entitled to immediate payment of their shares.

Greenlees' Trustees v Greenlees, 1894, 22 R. 136; 32 S.L.R. 106; 2 S.L.T. 333.

(1220a)

A testator in his trust disposition and settlement bequeathed the residue of his estate for behoof of all his children equally. He directed his trustees to pay over to each of his sons the share of residue falling to him; and he directed that his trustees should hold the shares of his daughters during their respective lives, and, on the death of each, should pay her share to such person or persons as she might appoint by any revocable deed executed by her after she had reached the age of twenty-one, and, failing such appointment, then to her own nearest heirs. Then followed a declaration that "the whole of the said provisions, whether of capital or income, so far as conceived as in favour of or devolving upon females, shall be for their own sole and separate use, shall not be assignable by them or attachable for their debts or obligations, and shall be exclusive of the *jus mariti* and right of administration of any husband or husbands they may marry, and shall not be subject to the debts of such husbands or the diligence of their creditors." **Held** that the daughters had not a right of fee, but merely a *liferevent* with a power to test on the capital of their shares.

Forrest's Trustees v Reid, 1904, 7 F. 142; 42 S.L.R. 133; 12 S.L.T. 484.

(1221)

A testator directed his trustees to divide his estate, on the expiry of certain *liferevents*, among certain nephews and nieces nominatim, equally, and further directed that the trustees should retain the capital of the shares belonging to the nephews and nieces so long as their father should be alive and pay to them the revenue thereof only. The *liferevents* having expired, **held** that the capital of the shares having vested in the nephews and nieces a *morte testatoris*, they were entitled to call on the trustees to denude in their favour notwithstanding that their father was still alive.

Hargrave's Trustees v Schofield, 1900, 3 F. 14; 38 S.L.R. 9; 8 S.L.T. 201.

(1222)

Circumstances in which **held** that trustees under a marriage contract were bound to denude in favour of beneficiaries.

Crawford v Crawford's Trustees, 1873, 11 S.L.R. 2.

(1223)

Gift over of sum remaining at death of beneficiary.

A testator bequeathed his whole estate to A, "but to be under the control of B and C," who were appointed executors; he further provided that the executors should only be entitled to pay to A such sums as might be required for his maintenance, and that at A's death the estate, or such portion as might not have been expended on A's maintenance, should be divided among other beneficiaries. **Held** that the fee vested in A.

Cunningham v Cunningham, (O.H.) 1896, 4 S.L.T. 132.

(1224)

Power to settle.

A truster directed his trustees, on the youngest of his children attaining the age of twenty-five years, "to divide to them equal shares of the remainder of my said trust property, but to retain one-half of the said remainder for and on behalf of my said daughter, and until her marriage or death to pay her the free annual income of the said half, and to pay over the other half, share and share alike, to my said sons; and on the marriage or death of my said daughter, then to pay over to my said sons the remaining unpaid portion of their respective equal shares of the remainder of my said trust property, divided to them on the youngest of my said children attaining twenty-five years of age, but hitherto retained on behalf of my said daughter, their sister, but with power to my said trustees, if they see fit, to settle my daughter's portion on her, and excluding all right of her husband therein . . . but declaring that the shares of my said children shall vest in them on their respectively attaining the age of twenty-five years." **Held** that after the youngest child had attained the age of twenty-five years the whole children were entitled, on tendering a joint discharge, to require the trustees to make over to them the one-half share of residue which the testator directed them to retain for behoof of his daughter.

Brown v Brown's Trustees, 1890, 17 R. 517; 27 S.L.R. 414.

(1225)

Direction to retain shares of company.

In a trust disposition and settlement the testator gave the following direction:—"Lastly, subject to . . . the declarations after mentioned, I appoint my trustees, when convenient, to divide, pay, assign, and dispose the residue of my estate . . . into five shares, corresponding to the number of my children, one of which shares they shall pay, assign, and dispose to" each of four children, A, B, C, and D. "Declaring" that, in so far as the residue consisted of shares in the company, W & S, Limited, "my trustees shall not be entitled to sell or assign to my said residuary legatees the said shares or any part thereof until the expiry of fifty years from 1st January, 1895, but the said shares shall be held by my trustees during the said period, when they

shall be assigned by them to my said residuary legatees." At the date of his death, in 1896, the truster held shares in the company to the value of £100,000. **Held** that the primary direction in regard to residue conferred an unqualified right of fee on A, B, C, and D, and that the direction to the trustees to retain the shares for fifty years was void from repugnancy.

Stewart's Trustees v Stewart, 1897, 25 R. 302; 35 S.L.R. 298; 5 S.L.T. 232.

(1226)

Power to trustees to retain if expedient.

A testator directed her trustees to make over the residue of her estate to her son on his attaining the age of twenty-five, "declaring that my trustees shall be entitled, so long as they think it expedient to do so, to retain the said residue and remainder in their own hands, . . . and that even after" the son "shall have attained said age, and only pay him the annual produce or income thereof, it being understood that should they so retain it after he attains twenty-five years, and should he die without said residue and remainder and others having been paid to him, then the same shall be paid to his nearest heirs and representatives whomsoever, my intention being that the same should vest in him at said age of twenty-five." The son having gone bankrupt after attaining the age of twenty-five, but before the residue had been made over to him, **held** that the residue having vested in the son the testamentary trustees were not entitled to retain it, but were bound to pay it over to the son's trustee.

Mackinnon's Trustees v Official Receiver in Bankruptcy in England, 1892, 19 R. 1051; 29 S.L.R. 867.

(1227)

Direction to pay on youngest of children attaining majority.

A testator by his trust disposition and settlement directed his trustees to pay the whole income of his estate to his widow, and "upon the subsequent marriage or upon the death of my said wife . . . I direct my trustees . . . to hold the remainder of my whole means and estate in trust for behoof of my children till the youngest of them shall reach majority, when my said trustees shall . . . convert the whole of my estate, . . . and shall divide and pay over the same equally among them; declaring that if any of my said children shall predecease the time of division leaving issue, such issue shall succeed to their parent's share equally among them." The widow took her legal rights and so forfeited her provisions under the settlement. **Held** (1) that the provisions in favour of the children vested a *morte testatoris*; and (2) that the widow's interest being at an end, the direction to postpone payment till the youngest child attained majority was ineffectual, as being repugnant to the children's vested right of

fee, and that consequently those of the children who had attained majority were entitled to immediate payment of their shares.

Ballantyne's Trustees v Kidd, 1898, 25 R. 621; 35 S.L.R. 488; 5 S.L.T. 322.

(1228)

Direction to pay on death of party named.

In contemplation of marriage a lady conveyed her estate to trustees for behoof of herself in *lifereit* and of the issue of the marriage and the lawful issue of predeceasers "payable at the majority or marriage of such issue whichever of these events shall first happen . . . after the decease or second marriage of the" husband if he should be the survivor of the spouses. The wife was survived by the husband and by two children who were of full age and who took a vested interest in the fee of the trust funds as at the wife's death. **Held** that the children were entitled to immediate payment of the trust estate notwithstanding the direction to postpone payment until the death of the husband.

Bate's Trustees v Bate, 1906, 8 F. 861; 43 S.L.R. 660; 14 S.L.T. 95.

(1229)

Annuity to widow—Direction to divide estate among children on death of widow—Portion of estate not required for annuity.

A testator directed his trustees to pay an annuity to his wife and to divide the balance of the income equally among his children, and on the death of his wife to divide his estate equally among his children. The testator left moveable estate considerably in excess of what was sufficient to secure the annuity. He was survived by his wife and two sons. **Held** that the trustees were bound forthwith to distribute the capital among the children, except in so far as it was necessary to retain the same to secure the widow's annuity.

Coats' Trustees v Coats, 1903, 5 F. 401; 40 S.L.R. 330; 10 S.L.T. 585.

(1230)

Direction to pay to daughters — Power of disposal — Codicil restricting power of disposal.

A testator directed his trustees to pay or make over to each of three of his daughters one-fifth share of the residue and remainder of his means and estate, "the said shares to be at the absolute disposal" of the daughters. By subsequent codicil he "revoked and altered" his settlement "to this extent, that, in place of the absolute power therein given to" his three daughters, "I restrict that absolute power in each case to one-half of their respective shares of my . . . estate, and in respect of the other half none of them shall have power to deal with it during their respective lifetime, beyond the interest or revenue derived from it; but they shall have power by any deed or writing duly executed by them to will the same over

after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime." **Held** that, as there was a clear direction to the trustees in the trust settlement to pay over the daughters' shares, and as that direction was not recalled, and as no machinery was provided for carrying out the provisions of the codicil, the trustees were not entitled to hold any part of the shares.

Clouston's Trustees v Bulloch, 1889, 16 R. 937; 26 S.L.R. 644.

(1231)

Legacy payable at a future date—Possible encroachments in carrying out trust purposes.

A testator bequeathed to his son John a legacy of £4500, the same not to be paid to him until he arrived at the age of thirty, but the trustees to pay him interest at the rate of 4 per cent. per annum from the time he reached twenty-five until he reached thirty. John having claimed that he was entitled to immediate payment of the £4500, or at least of a part thereof, on his attaining the age of twenty-five, in respect that the whole beneficial interest had vested in him, **held** that he was not entitled to any payment, as there were trust purposes which might involve encroachment on the capital of the £4500.

Graham's Trustees v Graham, 1899, 2 F. 232; 37 S.L.R. 163; 7 S.L.T. 283.

(1232)

Direction to hold and apply as trustees might think best.

A testator directed his trustees, after payment of an alimentary liferent of the residue of his estate to his brother, Joseph Ritchie, to "hold and apply" one-half of the residue "for the uses and behoof of Alexander Ritchie, son of Joseph Ritchie, and of any other child or children that may yet be procreated of his marriage, equally among them if more than one, and if only one child should be left, then for the sole use and behoof of such child, and that in such sums, at such times, and in such manner as my trustees shall think best, and of which they shall be the sole judges." Joseph Ritchie survived his brother, the testator, and as one of his brother's two next of kin was entitled to one-half of such part of his brother's estate as might be undisposed of. Joseph Ritchie died, leaving a will by which he bequeathed the fee of his whole estates to his only son Alexander. Alexander having called on his grandfather's trustees to denude of one-half of the trust estates in his favour, **held** that the fee of one-half of the residue of his grandfather's estate having vested in Alexander Ritchie either under his grandfather's will or ab intestato, the trustees were bound to denude in his favour.

Ritchie's Trustees v Ritchie, 1894, 21 R. 679; 31 S.L.R. 575; 1 S.L.T. 597.

(1233)

Discretion to apply income for liferenter or liferenter's issue—Liferenter also fiar.

The liferenters of a trust estate had also a vested right in the fee, but the trustees were directed to continue to hold the estate so long as any of the liferenters were alive, and were given a discretion as to the amount of income, if any, to be paid to each of them. The trustees were also given a discretionary power to apply the income for the maintenance of the issue of liferenters who might die. **Held** that the liferenters were not entitled to immediate payment of the trust funds.

Brown v Brown's Trustees, 1912, 1 S.L.T. 474.

(1234)

Gift of fee followed by limiting provision.

A testator by his will appointed an executor, and disposed of the residue of his estate by leaving it to two persons "for behoof of" Mrs. R and Mrs. B, and enjoined on these two persons "not to put a shilling at risk during the life of the two ladies." There was no further disposal of the residue. **Held** that the residue was vested in fee in the two ladies equally, and that they were entitled to immediate payment thereof.

Veitch's Trustees v Rutherford, 1914 S.C. 182; 51 S.L.R. 150; 1913, 2 S.L.T. 439.

(1235)

Gift of fee in will—Direction to retain in codicil—Income to be alimentary.

A testator, by his trust disposition and settlement, directed his trustees to pay a sum of £2000 to his son, or, in the event of their seeing fit to do so, to retain the sum in their hands for his behoof and pay him the interest. By a codicil the testator appointed his trustees, instead of paying over the sum of £2000 to his son, to retain that sum in their hands for his behoof, and to pay him the interest annually as an alimentary provision, and on the son's death to pay the sum of £2000 to his heirs and representatives equally. **Held** that the directions in the codicil were not repugnant to the gift of fee in the settlement.

Campbell's Trustees v Campbell, 1889, 16 R. 1007; 26 S.L.R. 699.

(1236)

Direction to divide at a certain date—Share of residue vested but not payable till ascertained.

Held that a legatee who had a vested right to a definite pro indiviso share of residue was not entitled to payment thereof before the date fixed by the testator for realising the estate, as the amount of residue could not be ascertained before that date.

Opinion (per Lord Davey) that *Miller's Trustees v Miller* (No. 1215, supra), and *Yuill's Trustees v Thomson* (No. 1216, supra), were well decided.

Macculloch v Macculloch's Trustees, 1903, 6 F. (H.L.) 3; [1904] A.C. 55; 41 S.L.R. 88; 11 S.L.T. 429.

(1237)

Legacies payable and residue divisible at widow's death—Vesting a morte testatoris—Surplus income to be accumulated with residue—Acceleration of payment prejudicial to residuary legatees.

A testator directed his trustees to pay his widow an annuity of £500 out of the residue of his estate, and to accumulate the surplus income as part of residue. On her death they were directed to pay out of residue certain legacies amounting to £4000, and thereafter to divide the remainder into four equal shares and pay them to certain residuary legatees. The legacies and shares of residue had vested a morte testatoris. The widow having renounced her annuity and obtained her legal rights, one of the residuary legatees claimed immediate payment of his share. The other residuary legatees were opposed to his demand. **Held** that the Court could not, in the absence of consent by the beneficiaries, accelerate the date of payment, as this would prejudice the residuary legatees by depriving them of their right to the interest of the legacies, which was to be accumulated with residue until the widow's death.

White v White's Trustees, 1916 S.C. 435; 53 S.L.R. 353; 1916, 1 S.L.T. 196.

2. DIRECTION TO PURCHASE ANNUITY.

(1238)

Direction to purchase annuity—Investment.

When a testator has directed a particular investment for behoof of a beneficiary who would have unlimited control over the investment if it were made, the Court will not enforce implement of the direction: so **held** where a testator directed his trustees to purchase a Government annuity and also an annuity from an insurance company for two beneficiaries.

Dow v Kilgour's Trustees, 1877, 4 R. 403; 14 S.L.R. 285.

(1239)

A father by trust disposition and settlement directed his trustees to purchase an annuity for his daughter, the same to be exclusive of the *ius mariti* of any husband she might marry, his debts or deeds, or the diligence of his creditors. After the father's death his trustees, under an arrangement with the daughter, paid a sum equivalent to the price of the annuity to certain trustees, in order that they might hold the money for behoof of the daughter on conditions similar to those imposed on the father's trustees. **Held** that the daughter, being the only person interested, would have been entitled to have had the price of the annuity paid to her by her father's trustees, and that she was entitled to revoke her own trust deed and to receive the whole sum paid to her trustees.

Kippen v Kippen's Trustees, 1871, 10 M. 134; 44 J. 84; 9 S.L.R. 112.

(1240)

Direction to purchase alimentary annuity—No continuing trust.

A father directed his testamentary trustees to divide the residue of his estate between his two sons, in manner following:—The trustees to advance to each son, for the purpose of setting him up in business, a sum not exceeding one-half of his share of residue, "and the other half or balance" "shall be invested, when my said trustees shall consider it proper and prudent to do so, in the purchase of two separate annuities for each of my said sons, or the survivor of them," declaring that the annuities should be alimentary and not assignable by the sons. **Held** that the trustees were not bound to purchase the annuities, but that they were entitled to pay over to one of the sons who desired to enter business his half of the capital.

Tod v Tod's Trustees, 1871, 9 M. 728; 43 J. 379; 8 S.L.R. 445.

(1241)

A testator directed his trustees to purchase at his death, with half of the residue of his estate, an alimentary annuity for his sister, exclusive of the rights of her husband and creditors. The sister died two days after the testator, leaving a will in favour of her husband. **Held** that, as there was no continuing trust, the annuity was not effectually rendered alimentary; and that the half of the residue required to purchase the annuity had vested in the testator's sister, and had passed on her death to her husband.

Brown's Trustees v Thom, 1916 S.C. 32; 53 S.L.R. 59; 1915, 2 S.L.T. 278.

(1242)

A testatrix directed her trustees to set aside a certain sum, "and to purchase from the Government or any Scottish insurance company of good standing a joint annuity payable to my daughters . . . equally during their joint lives and the lives of the survivors or survivor of them, which annuities shall be for their alimentary use alienably, not subject to their debts or deeds nor liable to the diligence of their creditors, and without power of anticipation." The testatrix made no provision for a continuing trust to protect the alimentary character of this annuity, but conferred upon the trustees "all requisite powers for carrying out the purposes of this settlement." **Held** that the daughters were entitled to immediate payment of the capital sum directed to be expended on the purchase of the annuity.

Dempster's Trustees v Dempster, 1921 S.C. 332; 58 S.L.R. 297; 1921, 1 S.L.T. 180.

(1243)

Trustees under a trust disposition and settlement were directed to apply one-third of the residue of the estate in the purchase of an annuity for a legatee subject to the condition that "the same is for the present support and subsistence only of the annuitant" and that it should not be either assignable or subject to the diligence of

creditors. There was no provision for a continuing trust. **Held** that the legatee was entitled to payment in money of the share of residue, on the ground that if an annuity were purchased it would be at the absolute disposal of the annuitant.

Kennedy's Trustees v Warren, 1901, 3 F. 1087; 38 S.L.R. 827; 9 S.L.T. 149.

(1244)

A testator by trust settlement left certain property to his wife, and declared—"By acceptance hereof she binds herself to execute a settlement of her own affairs, so as that my own relatives shall have at least the two-thirds of what may be at her disposal, to be invested in life annuities on the lives of my nephews and nieces" which were to be of an alimentary character. **Held**, upon the wife's death, that as her husband had given her no directions to create a continuing trust for the preservation of the alimentary character of the annuities directed to be purchased for the nephews and nieces, they had an unrestricted right to two-thirds of her estate as at her death, and were entitled to immediate and unconditional payment thereof.

Murray v Macfarlane's Trustees, 1895, 22 R. 927; 32 S.L.R. 715; 3 S.L.T. 63.

(1245)

Government annuity.

A testatrix directed her trustees "to provide and apply the sums after mentioned in the purchase of Government or savings bank annuities for the persons after named . . . and the said annuities shall be strictly alimentary and shall be payable to the said annuitants on their own receipt . . . and shall not be assignable or affectable by creditors." The testatrix did not provide for a continuing trust. The persons for whose behoof annuities were directed to be purchased having called on the trustees to make payment to them of the capital sums directed to be so invested, on the ground that, under the Government Annuities Act, 1853, sec. 25, it was impossible to purchase annuities, in terms of the truster's directions, which should be effectual against creditors, **held** that the trustees were bound to invest the sums in question in Government annuities payable to the annuitants according to the directions of the truster in so far as these directions could be carried out.

Hutchinson's Trustees v Young, 1903, 6 F. 26; 41 S.L.R. 14; 11 S.L.T. 359.

(1246)

Direction to purchase Government annuity.

A testator directed his executor or his trustees to invest certain sums in the purchase of annuities in the name and for the benefit of certain persons. He further provided—"And I declare that all annuities . . . shall be purchased by him or them from the British Government or from the Scottish Widows' Insurance Co., of Edinburgh, in Scotland, and any other first-class company or annuity office as my

said executor or . . . trustees shall in this behalf think fit." There was no declaration that the annuities were to be alimentary, but Government annuities, purchased under the Government Annuities Act, 1853, are not assignable except on the insolvency or bankruptcy of the annuitant. The beneficiaries having called on the trustees to pay over the principal sums instead of investing them in the purchase of annuities, **held** that the beneficiaries were entitled to payment of the principal sums.

Turner's Trustees v Fernie, 1908 S.C. 883; 45 S.L.R. 708; 16 S.L.T. 107.

(1247)

Power to purchase annuity.

A testator directed his trustees to divide his estate into three parts, and "to lay out and invest" two-thirds of it in heritable securities or Government stock and "pay the proceeds" to his two sisters, share and share alike. He also authorised his trustees to purchase with the said two-thirds an annuity "payable to my two sisters . . . exclusive of 'the jus mariti and right of administration of any husbands which they may marry, as I intend the same to be a provision for their own more comfortable support, and it shall not be assignable by them; and in the event of the death of any of them, then the said annuity shall be payable in the same manner to the survivor.'" There was no further disposal of the fee of the said two-thirds. The trustees paid the revenue of the two-thirds to the sisters, as long as they both survived, and on the death of one of them, to the survivor. The survivor, who was also donee of the predecessor, having claimed payment of the capital of the two-thirds, **held** that she was entitled to it, the fee of the bequests having vested in her and her sister.

Lawson's Trustees v Lawson, 1890, 17 R. 1167; 27 S.L.R. 899.

3. POWER TO TRUSTEES TO REDUCE FEE TO LIFERENT.

[See also IX. 11 (2), supra.]

(1248)

Income of unpaid funds to beneficiary—Fee destined to issue.

A testator by his settlement directed his trustees to divide the residue of his estate among his children. There was a survivorship clause, which is the case of sons prevented vesting from taking place before they attained majority. The testator further provided that the capital of one-half of the shares of residue falling to the sons should not be payable before they respectively attained twenty-five. Power was conferred on the trustees to withhold payment of the capital of the said half even after a son had attained twenty-five, and to pay the income to the son as an alimentary provision. If any son survived the testator, and attained majority, but died without receiving payment of the whole of his share, the unpaid capital was to be

paid to the son's lawful issue. **Held** that the provisions of the later purpose were not repugnant to the gift of fee in the former, but effectually qualified that gift and that portions of capital retained by the trustees from a son's share in exercise of the powers conferred on them, and remaining in their hands at the death of the son leaving issue did not vest in the son, but belonged to his issue.

White's Trustees v White, 1896, 23 R. 836; 33 S.L.R. 660; 4 S.L.T. 59.

(1249)

Power to trustees to restrict interest of beneficiary.

A legacy was given, in the event which happened, to two sons of the testator's daughter. The trustees of the settlement, acting in professed exercise of a power conferred by the settlement, executed a minute whereby they restricted the sons' interest to an alimentary liferent, with a testamentary power of disposal of the fee. The minute was invalid, not being in terms of the power. **Opinion** (per Lord McLaren) that, even if it had been in terms of the power, it would have been ineffectual, in respect that it was legally impossible to protect the life interest of a person to whom the fee was also given against his own voluntary acts.

Kinmond's Trustees v Mess, 1898, 25 R. 819; 35 S.L.R. 631; 5 S.L.T. 379.

(1250)

Power to trustees to restrict fee to alimentary liferent with fee to issue.

Chambers' Trustees v Smith, 1878, 5 R. (H.L.) 151; 3 App.Cas. 795; 15 S.L.R. 541, No. 735, supra.

4. FEE DECLARED TO BE ALIMENTARY.

(1251)

Fee conferred in settlement declared to be alimentary by codicil.

By trust disposition and settlement a testatrix directed her trustees in the second place to give certain furniture and other effects to her two daughters; in the third place, to convey her heritable property to the daughters equally; and in the fourth place, *inter alia*, to pay one-third share of the residue of her estates to each of the daughters. By a codicil the testator revoked the second and third purposes of the settlement, and in place thereof directed her trustees to sell the whole of her furniture and effects mentioned in the second purpose, and also her heritable property mentioned in the third purpose, and to hold the proceeds thereof, and also the shares of the residue appointed to be paid to the daughters under the fourth purpose, in their own hands, for the benefit and alimentary use of the daughters, and to apply the same for their behoof in such way and manner as the trustees might consider expedient, and to pay the daughters the capital and interest, or only the interest, in such manner as to the trustees should seem proper, as to all which she

gave the trustees most ample powers and discretion, without control or interference on the part of the daughters or their husbands, the provisions being purely alimentary, and not subject to the *ius mariti* or right of administration of the husbands. The testatrix declared that it should not be in the power of the daughters or their husbands to sell or burden with debt the provisions or any part thereof, either absolutely or in security, nor to anticipate the payment thereof, nor should the same be arrestable for, or affectable by, their debts or deeds of any description whatsoever, or subject to the diligence of their creditors. In all other respects the testatrix confirmed her settlement. **Held** (1) that the codicil was not to be construed as altering the period of vesting under the settlement, but merely as making a money addition to the daughters' shares of residue, vesting a *morte testatoris*; and (2) that the daughters were entitled to immediate payment of their provisions, the directions to the trustees to retain, in the codicil, being void from repugnancy.

Wilkie's Trustees v Wight's Trustees, 1893, 21 R. 199; 31 S.L.R. 135; 1 S.L.T. 335.

(1252)

Fee declared to be alimentary by later clause of settlement.

By his settlement a testator directed his trustees to realise his whole estate, "and thereafter (subject always to the discretionary power vested in my trustees hereinafter mentioned) to divide" the proceeds thereof equally among his children and the issue of predeceasing children. There followed a declaration that, "notwithstanding the power of division above mentioned," the trustees should have the most absolute discretionary power to retain any of these shares instead of paying them over, and to pay over the annual income only derived from the share or shares so retained, or to pay the capital thereof by such instalments, and at such times, as they might determine; and a further special declaration "that the whole provisions hereunder in favour of my son J W are purely and strictly alimentary, and the same shall not be attachable by the debts or deeds of the said J W, nor attachable by the diligence of his creditors," and that any share retained by the trustees under their discretionary power should be subject to this declaration. There was no ulterior destination of the shares of residue. In a special case, in which the trustees stated that they saw no occasion to exercise their discretionary power, and were prepared to hand over J W's share to him, if they had power to do so, **held** (1) that under the direction to divide the estate among the truster's children a right of fee was conferred on J W, which was not withdrawn by the subsequent declarations; (2) that, this being so, the declaration that the provision to J W should be alimentary was ineffectual; and, accordingly, that the trustees were entitled to pay over to him his share of residue.

Watson's Trustees v Watson, 1913 S.C. 1133; 50 S.L.R. 901; 1913, 2 S.L.T. 172.

(1253)

No continuing trust provided.

A testator left the fee of certain heritable subjects (or the price thereof if sold) to his daughters. He declared the provisions left by him to his daughters to be alimentary, and excluded the *ius mariti* of their husbands, but did not provide a continuing trust. **Held** that the daughters were entitled to payment of their provisions on granting receipts in terms of the trust deed.

M'Nish, &c. v Donald's Trustees, 1879, 7 R. 96; 17 S.L.R. 25.

(1254)

Gift of residue to children — Direction to hold daughters' shares — Income of daughters' shares payable to them as an alimentary provision — Power to daughters to dispose of capital by revocable deed.

Forrest's Trustees v Reid, 1904, 7 F. 142; 42 S.L.R. 133; 12 S.L.T. 484, No. 1220a, *supra*.

5. EXCLUSION OF MARRIAGE CONTRACT CONVEYANCE OF ACQUIRENDA.

(1255)

By an antenuptial marriage contract the wife, with consent of her father, conveyed her *acquirenda* during the marriage to trustees. The father by his settlement left to the wife the fee of a share of the residue of his estate, and directed that it should not fall under the conveyance in the marriage contract, and he authorised the trustees to take such steps as they might think necessary or proper to give effect to this direction. The wife survived her father, but died without receiving payment of her share of residue. **Held** that, as the father's settlement conferred on the wife the absolute property of the share of residue, the declaration that it should not fall under the conveyance in the marriage contract was ineffectual.

Douglas's Trustees v Kay's Trustees, 1879, 7 R. 295; 17 S.L.R. 180.

(1256)

A lady, by her antenuptial contract of marriage, assigned and conveyed to trustees her whole estate, and all she might succeed to or acquire during the subsistence of the marriage. An aunt, after narrating her knowledge of the terms of the antenuptial contract, directed her testamentary trustees to pay to her niece a share of her estate "for her own absolute use and benefit," declaring that, notwithstanding the provisions of said contract, the trustees under the same were not to be entitled to claim said share, but that it was to be her niece's absolute property, free from the control of the trustees, and further declaring that, in the event of its being necessary to give effect to her wishes and intentions, her testamentary trustees were to pay over the share to her niece in trust for herself in *liferent* and her children in fee, with power to her to distribute and apportion the same amongst her children, and to use and apply the capital in any way that might appear to her to be

right for the benefit of herself and her children. **Held** (by a majority of the whole Court) that the settlement conferred on the niece an absolute right to the property and possession of her share; that the declaration that the marriage contract trustees should not be entitled to claim that share was in consequence ineffectual; and therefore that the share fell to be made over to the marriage contract trustees.

Simson's Trustees v Brown, 1890, 17 R. 581; 27 S.L.R. 472.

6. LIMITATIONS IMPOSED ON RIGHT OF FIAR.

(1257)

Gift of furniture to widow — Forfeiture on second marriage.

Smith's Trustees v Smith, 1883, 10 R. 1144; 20 S.L.R. 764. **FEE AND LIFERENT**, No. 120.

(1258)

Heritage disposed to A in *liferent* and B in fee — Declaration that subjects to transmit to A if grantor died before B attained twenty-five — Repugnancy.

Robert Cruickshank, by gratuitous *inter vivos* disposition, disposed certain heritable subjects to Mrs. Forsyth, his daughter, in *liferent* for her *liferent* use *allenarly*, and to her daughter, Miss Agnes Forsyth, in fee, and to the heirs of her body, heritably and irredeemably, "but these presents are granted under the express condition and declaration that . . . in the event of the said Agnes Forsyth dying before attaining the age of twenty-five (without leaving issue) survived by me, the said subjects shall revert to me, and these presents shall, *ipso facto*, become void and null, and in that event I shall be entitled to deal with the subjects as my own, and to sell or burden the same as freely as if these presents had never been granted; and in the event of my predeceasing my grand-daughter before she attains said age, the subjects shall transmit to my said daughter, and failing her, to my own heirs whomsoever." The disposition was recorded in the Register of Sasines on behalf of Mrs. Forsyth in *liferent* *allenarly* and Miss Agnes Forsyth in fee, and Mrs. Forsyth entered into possession of the subjects. The granter of the disposition died before Miss Agnes Forsyth had attained the age of twenty-five. **Held** that the clause of transmission to Mrs. Forsyth in the event of the granter dying before Miss Forsyth had attained the age of twenty-five was repugnant to the gift of the fee to Miss Forsyth, and was ineffectual, and that the fee of the property belonged to Miss Forsyth.

Forsyth v Forsyth, 1901, 3 F. 929; 38 S.L.R. 668; 9 S.L.T. 88.

(1259)

Restrictions against burdening or selling.

Trustees were directed to convey lands with restrictions against burdening or selling. A docquet on the trust deed was signed by the beneficiary agreeing to the conditions and

restrictions. **Held** that the beneficiary was unlimited fiar.

Johnston v Johnston, 1903, 5 F. 1039; 40 S.L.R. 757; 11 S.L.T. 299.

(1260)

A testator, by a clause in his trust deed, directed his trustees on his death to make a disposition in fee to his son of certain property, but by a subsequent clause he directed his trustees "to take and conceive the disposition in such terms and manner that my son shall not have power to sell, alienate, burden with debt, or dispose or put away in any manner during his life the whole or any parts of said estate." **Held** that the son's right was a right of fee, and that the restrictions were ineffectual, because inconsistent with his right.

Gibson v Watt, (O.H.) 1896, 4 S.L.T. 11.

(1261)

Gift of fee — Directions for disposal on death of fiar of part not required or used by fiar.

In a mutual disposition and settlement a husband disposed the residue of his estate to his wife in the event of her survivance, under the declaration "that, so far as not required or used by my said spouse for her comfortable subsistence, the sums to be realised from the policy of insurance on my life shall on the death of the longer liver of me and my said spouse be paid to my said sons A and B in equal shares." **Held** that there was no repugnancy, and that the disposition of the residue and the declaration must be read together, being in substance a disposition of an estate, with the exception of a certain part of it.

Maddever v Maddever's Trustees, (O.H.) 1903, 11 S.L.T. 343.

XIX. FACULTIES AND POWERS.

1. GENERALLY.

(1262)

Observations on the nature of patrimonial and fiduciary powers respectively.

Bannerman's Trustees v Bannerman, 1915 S.C. 398; 52 S.L.R. 315; 1915, 1 S.L.T. 143, No. 228, *supra*.

(1263)

Power given to trustees to appoint others to apportion fund.

Question, whether it was competent for a testator, who had given his trustees power to apportion a fund among beneficiaries, to confer on them an option, instead of exercising the power themselves, to convey the fund to other persons, selected by them, to act as trustees for the purpose of apportioning the fund.

Potter's Trustees v Allan, 1918 S.C. 173; 55 S.L.R. 229; 1918, 1 S.L.T. 72.

(1264)

Reserved power of apportionment—Delegation of power.

The maxim *delegatus non potest delegare*

does not apply where a person who has reserved to himself a power of apportionment confers upon another the right to exercise the power.

Miller v Miller, (O.H.) 1906, 13 S.L.T. 770.

(1265)

Gift to executor of legatee—Whether power conferred on legatee—Revenue Act, 1845, sec. 4—Probate Duty Act, 1860, sec. 4.

A bequeathed one-third of the residue of her estate to B, and failing him to his executors and representatives. B predeceased A, leaving a will, under which he appointed executors who were found to be entitled to B's share of the residue. In addition to the inventory and legacy duties payable by A's executors the Crown claimed inventory and legacy duties from B's executors on one-third of A's residue on the ground that it had been disposed of by B's will. **Held** that B's executors were not liable for the duties claimed, as B had no power to dispose of and had not disposed of any part of A's estate.

Lord Advocate v Bogie, 1894, 21 R. (H.L.) 6; [1894] A.C. 83; 31 S.L.R. 920.

(1266)

Non-exercise of power.

A testator directed his trustees to pay over to his widow a certain sum, to be by her divided among her relations "as she shall think fit." **Observed** that any attempt of whatever kind to compel the widow to divide the sum must be absolutely inept.

Bank of Scotland v Comrie, 1871, 8 S.L.R. 419.

(1267)

Power conferred on A and failing exercise by him on B—Effect of exercise by A.

By antenuptial marriage contract power to apportion a provision in favour of the children of the marriage was reserved to the husband, and failing exercise by him a similar power was conferred on the wife. The husband having exercised the power by his will, **held** that the power conferred on the widow was evacuated.

Darling's Executor v Darling, (O.H.) 1869, 41 J. 545.

(1268)

Appointment revocable or irrevocable.

A testator by his settlement directed his trustees to hold a share of the residue of his estate for the children of his brother. By a codicil he conferred on his trustees discretionary powers (1) to apportion the share among the children, (2) to exclude any child, and (3) to retain the share of any child. **Observed** that the trustees might exercise these powers revocably or irrevocably, but if they once made an absolute exercise of any of the powers they could not go back on what they had done.

Macfarlane's Trustee v Macfarlane, 1903, 6 F. 201; 41 S.L.R. 164; 11 S.L.T. 505.

(1269)

Delivered disposition.

The lands of N were held in trust for a father in liferent allanarly and his children

in fee in such proportions as the father might appoint. The father in exercise of the power disposed one-third pro indiviso part of the lands to his second son. The disposition was delivered and infettment followed. **Held** that the deed was a valid and irrevocable exercise of the power of apportionment.

Murray's Trustee v Murray, 1872, 10 M. 773; 44 J. 545; 9 S.L.R. 497.

(1270)

Undelivered deed.

A mother who had a power of disposal over a certain fund executed a deed of appointment in favour of her son. Thereafter she made a will revoking all prior settlements. The deed of appointment was not delivered and was found in the mother's repositories after her death. **Held** that the deed of appointment was at best a testamentary deed, and, if originally operative, was revoked by the will.

Crosbie's Trustees v Wylie, (O.H.) 1902, 10 S.L.T. 395.

(1271)

Power to substitute annuity for payment of capital sum—Alimentary annuity.

By antenuptial marriage contract, the intended wife conveyed certain funds to trustees, directing them to pay the income thereof to herself during her life, and on her death, survived by her husband, to him, and on the death of both spouses, to pay the fee to the child or children of the marriage, subject to a power—conferred on the spouses jointly, and failing a joint exercise of the power, on the wife, and failing her exercise of the power, on the husband—to direct that the share or any portion of the share falling to any child or children should be laid out “in the purchase of an annuity for such child or children, . . . or in any other way or manner that may appear most for his or her benefit in the opinion of the said spouses jointly, or of either of the intended spouses who may exercise this power.” **Opinion** (per Lord Young) that it was a competent exercise of this power to direct that the share of a child should be laid out in the purchase of an annuity for the alimentary use only of such child, and not assignable by the child.

Gavin's Trustees v Johnston's Trustees, 1901, 4 F. 278; 39 S.L.R. 173; affirmed sub nom. *Dawson v Smart*, 1903, 5 F. (H.L.) 24; [1903] A.C. 457; 40 S.L.R. 879; 11 S.L.T. 321.

2. POWER OF DISPOSAL (INCLUDING POWER TO TEST).

(1) CONSTRUCTION OF POWER.

(1272)

Power to bequeath capital retained by trustees to meet annuity—Capital retained in excess of capital required.

A testator directed his trustees to pay to his widow an annuity of £500, with power to his widow to bequeath the amount retained to provide for the annuity to any one or more of the children of the marriage as she might think fit. The income of the

capital retained by the trustees, after payment of the annuity, left a surplus of from £120 to £150 a year. After the death of the widow, who had exercised her power of bequest, **held** that the power of bequest extended to the whole capital retained to meet the annuity, the trustees having acted in good faith, and the sum retained not being so extravagant as to show that they had not exercised a reasonable discretion.

Chivas' Trustees v Stewart, 1907 S.C. 701; 44 S.L.R. 15; 14 S.L.T. 357.

(1273)

Bequest of residue.

Watt's Trustees v Jamieson, 1912 S.C. 1320; 49 S.L.R. 983; 1912, 2 S.L.T. 223, No. 1292, infra.

(2) INTENTION TO EXERCISE POWER.

(1274)

Observations on the distinction between unrestricted powers of disposal and power of apportionment among a prescribed class.

Watt's Trustees v Jamieson, 1912 S.C. 1320; 49 S.L.R. 983; 1912, 2 S.L.T. 223.

Alexander's Trustees v Alexander's Trustees, 1917 S.C. 654; 54 S.L.R. 527; 1917, 2 S.L.T. 52.

Paterson's Trustees v Joy, 1910 S.C. 1029; 47 S.L.R. 844; 1910, 2 S.L.T. 170.

(1275)

Exercise of power by general bequest of residue.

A bequest of the moveable estate of a testator is to be construed as including any personal estate which he may have power to appoint in any manner he may think proper, and operates as an execution of such power unless a contrary intention appears by the will.

Bray v Bruce's Executors, 1906, 8 F. 1078; 43 S.L.R. 746; 14 S.L.T. 222.

(1276)

—A testator directed his trustees to pay to his daughter M, during her life, the interest of a sum of £3500, and at her death to pay over the capital to her children; and in the event of her having no children, to such persons as she should direct by any writing under her hand; and failing such direction, to the heir of entail in possession of an estate (which he had directed to be entailed on his elder son); or failing him, to the daughter's next of kin. M survived the testator and died unmarried, leaving a general settlement by which she conveyed to trustees her “whole estate, heritable and moveable, real and personal, of what kind or nature soever, or wheresoever situated, presently belonging and addebt, or which shall belong and be addebt to me at the time of my decease,” for, inter alia, payment of certain legacies which amounted to £18,000. She also named certain residuary legatees. The deed made no reference to the father's will or to the power of disposal conferred by it. At the date of M's settlement her

estate amounted in value only to £15,200, and she was fully aware of this and of her power of disposal of the £3500 under her father's will. **Held** that M had effectually exercised the power of disposal.

Dalglish's Trustees v Young, 1893, 20 R. 904; 30 S.L.R. 802; 1 S.L.T. 124.

(1277)

A son who was entitled under his father's settlement to the fee of part of his father's estate and to the life of another part with a power of testing thereon, left a will in which, after bequeathing certain legacies, he left the residue of his real and personal estate to his brothers. **Held** that the will was to be construed as embracing the share of his father's estate of which he had power to dispose by will.

Clark's Trustees v Clark's Executors, 1894, 21 R. 546; 31 S.L.R. 430; 1 S.L.T. 528.

(1278)

A daughter had under her father's settlement "power to dispose by settlement" of any part of £2000, not exceeding £1000, the remaining part, or the whole, if she did not exercise the power, being directed to be applied, with the residue of the father's estate, in payment of the debts on his entailed estate, which devolved on his son. The daughter left upwards of £15,000, and a testament by which she nominated an executor, and directed him to divide her estate equally among her nephews and nieces, and to pay her legacies. **Held** that the testatrix had not exercised the power.

Mackenzie v Gillanders, 1874, 1 R. 1050; 11 S.L.R. 612.

(1279)

Two powers expressly exercised and third not mentioned.

By his trust disposition and settlement a testator gave his widow (1) a power to dispose of certain furniture; (2) a power of appointment to the residue of his moveable estate; and (3) a power of appointment to one-half of the proceeds of the sale of a property called Blackmount. Failing disposal or appointment by her, he directed (1) the furniture to go to her grandnieces A and B; (2) the residue of his moveable estate to go to A and B equally; and (3) the said half of the proceeds of the sale of Blackmount to go to certain other relatives of his wife. The widow by her will appointed an executor and directed the residue of "my means and estate" to be divided between A and B, two-thirds to A and one-third to B. With express reference to the powers given to her to dispose of the furniture and of the residue of her husband's moveable estate, she (1) apportioned the furniture, and (2) by a codicil directed the residue of her husband's moveable estate to be divided between A and B equally. The will and codicil made no mention of Blackmount. **Held** (by a Court of seven judges) (1) that the widow's residuary bequest must be held to be a valid exercise of the power, and to include the said half of the proceeds of the sale of Black-

mount, unless her will indicated a contrary intention; and (2) that her will showed no such intention.

Bray v Bruce's Executors, 1906, 8 F. 1078; 43 S.L.R. 746; 14 S.L.T. 222.

(1280)

Exercise of power by prior general settlement.

A died in 1901, leaving a will, dated in 1894, by which he bequeathed "the whole estate and effects of every description of which I may die possessed." At the date of his death he had, under the settlement (dated in 1898) of a relative who died in 1899, the power of disposing by will of a fund which he had life-tenanted since that date. **Held** (1) that it was to be presumed that A intended to bequeath everything of which he should have the power of disposal at the time of his death; and (2) that the will took effect at A's death as a valid exercise of the power, although it had been executed before the power was conferred.

M'Tavish's Trustees v Ogston's Executors, 1903, 5 F. 641; 40 S.L.R. 458; 10 S.L.T. 739.

(1281)

In 1879 a lady executed a settlement by which she conveyed her whole estates to executors, directing them to pay certain legacies, and disposing of the residue. In 1886 she entered into a second marriage, and by antenuptial contract on the occasion of that marriage she conveyed her whole estate then belonging to her, or which she might acquire during the subsistence of the marriage, to trustees, who were directed to hold the estate for her behoof in life-tenancy, and to hold the capital for behoof of such person or persons and on such terms and payable at such periods as she might appoint by any writing under her hand, and, failing appointment, for her nearest heirs in mobilibus. The lady died about a year after her marriage, survived by her husband, and leaving the settlement of 1879, but no other writing except the marriage contract. **Held** that the deed of 1879 was not effectual as an appointment under the marriage contract, which was to be taken as a settlement of the lady's entire estate as existing at her death.

Bertram's Trustees v Matheson's Trustee, 1888, 15 R. 572; 25 S.L.R. 385.

(1282)

A testator gave to her daughter the life-tenancy of a share of her estate and a power of disposal over the capital. **Held** that the daughter's will, being a general testamentary deed and there being nothing in it to show an intention to the contrary, constituted an effectual exercise of the power of disposal, although there was no express reference to the power, and that it was immaterial that the will was made prior to the death of the mother, and therefore before the power became operative, in respect that the daughter's will spoke as at her death which was subsequent to that of her mother.

White's Trustee v Mathie, (O.H.) 1899, 7 S.L.T. 81.

(1283)

Power to test—Partial exercise—Vesting.

By mutual settlement dated in 1867, a husband conveyed to his wife, in the event of her survivance, the whole estate which might belong to him at the time of his death, and the wife made a similar conveyance in favour of her husband. The mutual conveyances were declared to be subject to the following condition: that any will left by the predeceaser should receive effect in the case of the predecease of the husband, to an extent not exceeding three-fifths, and in the case of the wife to an extent not exceeding two-fifths of the estate "remaining at the death of the survivor." In 1873 the husband executed a testamentary writing, whereby, on the narrative that the funds of the spouses amounted to £5000, of which "£2000 belongs to my wife in her own right," he authorised his wife after his death "to make another settlement, and to leave to my relations the following sums, of which they will receive after your death, viz." He then specified the sums to be left to the families of his late brother and of certain sisters, and other sums to be left to his other sisters. He further directed that what was "over out of my shares of the money, as mentioned by me, viz., £3000 that belongs to me," was to be divided equally "amongst each of the families." The husband died in 1876, survived by his wife, who died in 1887. At the husband's death the funds belonging to the spouses exceeded £5000, and they had increased still further at the date of the wife's death. **Held** that the husband's testamentary writing was effectual as an exercise of his reserved power of testing, and that it disposed of £3000 only.

Reddie's Trustees v Lindsay, 1890, 17 R. 558; 27 S.L.R. 514.

(1284)

Conveyance of *acquisita* and *acquirenda* under postnuptial marriage contract.

A lady who, under her grandfather's will, had the liferent alienarily of a share of the residue of his estate and a power to appoint to the fee by any writing under her hand, conveyed to her husband, by postnuptial marriage contract, her "whole estate, goods, chattels, and effects, heritable and moveable, real and personal, now pertaining and belonging to her, or that shall happen to pertain and belong to her in any manner of way" at the time of her death. **Held** that the conveyance was a valid exercise of the power of appointment.

Buchanan's Trustees v Whyte, 1890, 17 R. (H.L.) 53; 15 App.Cas. 156; 27 S.L.R. 1014.

(1285)

Marriage contract conveying *acquirenda*—Whether effectual as exercise of power subsequently bestowed.

A conveyance of *acquirenda* in a marriage contract does not operate as an exercise of a

power of disposal bestowed subsequently to the date of the marriage contract.

Montgomerie's Trustees v Alexander's Trustees, 1911 S.C. 856; 48 S.L.R. 761; 1911, 2 S.L.T. 8.

(1286)

Exercise of power by marriage contract.

A testator conferred upon his widow a power "to leave and bequeath or otherwise dispose of" the capital of a certain fund. In contemplation of a second marriage the widow entered into a marriage contract whereby she assigned all estate "presently pertaining or belonging, or that shall pertain and be owing to her at the time of her death" for certain purposes. **Held** that this was an effectual exercise of the power.

Thomson's Trustees v Pringle, (O.H.) 1901, 9 S.L.T. 11.

(1287)

Destination over failing exercise of power—Donee of power directing fund to be paid to conditional institutes.

A testator directed his trustees to hold half the residue of his estate for payment of the income thereof to his sister, so long as she remained unmarried, and on her death unmarried "to pay the capital of said half of my estate to the person or persons to whom she may bequeath the same by any will," and, failing any direction by her, to pay it to certain specified legatees. The testator's sister, who survived him and died unmarried, left a settlement by which she declared that "it is my wish and desire that the capital of the said half of" the brother's "whole estate shall be divided among the legatees appointed by him under his said trust disposition and deed of settlement." **Held** that the sister had not exercised the power of appointment.

Lord Advocate v Routledge's Trustees, 1907 S.C. 327; 44 S.L.R. 305; 14 S.L.T. 735.

(1288)

Misdescription of event in which power exercisable.

By antenuptial marriage contract the husband reserved power to dispose of the estate conveyed by him to the marriage contract trustees "in the event of there being no issue born of the said intended marriage or none surviving or leaving issue at the termination of the liferent interests before provided, and failing thereof to his own nearest heirs or assignees." The marriage was dissolved by the death of the husband. He left a trust settlement by which he, *inter alia*, provided—"Sixth, in the event of there being no issue of our marriage alive at my death, or in the event of there being issue and their dying before the youngest of them attaining the foresaid age of twenty-one years complete, I direct my trustees" to convey the marriage contract trust estate to his widow, whom failing, to certain other persons named, "whom in the foresaid order I hereby appoint to be my residuary legatees and nominees under

the said antenuptial contract of marriage." There was one child of the marriage, who survived her father, attained the age of twenty-one, and died before the termination of the liferent interests created by the marriage contract. **Held** that in the events which had occurred the sixth purpose had the effect of constituting the widow her husband's nominee under the antenuptial contract of marriage.

Donaldson's Trustee v Donaldson, 1894, 21 R. 1025; 2 S.L.T. 151.

(1289)

Partial exercise of power—Fund appointed to extent specified.

Reddie's Trustees v Lindsay, 1890, 17 R. 553; 27 S.L.R. 514, No. 1283, *supra*.

(3) VALIDITY OF EXERCISE.

(1290)

Power of disposal "during her life"—Exercise by mortis causa deed.

Heritable property was conveyed to M for her liferent use only, and to her children in fee, with the declaration that "it shall be lawful to and in the power of the said M by herself alone, during her life, to sell, burden, or otherwise dispose, onerously or gratuitously, of the said subjects as she may think proper." **Held** that the power did not entitle her to dispose of the subjects by mortis causa deed.

Miller's Trustees v Findlay, 1896, 24 R. 114; 34 S.L.R. 71; 4 S.L.T. 138.

(1291)

Power to dispose by testament—Exercise by general will.

A father in his trust disposition provided that if his only son should die unmarried he should have power to dispose "by testament of £5000 sterling of the trust estate, to be payable at the first term of Whitsunday or Martinmas after his death." The son died unmarried, leaving a trust disposition in which he conveyed his whole estates to trustees. The direction as to residue was as follows:—"And lastly, the whole residue of my means and estate, and of the said sum of £5000 of my father's trust estate, shall . . . be applied by my said trustees in whatever manner they may judge best for the advancement and diffusion of the science of phrenology, and the practical application thereof in particular, giving hereby and committing to my said trustees the most full and unlimited power to manage and dispose of the said residue in whatever manner shall appear to them best suited to promote the ends in view." Certain well-known phrenologists were nominated trustees, to whom the testator gave powers to assume new trustees for the general management of the funds, and directions to assume as special trustees for the application of the residue "enlightened phrenologists," with powers to appoint like-minded successors ad per-

petuum. **Held** that the son by his trust settlement effectually exercised the power given him by his father.

M'Lean v Henderson's Trustees, 1880, 7 R. 601; 17 S.L.R. 457.

(1292)

A testatrix by her will, after providing for the payment of certain legacies, bequeathed the "residue" of her estate to her sisters in liferent and to her nieces in fee. The testatrix, in addition to her own estate, had a power of appointment over a portion of her father's estate liferented by her, the power being in the form of a direction in her father's will to his trustees "to pay over her portion to such person or persons, and if more than one, in such proportions as she shall by any writing under her hand direct or appoint." **Held** that the testatrix by the bequest of residue in her will had validly exercised the power of appointment conferred on her by her father's testament, notwithstanding that she thereby restricted the right of certain appointees to a liferent. **Observations** on the distinction between unrestricted powers of appointment and powers of apportionment among a prescribed class.

Watt's Trustees v Jamieson, 1912 S.C. 1320; 49 S.L.R. 983; 1912, 2 S.L.T. 223.

(1293)

Cumulative exercises of power.

A mother who had a power of disposal over a certain fund executed two deeds of appointment in favour of her son, the first of which expressly gave him one-seventh of the fund, and the second a share equal to what would have fallen to him if no appointment had been made, which practically amounted to one-seventh of the fund. Both deeds were declared to be irrevocable and were duly delivered. **Held** that the appointments were cumulative and not substitutional.

Crosbie's Trustees v Wylie, (O.H.) 1902, 10 S.L.T. 395.

3. POWER OF APPOINTMENT (APPORTIONMENT).

(1) CONSTRUCTION OF POWER.

(1294)

Power of selection.

A testatrix directed a share of residue to be paid to a certain person who predeceased her "to be divided among those of his children whom he may think most needful." It was maintained that this was not a power of apportionment but of selection, the non-exercise of which made the bequest void from uncertainty. **Held** that in virtue of the Powers Act, 1874, there was now no real distinction between a power of apportionment and a power of selection, and that the intention being to benefit the children, the bequest fell to be divided equally among them.

Weir v Young, (O.H.) 1897, 5 S.L.T. 233.

(1295)

Reserved powers—Powers applicable to a universitas.

The effect to be given to a power of apportionment is the same whether the person who is to exercise the power be the original owner of the fund, or be merely the donee of the power. It is also immaterial whether the power be applicable to a universitas or to a specified sum.

Gillon's Trustees v Gillon, 1890, 17 R. 435; 27 S.L.R. 338.

(1296)

Whether power covered heritage.

By antenuptial contract of marriage the intended husband, inter alia, gave his intended wife "full power and liberty, by mortis causa deed, to test upon and divide and apportion among my lawful children . . . my whole means and estate . . . and to that end I hereby appoint the said" wife "to be my executrix, with power to give up inventories, and all other powers competent to an executrix; and I hereby leave and bequeath my whole means and estate to her as executrix foresaid." The husband predeceased his wife intestate, and leaving heritage as well as moveable estate. It having been held that the terms of the deed were ineffectual to carry the heritage to the widow to the effect of entitling her to make up a title as trustee thereto, question, whether the power of apportionment covered heritage.

Campbell v Campbell, 1887, 15 R. 103; 25 S.L.R. 97.

(1297)

Power limited to equal division among objects.

In a marriage contract it was provided that after the death of the spouses the capital of the trust funds should belong to the child or children of the marriage, and be payable at such terms as the spouses or the survivor should appoint. Held that there was no power to appoint the capital otherwise than equally among the children.

Wylie's Trustees v Wylie, (O.H.) 1902, 10 S.L.T. 397.

(1298)

Event in which power exercisable—Vesting of share to be apportioned.

A testator provided by the sixth purpose of his settlement that "the shares of my estate shall vest in beneficiaries . . . at and only upon the arrival of the terms at which their shares . . . become payable." He bequeathed a share of his estate to a beneficiary "in liferent alienably, with power of appointment and disposal of half the fee thereof at her death." By a codicil the testator provided that the provisions contained in the sixth purpose of his settlement should not be payable until three years after his death. The beneficiary exercised the power of appointment, but died before the expiry of the three years. Held that the power had been validly exer-

cised, the right to exercise it not being contingent on the donee of the power surviving the date of payment.

Smellie's Trustees v Glasgow Royal Infirmary, (O.H.) 1905, 13 S.L.T. 450.

(1299)

Donee of power—Trustee—Whether power exercisable by assumed trustees.

The sole trustee under a settlement was directed to retain one-third of the residue of the estate and apply it for behoof of a family of children "and that at such time or times and in such way and manner as my said trustee, in whose judgment and discretion I have perfect confidence, may think most conducive to the welfare of the said children, with full power to her to divide and apportion the said provision among the said children, or to apply the same for their behoof in such shares and proportions as she may think proper." The deed contained no power to assume new trustees. Held that the power of apportionment was personal to the original trustee and could not be exercised by assumed trustees.

Hill's Trustees v Thomson, 1874, 2 R. 68; 12 S.L.R. 20.

(1300)

Power given to two out of four trustees—Death of one of the donees of the power—Validity of exercise by the survivor.

A testator, who had conveyed his estate by his settlement to four trustees, by a codicil conferred power on two of these trustees, his sister and his law agent, to allocate part of the residue of his estate among charitable objects. On the sister's death, there being no allocation of this fund, the law agent by himself executed a deed of allocation. Held, on a construction of the terms of the testator's testamentary deeds, that the two nominees had been selected delectu personarum from the body of the trustees for the purpose of allocating the fund; that the power of allocation could be exercised only by these nominees jointly and did not pass to the survivor; and accordingly that, the deed of allocation by the survivor being invalid, the fund had fallen into intestacy.

Paterson's Trustees v Finlay, 1918 S.C. 713; 55 S.L.R. 759; 1918, 2 S.L.T. 93.

(1301)

Objects of power—Children of daughter or any of them—Children born after testator's death.

A testator directed his trustees to hold and apply or pay a share of residue and the income thereof to or for behoof of one of his daughters and her children, or any of them, in such portions and at such times as his trustees might think most for the advantage of them or any of them. The daughter had two children at the date of the testator's death. Thereafter two other children were born to her before any apportionment of the share in question had been made. Held that the children born after the date of the

testator's death were included among the objects of the power.

Potter's Trustees v Allan, 1918 S.C. 173; 55 S.L.R. 229; 1918, 1 S.L.T. 72.

(1302)

———**Power to apportion among children—Failing apportionment fund to be divided amongst survivors and issue of predeceasers.**

By antenuptial marriage contract A bound himself to pay to "the child or children" of the marriage the sum of £8000 payable at the first term after the death of the survivor of A and his wife. The sum, in the event of there being more children than one, was to be "divisible in such proportions as" A shall appoint, "and failing appointment was" to be divided equally amongst the survivors and the issue of such as may have predeceased leaving issue." **Held** that the sole objects of the power were the children of the marriage in life at the death of the surviving spouse and the issue of predeceasers.

Blackburn's Trustees v Blackburn, 1896, 23 R. 698; 33 S.L.R. 505; 3 S.L.T. 331.

(1303)

———**Power to apportion among children—Failing apportionment, gift on death of liferenter, to children and issue of predeceasers.**

A wife, by antenuptial contract, conveyed her whole estate to trustees for payment of the annual proceeds to the spouses and the survivor. "After the death of the longest liver" the trustees were directed to pay over the trust estate to the children of the marriage in such shares as might be appointed by the spouses or the survivor by writing under their hand, and failing such writing the trustees were to pay the trust estate "to the said children equally and to the issue of such child or children as may have predeceased." **Held** that the persons entitled to the fee of the trust estate, failing exercise of the power of appointment, were the children of the marriage alive at the death of the surviving spouse and the issue of predeceasers, and that these persons were the sole objects of the power.

Cuming's Trustee v Cuming, 1896, 24 R. 153; 34 S.L.R. 77; 4 S.L.T. 146.

(2) INTENTION TO EXERCISE POWER.

(1304)

Observations on the distinction between unrestricted powers of disposal and powers of apportionment among a prescribed class.

Alexander's Trustees v Alexander's Trustees, 1917 S.C. 654; 54 S.L.R. 527; 1917, 2 S.L.T. 52.

Paterson's Trustees v Joy, 1910 S.C. 1029; 47 S.L.R. 844; 1910, 2 S.L.T. 170.

Watt's Trustees v Jamieson, 1912 S.C. 1320; 49 S.L.R. 983; 1912, 2 S.L.T. 223.

(1305)

Exercise by general settlement.

By antenuptial contract a person bound

himself to pay £2000 to the children of the marriage in lieu of legitim, &c., at the first term after his death, and after their majority or marriage, reserving power to apportion the sum among the children if more than one. He never expressly exercised the power of apportionment, but by his will he directed his executors, after payment of debts, to pay to his children, on attaining majority respectively, his whole remaining estate in equal shares. **Held** (by Lord Barcaple, Ordinary) that the father's general settlement was an implied exercise of the power to apportion.

Darling's Executor v Darling, (O.H.) 1869, 41 J. 545.

(1306)

A widow who, under her marriage settlement, enjoyed the liferent of a fund with a power of appointment to the fee among the children of the marriage, died leaving a will by which she left "all I possess" to a daughter named. **Held** that the will was an exercise of the power, and carried the fee of the fund to the daughter named to the exclusion of the other child of the marriage.

Tarratt's Trustees v Hastings, 1904, 6 F. 968; 41 S.L.R. 738; 12 S.L.T. 206.

(1307)

Question, whether a power of apportionment among a specified class had been effectually exercised by a general testamentary settlement which did not mention the power.

Dick's Trustees v Cameron, 1907 S.C. 1018; 44 S.L.R. 753; 15 S.L.T. 111.

(1308)

———**Bequest of residue.**

Residuary clause of a settlement which was held not intended to be, and not to be in fact, an exercise of the power of apportionment in a marriage contract.

Brodie's Judicial Factor v Brodie, 1900, 2 F. 1105; 37 S.L.R. 847; 8 S.L.T. 134.

(1309)

———**Bequest of residue—Expressio unius exclusio alterius.**

By antenuptial contract of marriage, dated July, 1851, the husband, upon his part, bound himself to pay a sum of £4000 on the death of the longer liver of himself and his wife to the children of the marriage equally, and to pay to the trustees £3000 within ten years from the date of the marriage contract. The wife's father bound himself within ten years to pay £3000 to the marriage contract trustees, the two sums of £3000 so provided to be held in liferent for the spouses, and on the death of the survivor to be paid to the children of the marriage. In regard to the sum of £4000, and to the two sums of £3000, a power of appointment was given to the spouses jointly. By a mutual trust disposition and settlement, dated December, 1887, the husband and wife conveyed to trustees "all and sundry lands, sums of money, and in general the whole means and estate, heritable and moveable, of what kind or

nature soever . . . presently belonging to us, or that shall belong and be addebted to us at the time of our deaths," in trust for the children of the marriage. The deed then narrated the part of the marriage contract which dealt with the two provisions of £3000, and also the terms of the will of the wife's father, whereby a sum of £1518 18s. 11d. was directed to be held by the marriage contract trustees for the purposes of the marriage contract, and proceeded—"And whereas the several sums above specified have been paid over to the said marriage contract trustees, and that the fund under their charge amounts in cumulo to £7518 18s. 11d., and now seeing that we have resolved to exercise the power of appointment and direction conferred upon us by the said contract of marriage, therefore we do hereby appoint" a sum of £10 to each of the sons of the marriage, and the remainder to the daughters equally. **Held** (1) that the parties intended the first part of the mutual deed to operate as a general disposition, and the second as a deed of appointment; (2) that the second part of the deed showed that the parties intended to exclude the £4000 from appointment; and (3) that accordingly the general disposition in the first part of the deed was not intended to operate as an appointment to the £4000.

Ramsay's Trustees v Ramsay, 1909 S.C. 628; 46 S.L.R. 468; 1909, 1 S.L.T. 192.

(1310)

———Title taken by parents to themselves, whom failing to trustees to be nominated, in trust for themselves in *liferent* and children *nominatim* in fee — Powers to parents to appoint—Mutual settlement.

A husband and wife purchased certain heritable subjects, and took the destination to themselves and the survivor, whom failing, to such trustees as they might appoint, in trust, for behoof of themselves in *liferent*, and their son and daughter, the only children of the marriage, equally between them, in fee, and the shares of both were declared to be subject "to such further limitations and restrictions, and to such apportionment" as the spouses should impose or make. The spouses afterwards executed a mutual settlement, whereby they conveyed to trustees in general terms all their means and estate, heritable and moveable, but no express mention was made of the subjects held under the above destination. **Held** that they had not intended to exercise the power of apportionment.

Boustead v Gardner, 1879, 7 R. 139; 17 S.L.R. 67.

(1311)

———Power to husband to apportion wife's estate settled by antenuptial contract — Exercise by will disposing of husband's estate.

By antenuptial marriage contract the wife conveyed to herself in *liferent*, and failing her to her husband in *liferent*, exclusive of the *jus mariti*, and in either case to the children of the marriage in fee, certain

bank shares, subject to a power in the husband, and failing his exercising it, in the wife, to divide the provisions made for them among the children. There were three daughters and one son. By his settlement the husband conveyed his whole estate to trustees to pay certain special legacies to the daughters, and to hold "the whole residue and remainder of my estate, heritable and moveable, for behoof of my son," declaring that he had made this division in virtue of the powers in the marriage contract. The husband predeceased the wife, who thereafter executed a transfer of the bank shares to herself in *liferent* *allenarly*, and the children equally among them in fee. **Held** that as the bank stock never belonged to the husband, his settlement was not an exercise of the power conferred by the marriage contract.

Whyte v Murray, 1888, 16 R. 95; 26 S.L.R. 67.

(1312)

———Conveyance of property over which testator had power of appointment.

By a deed of settlement by way of indenture between A, a married woman, and trustees, it was agreed that the trustees should hold the funds for A's issue in such shares and in such manner as she should appoint. By her will A bequeathed to other trustees the whole residue of her estate "including all property over which I have power of appointment" upon trust to hold for her two children (a son and a daughter) or such one of them as should attain 24 or die under that age leaving lawful issue, the daughter's share to be retained and the income paid to her during life, and the capital to be held for her issue "whether children or remoter descendants" in such manner as she should appoint, with power to her to appoint to her husband if he survived her a moiety of the income during his life. **Held** that A had, by her will, exercised the power of appointment reserved by the settlement.

Dalziel v Dalziel's Trustees, 1905, 7 F. 545; 42 S.L.R. 404; 12 S.L.T. 793.

(1313)

———Conveyance of all property over which testator had power of disposal.

A marriage contract provided that certain funds should be held for the children in fee in such proportions and under such restrictions as (in the event which occurred) the wife might appoint. The wife died leaving a trust disposition and settlement whereby she conveyed to trustees her whole estate, "including therein all means and estate over which I have power of disposal by will or otherwise." She directed the trustees to make over the residue of the estate to her children under certain restrictions. There was no property, other than the marriage contract funds, over which the testatrix could exercise any power of appointment. **Held** that the testatrix, by her trust disposition and settlement, intended to exercise, and had exercised, the power of appointment over these funds. **Opinions** reserved as to whether a power to appoint to a limited

class can be held to have been exercised by a general settlement which makes no reference to the power.

Alexander's Trustees v Alexander's Trustees, 1917 S.C. 654; 54 S.L.R. 527; 1917, 2 S.L.T. 52.

(1314)

———**Power to apportion profits accruing subsequent to testator's death.**

A law agent in his trust disposition and settlement directed that the whole "income and profits" of his estate should be paid to his widow during her lifetime "for her own use and for the maintenance and upbringing of our children and for their education," and that after her death the whole estate should be divided equally among the children. Under a contract of copartnery, which, though the fixed period of existence had expired, was still being acted upon at the date of the trustor's death, his trustees were entitled to receive a share of the net profits of the business for ten years after his death, to be applied for behoof of his wife and children in such way and in such proportions as he might direct. The trustor's trust settlement was executed later in date than the contract of copartnery, but made no express reference to its provisions. **Held** that the trust settlement operated as a valid appointment to the share of the profits paid under the contract of copartnery.

Dykes' Trustees v Dykes, 1903, 6 F. 133; 41 S.L.R. 84; 11 S.L.T. 463.

(1315)

———**Vesting clause inconsistent with power.**

By antenuptial contract a husband bound himself to pay the children of the marriage a provision, he having power to apportion the same, and, failing apportionment, equally, the period of payment being the first term after his death. By a subsequent trust disposition and settlement he provided, *inter alia*, that certain portions of his estate should be held for his children, subject to a liferent in favour of his widow and vesting on payment. **Held** that the settlement was not intended to operate and did not operate as an exercise of the powers of appointment.

Crawford's Trustees v Crawford, 1886, 23 S.L.R. 787.

(1316)

Express partial exercise—Donee of power becoming party to deed granted by object of power.

A lady who had a power of apportionment of a fund provided by her husband in their marriage contract in liferent to herself and in fee to the children of the marriage, became party to a bond and assignation in security, whereby one of the sons, in security of a loan, assigned his interest under the marriage contract to the lender, and his mother, in farther security, apportioned to her son one-fifth of the fund and declared the apportionment to be irrevocable. She died leaving no other deed expressly bearing to be an exercise of the power. By

her trust disposition and settlement she left a legacy of £100 to one of her daughters, and appointed the residue of her estate to be divided equally among her children other than this daughter, declaring that these provisions should be in full satisfaction "of all claims competent to them on my decease, whether legally or under my marriage contract, or in any other manner of way." **Held** that the bond and assignation in security contained a valid exercise of the power of apportionment to the extent of one-fifth of the fund; that the trust disposition and settlement dealt with the lady's own estate only, and not with the fund subject to the power, which consequently was as regarded four-fifths unapportioned.

Bowie's Trustees v Paterson, 1889, 16 R. 983; 26 S.L.R. 676.

(3) VALIDITY OF EXERCISE.

(a) Generally.

(1317)

Power to be executed by writing executed with certain formalities—Failure to observe formalities.

When a contract or a will confers a power to appoint certain funds by a writing to be executed in a manner prescribed the power cannot be exercised by a writing not so executed.

Campbell's Trustees v Campbell, 1903, 5 F. 366; 40 S.L.R. 335; 10 S.L.T. 589.

(1318)

Power to appoint executor to granter of power—Whether duly exercised.

Bowman v Bowman, (O.H.) 1910, 1 S.L.T. 381. Trust, No. 63.

(1319)

Fund to be held by trustees—Exercise of power by conveyance to other trustees.

In a deed of settlement by way of indenture between A, a married woman, and trustees it was, *inter alia*, agreed that the trustees should hold the trust funds for A's issue in such shares and in such manner as she should appoint. By her will A bequeathed to other trustees the whole residue of her estate "including all property over which I have power of disposal" in trust for her issue. **Held** that the exercise of the power by the will was not invalidated by the fact that it took the form of a conveyance to other trustees who held other funds.

Dalziel v Dalziel's Trustees, 1905, 7 F. 545; 42 S.L.R. 404; 12 S.L.T. 793.

(1320)

A lady in her antenuptial marriage contract conveyed to trustees certain heritable and moveable estate, to be held for behoof of herself in liferent, and of her children in fee, in such proportions and on such terms and conditions as she might appoint by writing under her hand. She died, leaving a trust disposition and settlement,

in which she stated her intention to exercise this power of appointment, and desired the trustees under the marriage contract to transfer the property vested in them to the trustees under the trust disposition and settlement, "it being my desire and intention that the property conveyed by the said contract of marriage, and now vested in the trustees under the same, and whether so transferred or not, shall be dealt with and divided as part of my general estate." **Held** that it was no objection to the exercise of the power that it was in this form.

Mackie v Mackie's Trustees, 1885, 12 R. 1230; 22 S.L.R. 814.

(1321)

Signed holograph marginal note on deed by which power reserved.

A purchaser of heritage took a disposition in favour of himself and his wife in conjunct fee and liferent, and after their death to his daughters in liferent, and their children in fee, full power being reserved to him to burden or dispose of the subjects gratuitously as full fiar. The deed was found in his repositories after his death, with a holograph note signed by him upon the margin as follows:—"If any of my daughters die and leave children, they fall in to the mother's share of the rents while any of their aunts live." **Held** that this direction was a valid exercise of the reserved power to qualify the conveyance.

Jack v Rennie, 1874, 1 R. 828; 11 S.L.R. 345.

(1322)

Appointment by contractual deed invalid—Right of donee of power to make new appointment.

A wife who had power to apportion a fund among her children purported to exercise it by a mutual settlement, executed by herself and her husband. The exercise of the power was contractual as between the spouses, but it was held to be invalid by the Court. **Held** that the wife was free to make a new appointment of the fund, and an apportionment contained in a codicil executed by her subsequent to her husband's death sustained.

MacGillivray's Trustees v Watson's Trustees, 1911 S.C. 1103; 48 S.L.R. 887; 1911, 2 S.L.T. 104.

(1323)

Irrevocable appointment — Appointment invalid in event which happened—Validity of new appointment.

When an appointment is made to persons in succession which is partly *intra vires* and partly *ultra vires* the validity of the appointment is to be determined by the event. By an antenuptial contract of marriage the spouses or the survivor had power to apportion a fund among their children. The surviving husband made a deed of appointment, which bore to be irrevocable, directing that the greater part of the estate should belong to his eldest son, whom failing, to the heir of his body who might be entitled to succeed to an estate belonging

to the husband at the date of the husband's death. The eldest son predeceased the father, leaving issue. The father thereupon made another deed of appointment. **Held** that, as the son's issue were not objects of the power, the first deed, in the event which happened, contained no valid scheme of division, and that the estate fell to be divided in terms of the second deed.

Robertson's Trustee v Mackay, (O.H.) 1882, 20 S.L.R. 196.

(1324)

Validity of partial appointment.

A power of appointment may be exercised partially, the fund so far as unappointed going as in default of appointment.

Smith Cuninghame v Anstruther's Trustees; Mercer v Anstruther's Trustees, 1872, 10 M. (H.L.) 39; L.R., 2 H.L. Sc. 223; 44 J. 407; 9 S.L.R. 431.

(1325)

The lands of N were held in trust for a father in liferent and his children in fee in such proportions as he might appoint, and, failing appointment, equally. In exercise of the power the father disposed one-third *pro indiviso* part of the lands of N to his second son. The deed was delivered and infetment followed on it. **Held** that this was a valid partial appointment in favour of the second son and was irrevocable.

Murray's Trustee v Murray, 1872, 10 M. 778; 44 J. 545; 9 S.L.R. 497.

(1326)

Exercise from time to time.

A power of appointment may be exercised from time to time.

Smith Cuninghame v Anstruther's Trustees; Mercer v Anstruther's Trustees, 1872, 10 M. (H.L.) 39; L.R., 2 H.L. Sc. 223; 44 J. 407; 9 S.L.R. 431.

(1327)

Uncertainty—Three different powers over different funds—Will not expressly exercising powers.

A testatrix by a will (partly printed and partly holograph), in which she appointed executors, made pecuniary bequests to all her children, and divided the residue equally among them. The testatrix, in addition to her own estate, which was of small extent, had powers of apportionment over three funds, amounting to a considerable sum, coming from different sources, and held by different trustees for behoof of her in liferent and of her children in fee, the power in each case being "to divide and apportion the income and capital" among her children, "subject to such conditions, and payable at such times" as she might appoint. The will made no reference to these powers, but the amount of the pecuniary bequests to the children was practically the same as the total amount of the three funds which were the subject of the powers. **Held** that the will was bad as an exercise of the powers, in respect that, while the bequests

to the children could not be met out of the testatrix's own estate or out of any one of the funds in the hands of the various trustees, the will did not discriminate between these, or indicate from what source the bequests were to be paid.

Paterson's Trustees v Joy, 1910 S.C. 1029; 47 S.L.R. 844; 1910, 2 S.L.T. 170.

(1328)

Power to grant alimentary liferent.

A testator, by his trust settlement, provided that his son should be entitled to grant to his surviving widow "so long as she remains unmarried an alimentary liferent provision not exceeding one-half of the free annual proceeds of the share of my estate liferented by him." The son, by a will in English form, "in exercise of all powers and authorities enabling me in this behalf," granted to his wife "so long as she shall remain my widow the one-half of the annual proceeds of the share of my interest under the said will of my said father." Held that the son had validly exercised the power conferred on him by his father's will in respect that, although he did not repeat the restrictive word "alimentary," the context made it clear that he did not seek to give to his widow anything more than an alimentary liferent provision.

Cook v Cook's Trustees, (O.H.) 1911, 2 S.L.T. 64.

(1329)

Provision of liferent to widow, with power to accelerate payment of legacies—*Jus relictae* claimed and liferent surrendered — Right to exercise power of accelerating.

A testator in his settlement directed his trustees to pay to his widow the income of the residue of his estate in full of her legal rights but with power to her "to consent to payment of all or one or more of the legacies" thereafter bequeathed, " . . . so as to admit of payment thereof during her life." He then directed the payment of a number of legacies "upon the death of my said wife, or should she surrender her liferent over any part thereof so as to admit of payment, then for payment of such part on such surrender." Some of the legacies were unconditional, others were bequeathed subject to a clause of survivorship and conditions in favour of the issue of the legatees. After the husband's death the widow claimed her legal rights, and thereafter executed a formal deed in which she confirmed this election and surrendered her whole rights under the settlement, and consented, so far as she competently could in exercise of the power conferred upon her in the settlement, to the immediate payment of the whole of the legacies. Held that the widow, having surrendered the whole of the provisions of the settlement in her favour, was debarred from exercising the power of consent. Held also that the unconditional legacies having vested indefeasibly at the testator's death were, owing to the surrender of the liferent immediately payable, provided the trustees had sufficient funds to pay the legacies, but that the vesting of the contingent legacies

was not accelerated, and that they were not payable until the widow's death.

Jacks's Trustees v Jacks, 1913 S.C. 815; 50 S.L.R. 536; 1913, 1 S.L.T. 341.

(1330)

Power exercised under misapprehension—Prior partial exercise.

The lands of N were held in trust for a father in liferent allanarly and for his children in fee, in such proportions as he might appoint, which failing, equally among them. The father in exercise of the power, disposed one-third pro indiviso part of the lands of N to his second son. This deed was delivered, and infettment followed on it. Ten years afterwards the father executed a settlement directing the trustee on his death to sell the whole estate of N and divide the proceeds among his children in certain proportions, viz., to his eldest son £3000, and to each of his other children an equal share of the residue. Held that the first deed was a valid exercise of the reserved power of apportionment, and irrevocable, and that the second deed, having been granted under error as to his legal powers, was inept.

Murray's Trustee v Murray, 1872, 10 M. 778; 44 J. 545; 9 S.L.R. 497.

(b) Fraud on Power.

(1331)

Option given between small sum and larger benefit not in accordance with power.

By an antenuptial contract of marriage the trustees were directed, on the death of the survivor of the spouses survived by issue of the marriage, to hold and pay over the estate conveyed by the wife to or for behoof of the children of the marriage "in such proportions and subject to such conditions" as the wife, whom failing, the husband, might direct, and failing such direction, equally. After the death of the wife the husband executed a deed of apportionment by which, in professed exercise of the power, he directed the trustees to pay to each of his daughters £500, and the whole residue to his son, but declared that the daughters should have the option of either accepting the £500 or of claiming the liferent of certain larger sums specified. Held that the power of apportionment had not been to any extent validly exercised, in respect that the professed apportionment was not a bona fide or legitimate exercise of the power, the first alternative, which would by itself have been valid, having been inserted merely for the purpose of concussing acceptance of an invalid exercise of the power.

Dick's Trustees v Cameron, 1907 S.C. 1018; 44 S.L.R. 753; 15 S.L.T. 111.

(1332)

Bargain to accept liferent, the fee going outside power.

Held that an averment that a deed of appointment had been executed by a father as the outcome of an agreement between

him and his daughters, who were objects of the power, whereby the daughters agreed to restrict their rights in the shares appointed to them to a *liferent*, and to make provision for the capital being secured at their death for the endowment of an institution which the father desired to found, was relevant to support a reduction of the deed of appointment at the instance of a son who was also an object of the power.

Craig v Craig's Trustees, (O.H.) 1905, 12 S.L.T. 620.

(1333)

Reduction of deed granted as consideration for ultra vires exercise of power of appointment—Title to sue.

A son brought a declarator that his father had not validly exercised a power of appointment conferred upon him by his antenuptial marriage contract on the ground that, with a view to securing the endowment of a charitable institution, he had made an agreement with his three daughters, who were also objects of the power, to appoint certain shares of the fund to them, provided they restricted their interest in their shares to a *liferent* and secured the capital for the endowment of the institution. The pursuer concluded for reduction of the deed of appointment and also for reduction of the deed granted by the sisters in fulfilment of the agreement. **Held** that the pursuer had no title to reduce the deed granted by the sisters, but **observed** that he would be entitled to production of it in modum probationis in support of his plea of illegal bargain.

Craig v Craig's Trustees, (O.H.) 1904, 12 S.L.T. 136.

(1334)

Purchase by donee of power of interest of object.

Held that the holder of a power of apportionment in a marriage contract was disqualified from purchasing for her own behoof the interest in the fund of one of the objects of the power, and that a purchase made on her behalf from his creditors was to be regarded as made in trust for him.

M'Donald v M'Grigor, 1874, 1 R. 817.

(1335)

Parent and child—Transaction between parent and child—Partial appointment—Effect of discharge by child of all claims to fund.

Smith Cuninghame v Anstruther's Trustees; Mercer v Anstruther's Trustees, 1872, 10 M. (H.L.) 39; L.R., 2 H.L. Sc. 223; 44 J. 407; 9 S.L.R. 431, No. 1384, *infra*.

(1336)

(c) **Total Exclusion of Object of Power.**

Powers of appointment—Powers of Appointment Act, 1874.

Opinion (per Lord Fraser) that the Powers of Appointment Act, 1874, applies to Scotland.

Mackie v Gloag's Trustees, 1883, 10 R. 746; 20 S.L.R. 486.

(1337)

Appointment subsequent to vesting.

Held (1) that the Powers of Appointment Act, 1874, which by its first section enacts that no exercise of a power of appointment should be invalid on the ground that any object of the power is altogether excluded, applies to Scotland; and (2) that where a right was vested in children subject to a power of apportionment, an apportionment was not invalid which excluded the representatives of one of them, who had died, from a share in it.

Mackie v Mackie's Trustees, 1885, 12 R. 1230; 22 S.L.R. 814.

(1338)

Exclusion of representatives of deceased object of power.

In a marriage contract, dated in 1812, a fund was provided by the lady's father to the spouses in *liferent* and to their children in fee, with a power of apportionment to the spouses jointly or the survivor. The husband died without exercising the power, survived by six children, of whom one son died unmarried and intestate. After the son's death his mother executed a deed apportioning the fund among her surviving children. She died in 1873. **Held** that the exercise of the power was invalid in respect of the omission to apportion any part to the deceased son's representatives, notwithstanding the fact that his surviving brothers and sisters were his representatives.

Campbell v Campbell, 1878, 5 R. 961; 15 S.L.R. 643.

(1339)

Illusory appointment.

Question, whether the enactment in the Illusory Appointments Act, 1830, that all appointments under a power shall be valid, whether illusory or not, applies to Scotland.

Smith's Trustees v Graham, 1873, 11 M. 630; 45 J. 399; 10 S.L.R. 426.

(d) **Restriction of Interest to Liferent.**

(1340)

Power to apportion among certain objects.

Opinions reserved as to the validity of the appointment of a mere *liferent* where the power is given to appoint a sum among certain persons in such shares and proportions as the appointer may direct.

Darling's Trustees v Darling's Trustees, 1909 S.C. 445; 46 S.L.R. 394; 1909, 1 S.L.T. 207.

(1341)

Appointment to an object of power in *liferent* and to another object in fee—Right to object of power to confer *liferent* on party not object of power—Power to appoint among issue—Appointment to daughter in *liferent*, with fee to her issue as she should appoint—Power to daughter to give *liferent* to husband.

In a deed of settlement by way of indenture between A, a married woman, and

trustees, it was, *inter alia*, agreed that the trustees should hold the trust funds in trust for A's issue, at such ages or times not earlier than twenty-one or marriage, in such shares, and in such manner, as she should appoint. In a hotchpot clause reference was made to any "child who or any of whose issue shall take under such appointment." By her will A bequeathed to other trustees the whole residue of her estate, "including all property over which I have power of appointment," upon trust to hold for her two children (a son and daughter), or such one of them as should attain twenty-four, or die under that age leaving lawful issue, the daughter's share to be retained and the income paid to her during life, and the capital after her death to be held for her issue, "whether children or remoter descendants," in such manner as she should appoint, with power to her to appoint to her husband, if he survived her, not more than a moiety of the income during his life. **Held** (1) that the expression "issue" in the settlement included remoter descendants than children, and that consequently the daughter's issue were objects of the power; (2) that the testatrix had validly exercised the power by giving a life interest to her daughter with a power of appointment of the fee among her issue, and the fee to her daughter's issue as the daughter should appoint; (3) that the daughter's husband not being an object of the power, the will was not a valid exercise of the power in so far as it gave the daughter right to provide a life interest to her husband, but that this provision was to be held *pro non scripto*, and did not affect the validity of the exercise of the power otherwise.

A had also under her father's will a power to appoint among her issue "born or to be born during" her life, "or within twenty-one years after her death," with such future or other trusts for their benefit as she should appoint. **Held** that A had also validly exercised this power by her will except in so far as she gave right to her daughter to provide a life interest to her husband, and in particular, that the exercise of the power was not necessarily invalidated owing to A having given her daughter power to appoint to issue, whether children or remoter descendants, without any restriction to issue born within twenty-one years of A's death.

Dalziel v Dalziel's Trustees, 1905, 7 F. 545; 42 S.L.R. 404; 12 S.L.T. 793.

(1342)

Appointment of liferent of part of the fund to one object of the power, and whole fee to the other object.

By a contract of marriage it was provided that the trustees should hold the capital of the trust funds "as a provision for behoof of the child or children" of the marriage, divisible "in such shares and proportions" as the spouses jointly or the survivor might appoint, and failing appointment, then equally. The husband died survived by his wife and by a son and a daughter. **Held**

that a deed executed by the surviving wife, whereby she appointed a life interest only in part of the trust fund to her son, and the fee of the whole fund to her daughter or the daughter's heirs, was a valid exercise of the power.

Pringle's Trustees v Basta, 1913 S.C. 172; 50 S.L.R. 74; 1912, 2 S.L.T. 367.

(1343)

Annuity to object of power — Residue to others.

In an antenuptial marriage contract the husband conveyed the whole property then belonging to him, or which should belong to him at the time of his death, to himself and his intended wife in conjunct fee and life interest, for her life interest use alienably, and the children of the marriage in fee, declaring that it should be in his power to divide the fee in such proportions and under such conditions as he should appoint, and failing such apportionment, that the fee should be divided equally among the children. In his settlement the husband directed his trustees to pay three-fourth parts of the residue of his estate to three of his four children, and to hold the remaining fourth for his fourth child, who was insane. By a codicil he recalled the latter direction, and directed his trustees to purchase an annuity of £300 for his insane child. **Held** that there had been a valid apportionment, and that the residue, under deduction of the sum required to purchase the annuity for the fourth child, went to the remaining children.

Moir's Trustees, &c., 1871, 9 M. 848; 43 J. 462; 8 S.L.R. 565.

(1344)

Appointment to alimentary life interest with power of disposal — Power to appoint under "conditions, limitations, and restrictions."

By an antenuptial contract of marriage the trustees were directed, after the death of the surviving spouse, to hold the fee of the estate conveyed to them by the wife for behoof of the children of the marriage "in such proportions, and subject to such conditions, limitations, and restrictions, and with such terms of payment and vesting" as the wife should appoint by any deed under her hand. The husband having died leaving a son and daughter, the wife executed a deed of appointment by which she directed the trustees to retain three-fourths of the estate "for behoof of her daughter in life interest for her life interest alimentary use only," and on her daughter's death to apply the capital so life interest in such manner as her daughter might direct by any writing under her hand, whether *inter vivos* or *mortis causa*, and failing such appointment to pay and convey the same to her daughter's heirs in mobili-bus. **Held** (1) that the wife's deed of appointment was a valid exercise of the power, and (2) that the daughter's right under the deed of appointment was not a right of fee.

Ewing's Trustees v Ewing, 1909 S.C. 409; 46 S.L.R. 316; 1909, 1 S.L.T. 104.

(1345)

Appointment to liferent with power to test—Power to appoint under “conditions, provisions, and limitations.”

By antenuptial marriage contract the trustees were directed, after the death of the survivor of the spouses “to pay over” certain funds “to or for behoof of” the surviving child or children of the marriage, “in such shares or proportions, and subject to such conditions, provisions, and limitations” as the spouses or the survivor of them should appoint. By mutual trust disposition and settlement, in exercise of the reserved power of appointment, the spouses directed their testamentary trustees to hold these funds for behoof of their children in equal shares, and to pay to them the income, it being provided that the shares of the sons should be paid at majority, and that in the case of the daughters the share of each should be settled upon her at marriage for her sole and exclusive use, and held by trustees for her behoof, “with power to her to dispose of the fee of the same by any testamentary deed, and failing her disposing of the same by such deed, the same shall be paid, assigned, and conveyed to her heirs and executors.” In regard to the disposal of the fee of the shares of unmarried daughters the trustees were directed to pay or assign the same “according to the direction which each such daughter may leave by any testamentary deed,” and failing the execution of such deed “to her heirs and executors.” The daughters (none of whom were married) contended that their parents were not entitled to restrict their rights to a liferent with power to test. **Held** that the appointment was valid.

Wallace's Trustees v Wallace, 1891, 18 R. 921; 28 S.L.R. 709.

(1346)

Certain sums of money were destined in fee to certain beneficiaries by (1) their grandmother's trust disposition and settlement, and (2) their mother's marriage contract. The deeds conferred upon the mother a power of appointment to the respective sums. The mother, in exercising the power, restricted the rights of the beneficiaries to a liferent with a power to test. **Held** that the restriction was ultra vires of the power of appointment.

M'Kerlie v Logan's Trustees, (O.H.) 1903, 10 S.L.T. 552.

(1347)

Apportionment to object of power but as heir of entail.

By an antenuptial contract of marriage the wife's fortune was conveyed to trustees with directions on the death of the survivor of the spouses to “pay over or assign” the whole trust funds to the child or children of the marriage, “in such proportions and at such time and under such conditions as” the spouses should by joint deed appoint, and failing such apportionment, then in certain specified proportions. A portion of the wife's funds, amounting to £25,000, was advanced

by the marriage contract trustees on heritable bond over two estates purchased by the husband for £28,000 during the subsistence of the marriage. The parents, in the exercise of their power of division, provided that the sum of £25,000 secured over the husband's estates should be “settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate,” . . . “it being our desire and appointment that the said trustees under our marriage contract before narrated, or the survivors of them, should immediately on the death of the survivor of us discharge” the bond for £25,000. **Held** that this was a valid exercise by the parents of the power of appointment contained in the marriage contract in favour of the eldest son to the extent of £25,000 in fee, the addition of the words “and other members of our family in succession, being heirs in possession of the entailed estate,” importing no effectual limitation of his right and the direction to the trustees to discharge the bond for £25,000 over the entailed estate being one which could only be carried out with his consent.

M'Donald v M'Donald's Trustees, 1875, 2 R. (H.L.) 125; L.R., 2 H.L. Sc. 482; 12 S.L.R. 635.

(e) Appointment Subject to Unauthorised Conditions.

(1348)

Condition that object should repay on succeeding to landed estate.

By antenuptial marriage contract the trustees were directed after the death of the survivor of the spouses “to pay over” certain funds “to or for behoof of” the surviving child or children of the marriage, “in such shares or proportions, and subject to such conditions, provisions, and limitations” as the spouses or the survivor of them should appoint. By mutual trust disposition and settlement, in exercise of the reserved power of appointment, the spouses directed their trustees in making payment to their children of their respective shares of the funds in question to take them bound to repay the same “in the event of such son or daughter succeeding to the said estate of L.” The contingency had not occurred at the death of the survivor of the spouses. **Held** that the direction was ultra vires and ineffectual, but that its invalidity did not affect the appointment in other respects.

Wallace's Trustees v Wallace, 1891, 18 R. 921; 28 S.L.R. 709.

(1349)

Apportionment of share of fund to objects of power—Restriction to liferent with fee to issue.

By an antenuptial marriage contract, a fund was provided to the children of the marriage “in such proportions” as the spouses might “direct and appoint.” The settlement of the husband, which was also

signed by the wife, contained this joint appointment—"We hereby apportion amongst our children equally, share and share alike, the fund falling to them under our marriage contract, the issue of any of them predeceasing taking their parent's share, the share of any such child or his or her issue being held, managed, and dealt with as hereafter provided for my children's shares of my estate." The father's settlement contained directions to the trustees in regard to the children's shares (including their shares of the marriage contract fund as well as their shares of his own estate), which in the case of sons might, and in the case of daughters would, have the effect of reducing their right in a share to a *liferent*, and in both cases without the right to dispose of it by will or otherwise. When the appointment took effect there were no issue of predeceasing children in existence. **Held** (1) that the appointment was not invalid in respect of the mention of the issue of predeceasing children, as issue were not included in the appointment in the event which happened; (2) that the appointment was valid as a division of the fund among the children, but that the restrictions imposed were invalid; (3) that the children were entitled (without being put to an election) to their share of the marriage contract fund free of the restrictions imposed, as well as to their share of their father's own estate bequeathed by his settlement.

Matthews Duncan's Trustees v Matthews Duncan, 1901, 3 F. 533; 38 S.L.R. 401; 8 S.L.T. 443.

(1350)

Power to appoint "under conditions and restrictions."

Mrs. Warrand, by trust disposition and settlement, directed her trustees to convey the residue of her estate to the children of her brother Alexander Warrand, "in such proportions, at such times, on such conditions, and under such restrictions as he may direct by any writing under his hand executed after my death." After the death of *Mrs. Warrand*, Alexander executed a deed of appointment, whereby, on the narrative of the power of appointment in *Mrs. Warrand's* settlement, he appointed that "the said residue shall on my death belong to the said children (on the conditions and under the restrictions hereinafter written, so far as I may lawfully impose such conditions and restrictions) in the proportions" specified; and with regard to the shares of all but two of his children, he directed that the said shares shall belong to them in *liferent* only, and for their *alimentary* use *allenerly*, with fee to their issue and failing issue of any child the fee to be disposed of as such child should direct, and failing direction, to belong to the next of kin of such child. **Held** (1) that the deed of appointment, in so far as it appointed that the residue should belong to the appointer's children in the proportions specified, was a valid and effectual exercise of the power of appointment; (2) that the

restriction of the children's right to a *liferent*, and the appointment of the fee to their issue, were *ultra vires* and ineffectual; and (3) that children whose shares were restricted to a *liferent* were entitled to payment of the fee of the shares respectively appointed to them.

Warrand's Trustees v Warrand, 1901, 3 F. 369; 38 S.L.R. 273; 8 S.L.T. 367.

(1351)

By an antenuptial marriage contract the trustees were directed to hold and apply the fee of the wife's funds for behoof of her children, "in such proportions, and with such restrictions, and on such terms, and payable at such periods" as she might appoint, and failing such appointment, equally. There were two children of the marriage, a son and a daughter. By her will and codicil the wife, in professed exercise of the power, appointed the whole fund to her son, declaring that it should be held by her trustees for his *liferent* *alimentary* use *allenerly*, and for behoof of his issue in fee as he should appoint, and that if he died without being survived by children or remoter issue, it should fall to her daughter or her issue, with power to the trustees to make advances to the son, and to the son to confer upon his widow a *liferent* of the fund, or part thereof. **Held** that the exercise of the power was valid in so far as it apportioned the fund to the son, but that the adjoined provisions and declarations were all invalid, and to be treated *pro non scriptis*.

Middleton's Trustees v Middleton, 1906, 8 F. 1037; 43 S.L.R. 718; 14 S.L.T. 187.

(1352)

Under an antenuptial marriage contract the husband disposed his whole estate to the children of the marriage in fee, "under such burdens and conditions and payable at such periods and in such shares or proportions amongst the said children respectively," and the issue of children predeceasing him, as he might appoint, and failing appointment, to the children and such issue equally among them. By his trust disposition and settlement he directed his trustees to hold the residue of his estate for his children in equal shares, and to pay or apply the same as thereafter mentioned, the interest of daughters being restricted also as thereafter mentioned. In a subsequent portion of the deed it was provided that the daughters' shares should be held for their respective *liferent* uses *allenerly* and for their issue in fee, in such proportions and under such conditions as the daughters might appoint, and, in default of appointment, for such issue equally among them; and, failing issue, for such persons as the daughters might direct, and, in default of such direction, for the testator's then surviving children and the issue of predeceasing children. It was also declared that the daughters' shares should be *alimentary* and not assignable by them, and should be exclusive of the rights of any husbands they might marry. A daughter, who was aged sixty-seven and

was unmarried, having claimed payment of an equal share of the residue free from the restrictions imposed in the trust disposition and settlement, **held** that these restrictions were ultra vires and ineffectual, and that the daughter was entitled to payment, as her absolute property, of an equal share of the residue.

MacEwan's Trustees v MacEwan, 1917 S.C. 50; 54 S.L.R. 69; 1916, 2 S.L.T. 271.

(1353)

A testator left the residue of his estate to trustees, with a declaration that upon the death of his son, or on the death of his son's wife if she survived him, the residue of the trust funds should belong and be paid to the son's children "at such periods, and in such proportions, and under such limitations, conditions, and restrictions," as his son should direct by any deed under his hand. The son, in a deed of appointment, after making provisions for his sons, directed his trustees to hold the remainder of the fund "upon trust, to pay the interest thereof" to his two daughters for their own separate use, notwithstanding coverture, and so that the daughters should not have power to dispose thereof by way of anticipation, and upon the death of each daughter to hold her share for her children in such shares as she should have appointed, and, failing children, for such persons as she should have appointed. **Held** that the appointment was valid, and had vested in the daughters the capital of their shares, but that these were limited to their separate use for life, independent of any present or future husband, and were to be held by them subject to the power of appointment conferred on them by their father's settlement, but without power to make any other assignment or appointment by way of alienation.

Lennox's Trustees v Lennox, 1880, 8 R. 14; 18 S.L.R. 36.

(1354)

By antenuptial marriage contract trustees were directed after the death of the survivor of the spouses "to pay over or assign" certain funds to the child or children of the marriage "in such proportions and at such times and under such conditions" as the survivor of the spouses should appoint. The spouses were survived by three children of the marriage. The surviving spouse, professing to exercise the power of appointment, directed his trustees to "lay out and invest the third part or share falling to his daughter F" in their own names, and to pay over the annual proceeds to F during her life, and "in the event of her being married, and her husband surviving her," to pay the annual proceeds to him, and upon the death of the longest liver of F and her husband, then to hold the funds for behoof of F's children. Failing children of F, the trustees were directed at the death of the survivor of F and her husband to pay the funds "to such persons and in such manner" as F should direct. In a question

between the trustees and F (who was seventy-five years of age and unmarried), **held** (1) that the appointment was not invalid because it restricted F's right to a life-rent, with a power to test; and (2) that although the provisions in favour of F's husband and children were ultra vires and ineffectual, their invalidity did not affect the gift of the power of disposal in the event of F having no children.

Wright's Trustees v Wright, 1894, 21 R. 568; 31 S.L.R. 450; 1 S.L.T. 558.

(1355)

Marriage contract provision—Power to apportion exercised by will—Date of payment of provision altered.

By antenuptial contract a person bound himself to pay £2000 to the children of the marriage at the first term after his death, and after their majority or marriage, reserving power to apportion the sum among the children if more than one. He did not expressly exercise the power, but by his will he directed his executors, after payment of debts, to pay his whole remaining estate to his children in equal shares on their respectively attaining majority. **Held** that the father's general settlement was an implied exercise of the power which was not rendered invalid by the alteration in the date of payment.

Darling's Executor v Darling, (O.H.) 1869, 41 J. 545.

(f) Appointment to Parties not Objects of Power.

(1356)

Liferent to object of power with fee to persons not objects of power.

By an antenuptial contract of marriage the trustees were directed, on the death of the survivor of the spouses survived by issue of the marriage, to hold and pay over the estate conveyed to them by the wife to or for behoof of the children of the marriage "in such proportions and subject to such conditions" as the wife, whom failing, the husband, might direct, and failing such direction equally. By her will the wife, inter alia, directed her trustees to hold "for my daughter A the sum of £20,000," and pay her certain sums per annum till she was twenty-five, and thereafter the whole income, and upon her death to divide the capital among A's children equally. Failing children at A's decease the money was to revert to the general estate of the testatrix. **Held** that this was not to any extent a valid exercise of the power of apportionment, there being no initial gift of the £20,000 to the daughter, which could be separated from the limitation of her right to a life-rent, with the fee to her children, who were not objects of the power.

Dick's Trustees v Cameron, 1907 S.C. 1018; 44 S.L.R. 753; 15 S.L.T. 111.

(1357)

A testator directed his trustees to hold certain funds for his daughter in life-rent

only, and her "children per stirpes in fee, payable . . . in such proportions and subject to such conditions and restrictions" as his daughter might appoint. By her appointment the daughter, who was survived by three sons, directed that, as regarded half of the funds in question, each son should have the *liferent* only of one-third, and his children the fee. **Held** that the appointment was invalid, as the sons' children were not objects of the power.

Neill's Trustees v Neill, 1902, 4 F. 636;
39 S.L.R. 426; 9 S.L.T. 495.

(1358)

A husband, by his antenuptial contract of marriage, bound himself to provide and secure his whole estate to the children of the marriage in fee, declaring that it should be in his power if there were more than one child to divide the estate among them as he should think proper, and, failing such division, that the estate should be divided equally. He had several children, one of whom, a son, predeceased him, leaving a widow and children. He bequeathed by his settlement a share of his estate to this son's widow in *liferent*, and in part to the son's son in fee on his attaining a certain age, and the remainder to the son's daughters in *liferent*, and the heirs of their bodies in fee. The remainder of the residue of his estate he bequeathed to his two daughters, who survived him, in *liferent* *allenerly* and to their children in fee. He also bequeathed a legacy to his grandson. **Held** that the testator's children took under the marriage contract a protected succession which he could not defeat by any gratuitous deed, that his power was limited to apportioning his estate among them, and therefore that the settlement was invalid as an exercise of the power, because it conferred a benefit on persons who were not objects of the power, and gave *liferents* only to two of the children who were objects of it.

Gillon's Trustees v Gillon, 1890, 17 R. 435;
27 S.L.R. 338.

(1359)

Terms of an antenuptial marriage contract which provided for the division of the residue of the husband's estate among his children under reservation of a power of apportionment, on which **held** that the intended exercise of the power by will to the effect of restricting a child's share to an alimentary *liferent* and giving the fee to the child's issue was *ultra vires*, in respect that the grandchildren were strangers to the power.

Wilson's Trustees v Wilson, (O.H.) 1907,
15 S.L.T. 262.

(1360)

A father was entitled to apportion a sum among his children. **Opinion** that he was not entitled to appoint that certain of his children should take a *liferent* and that the fee should go to their children.

Murray's Trustees v Murray, 1881, 18 S.L.R. 690.

(1361)

Annuity only apportioned to object of power.

Parents purchased heritage and took the title to themselves and the survivor, whom failing, to such trustees as they might appoint, in trust, for behoof of themselves in *liferent*, and their only son and daughter, equally, in fee, but subject "to such further limitations and restrictions, and to such apportionment" as the parents should impose or make. The parents afterwards executed a mutual settlement, whereby they conveyed their whole means and estate to trustees. Under this deed the daughter's share of her parent's estate was restricted to a small annuity and certain interests were given to the grandchildren of the spouses. **Held** that this mutual settlement was not in execution of the power of appointment reserved.

Boustead v Gardner, 1879, 7 R. 139; 17 S.L.R. 67.

(1362)

Liferent to objects of power—Fee to certain objects of power or their heirs—Heirs not necessarily objects of power.

A testator left the sum of £2000 to his daughter in *liferent*, and directed that on her death it should be paid to any one or more of his descendants in such shares or proportions as his daughter should direct, and failing such direction to his descendants equally among them per stirpes. His daughter died, leaving a trust disposition and settlement by which she appointed a *liferent* of this sum to her niece (a descendant of the testator), and directed that on the expiry of that *liferent* the capital should be divided among certain persons (all descendants of the testator) and their heirs in *mobilibus*. **Held** that the appointment was bad for two reasons—(1) in respect that the introduction of heirs in *mobilibus* introduced persons who might not be descendants of the testator and so not objects of the power; (2) in respect that the introduction of the *liferent* postponed the division of the capital and the ascertainment of beneficiaries to a future date, contrary to the intention of the testator that this should take place on the death of the *liferentrix*. **Held** further, that as there was no valid appointment of capital to any one the sum fell to be divided among the testator's descendants as at the daughter's death.

Darling's Trustees v Darling's Trustees,
1909 S.C. 445; 46 S.L.R. 394; 1909, 1 S.L.T. 207.

(1363)

Appointment to *liferent* with power to test—Power to object to confer fee on non-object.

A, by his marriage contract, assigned £18,000 to trustees, to hold the capital for the children of the marriage in fee, in such shares and subject to such conditions and restrictions as he should appoint, with power to him to restrict the share of any of the children to a *liferent* and settle the

fee on their offspring. By the 13th purpose of his trust disposition and settlement A directed the trustees therein named to hold the residue of his estate for his children in *liferent* only, and for his grandchildren *per stirpes* in fee, "in such proportions and . . . subject to such restrictions, limitations, and conditions" as the children might appoint; and provided that if any child died without issue, the share *liferented* by him should go to the surviving children and the issue of children who had predeceased. He further declared that the £18,000 was to be treated as falling under this purpose, and that the provisions in the settlement were granted "upon the special condition and provision" that they should be in satisfaction to the children of legitim, and every other claim competent to them against his estate, and "in full and in lieu and place of all provisions" conceived in their favour in the marriage contract. One of A's children, B, having died without issue, a question arose as to the validity and effect of this appointment of the marriage contract funds. **Held** (1) that the exercise of the power was bad, in respect that while the marriage contract permitted a child's interest to be reduced to a *liferent* only for the purpose of giving the fee to his issue, A's settlement went beyond this and empowered the child to restrict to a *liferent* the interest of his issue and to confer a fee on his grandchildren; and (2) that B could not set aside the disposition in A's settlement quoad the marriage contract funds, and at the same time take benefit under that disposition quoad the remainder of A's estate, but was put to his election.

Lord Inverclyde's Trustees v Lord Inverclyde, 1910 S.C. 420; 48 S.L.R. 1062.

(1364)

Power to apportion among surviving children—Apportionment to children then surviving and *nascituri*.

A testator left heritable property to a father in *liferent* and his issue in fee with a destination over in the event of the father dying without issue. The trust disposition and settlement also conferred on the father a power of apportionment among such issue as survived him. During his life he executed a deed of apportionment which he declared to be irrevocable and by which he divided the property between his then surviving children and his children *nascituri*. **Held** that the attempted exercise of the power was invalid even quoad those children who survived the father, in respect that it was attempted to include persons who were not objects of the power and to create an immediate fee contrary to the terms of the trust disposition and settlement.

Stevenson's Trustees v Taylor, (O.H.) 1895, 3 S.L.T. 102.

(1365)

Gift to objects of power—Conditional institution of non-objects.

Under an antenuptial marriage contract

one-half of the trust funds were payable on the death of the wife to the children of the husband's former marriage. Power was reserved to the spouses to apportion the fund among the children, and vesting was suspended until the wife's death. By deed of apportionment the spouses apportioned the sum of £10 to I, one of the children, and the balance of the half of the trust funds to the other children, "the children of any child predeceasing before the period of payment taking . . . the share which the parent would have taken had he or she survived." There were three children of the former marriage I, J, and R, of whom R predeceased the date of payment without taking a vested right. **Held** that the deed of apportionment was effectual in so far as it apportioned £10 to I and one-half of the balance to J.

Stirling's Trustees v Stirling, 1898, 1 F. 215; 36 S.L.R. 194; 6 S.L.T. 225.

(g) Separability of Invalid Appointments.

(1366)

Per Lord Cairns (Lord Chancellor)—"The plain rule is to be derived" from the authorities "that if you cannot disconnect that which is imposed by way of condition or mode of enjoyment from a gift, the gift itself may be found to be involved in conditions so much beyond the power that it becomes void. But where that is not so, where you have a gift to an object of the power and where you have nothing alleged to invalidate that gift but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, then the gift may be valid and take effect without reference to those conditions."

McDonald v McDonald's Trustees, 1875, 2 R. (H.L.) 125; L.R., 2 H.L. Sc. 482; 12 S.L.R. 635.

(1367)

If in terms absolute and unqualified an initial gift, self-contained and complete, is given under a power of apportionment or appointment to an object or objects of the power, any adjected conditions or restrictions which are in excess of the power have no effect, and are to be treated simply *pro non scriptis*.

Middleton's Trustees v Middleton, 1906, 8 F. 1037; 43 S.L.R. 718; 14 S.L.T. 187.

(1368)

Power exercised in part in favour of persons not objects.

By the terms of an antenuptial contract of marriage the husband had power to apportion a fund among the issue of the marriage, which the Court interpreted to mean the immediate children. By his trust disposition and settlement he exercised the power in favour of children, and the children of a predeceasing child. **Held** that the invalid exercise of the power in favour of grandchildren was to be held *pro non*

scripto, and did not invalidate the exercise of the power quoad children.

Cattanach's Trustees v Cattanach, 1901, 4 F. 205; 39 S.L.R. 154; 9 S.L.T. 284.

(1369)

A father who had power by his antenuptial contract to apportion a fund of £60,000 among his children settled a sum of £5000 on his eldest daughter by her antenuptial marriage contract which contained a discharge of all the daughter's claims under her parent's marriage contract. Thereafter the father settled a sum of £5000 on his second daughter by her antenuptial contract which contained a similar discharge. Subsequently, on entering into a second marriage, the father settled a sum of £20,000 on his youngest daughter, taking from her a discharge in similar terms, and he settled the balance of the fund on his second wife in life and the issue of his second marriage in fee and on the failure of issue on his youngest daughter in fee. **Held** that there had been a valid appointment of £5000 to each of the two elder daughters, and of £20,000 to the youngest daughter, but that the balance of the fund had been invalidly appointed and fell to be divided equally among the three daughters as in default of appointment.

Smith Cuninghame v Anstruther's Trustees; Mercer v Anstruther's Trustees, 1872, 10 M. (H.L.) 39; L.R., 2 H.L. Sc. 223; 44 J. 407; 9 S.L.R. 431.

(1370)

Invalid provisions rendered inseparable—Clause of forfeiture in the event of deed of appointment being impugned.

A deed of appointment contained both valid and invalid provisions concluded with a forfeiture clause, which declared that any of the appointees who impugned the appointment "in any manner of way" should forfeit all interest, "to the same effect" as if they had been expressly excluded from any share in the appointed fund. **Held** that the effect of the forfeiture clause was to bind the conditions of the deed so closely together that (apart from other considerations) it was impossible to separate the valid provisions from those which were ultra vires, and that accordingly the deed was wholly invalid, and that the fund fell to be divided as if there had been no deed.

Collins's Trustees v Collins, 1913 S.C. 588; 50 S.L.R. 421; 1913, 1 S.L.T. 185.

(h) Consent of Beneficiaries to Invalid Appointment.

[See also XXI., infra.]

(1371)

Appointment to persons not objects of the power—Consent of object of the power—Necessity for written consent.

A lady, who reserved a power of appointment over the estate conveyed by her in her marriage contract, the objects of the power being her children, exercised it by leaving a

legacy and an annuity to her son, and the rest of the estate to her daughter in life, and to her daughter's three children and the son of her son equally in fee. There was no written consent by the daughter to the exercise of the power in favour of the grandchildren of the appointer, but she did not dispute its validity. **Held**, in an action of reduction at the instance of the son, that as regarded the three-fourths appointed to the daughter's three children the appointment was valid, as having been made with the consent, though not expressed in writing, of their mother, the proper object of the power, but (per Lord Fraser, Ordinary, and acquiesced in) that as regarded the fourth appointed to the pursuer's son, the appointment was bad, as having been made without the pursuer's consent, and that the fourth fell to be divided as unappointed estate between the son and daughter equally, in terms of the provision of the marriage contract for that event.

Mackie v Mackie's Trustees, 1885, 12 R. 1230; 22 S.L.R. 814.

(1372)

A father made provision in his marriage contract for payment after his death of certain sums to the capital value of £3000 to the children of his marriage, reserving to himself power to apportion these sums among his children. He died, survived by sons and daughters. In his will he professed to exercise the reserved power by bequeathing a legacy of £25 to each of his sons, and by directing his trustees to hold a sum of £7000 of the residue of his estate for his daughters in life and for their issue in fee. In a special case in which the daughters, as parties, consented to and upheld the validity of this appointment, **held** that the appointment, although made to persons who were not objects of the power, had been wholly validated by this consent.

Macleod's Trustees v Macleod's Trustees, 1914 S.C. 10; 51 S.L.R. 35; 1913, 2 S.L.T. 290.

(1373)

—Subsequent consent of object of the power.

A lady who had power to apportion a fund among her children purported to exercise the power by a mutual settlement, executed by her and her husband, whereby she appointed one-half of the fund to her son A in fee, and the other half to her son B in life and to his issue in fee, B being mentally infirm and having no issue. **Held** (1) that the appointment in the mutual settlement was invalid in respect that strangers to the power, viz., B's possible children, were introduced; (2) that the assent of B's curator to this appointment, given after the death of the donee of the power—assuming that it was within his power as curator to assent to it—did not cure the invalidity of the appointment.

MacGillivray's Trustees v Watson's Trustees, 1911 S.C. 1103; 48 S.L.R. 887; 1911, 2 S.L.T. 104.

(4) DISPOSAL OF UNAPPOINTED FUNDS.

(1374)

Apportionment wholly invalid.

Darling's Trustees v Darling's Trustees, 1909 S.C. 445; 46 S.L.R. 394; 1909, 1 S.L.T. 207, No. 1362, *supra*.

(1375)

Partial appointment—Right of appointee to share unappointed portion.

A testator directed his trustees to hold a share of the residue of his estate for behoof of his daughter, Mrs. Sandilands, in liferent, and her children in such proportions as she might appoint, and failing appointment then "equally among them," in fee. Mrs. Sandilands, who had five children, executed a deed of appointment, whereby in contemplation of the marriage of her daughter Maud (afterwards Mrs. Simpson), she appointed "one equal one-fifth part or share" of the fund to that daughter. Mrs. Sandilands died without having executed any further deed of appointment, survived by her five children. In a question between Mrs. Simpson and the four other children of Mrs. Sandilands, **held** that Mrs. Simpson was entitled to an equal share along with the other children of the unappointed four-fifths of the fund, in addition to the one-fifth appointed to her by her mother.

Johnson's Trustees v Sandilands, 1903, 5 F. 518; 40 S.L.R. 393; 10 S.L.T. 716.

(1376)

The liferent of a sum of money was settled on a father, and, on his death, on his children in such shares and proportions as the father might appoint, and failing such appointment equally among them. There were four children. The father died, having appointed a quarter of the sum to a son, and a quarter to a daughter, but leaving the remaining half unappointed. **Held** that the unappointed portion fell to be divided equally among the four children, including the children who had already received portions.

Mackenzie's Trustees v Lord Kilmarnock's Trustees, 1909 S.C. 472; 46 S.L.R. 217; 16 S.L.T. 676.

(1377)

A lady who had under her marriage contract power to apportion a fund among her children apportioned one-fifth of the fund to her eldest son, and died without making any further apportionment. **Held** that the remaining four-fifths fell to be divided among the children, exclusive of the eldest son.

Bowie's Trustees v Paterson, 1889, 16 R. 983; 26 S.L.R. 676.

(1378)

Right of appointee to share—Heritage.

The lands of N were held in trust for a father in liferent and his children in fee in such proportions as the father might appoint, and failing appointment, equally. The

father, by irrevocable deed, appointed one-third pro indiviso part of the lands of N to his second son. **Held** that the unappointed two-thirds fell to be divided equally among the whole children including the second son.

Murray's Trustee v Murray, 1872, 10 M. 778; 44 J. 545; 9 S.L.R. 497.

(1379)

Donee of power becoming insane after partial exercise.

A trustee under a settlement had power to apportion a fund among a family of children. The trustee became insane after partially exercising the power. **Held** that as the power could no longer be exercised, the fund must be divided among the children in such a way that each child should have an equal share of the whole fund.

Hill's Trustees v Thomson, 1874, 2 R. 68; 12 S.L.R. 20.

(1380)

Exercise partly inoperative.

By an antenuptial marriage contract the husband had power to apportion a fund among all or any of the children of the marriage, subject to such limitations or conditions as he might appoint. Failing such apportionment, or in so far as such apportionment should not extend, the fund was to be divided equally among the children, vesting being postponed till, in the case of sons, they reached the age of twenty-one. The husband, by his trust disposition and settlement, apportioned the fund by directing that it, along with the residue of his estate, should be held in trust for his children equally, the shares of sons to vest in them and be payable on their reaching the age of thirty. One of the sons died at the age of twenty-eight. **Held** that nothing having vested in virtue of the settlement in the son who had died under thirty years of age, the share of the marriage contract fund intended for him was unappropriated, and fell to be divided equally among the other children of the marriage.

Cattanach's Trustees v Cattanach, 1901, 4 F. 205; 39 S.L.R. 154; 9 S.L.T. 284.

(1381)

Exercise partially invalid.

Mackie v Mackie's Trustees, 1885, 12 R. 1230; 22 S.L.R. 814, No. 1371, *supra*.

(1382)

Invalidly appointed fund—Residuary appointment.

In an antenuptial marriage contract the trustees were directed to convey the wife's funds to the children of the marriage in such proportions as she should appoint, and failing such appointment, equally. She apportioned part of the funds among certain of the children, appointed another part to persons not objects of the power, and, in the third place, directed that "after fulfilling or providing for the fulfilment of the above directions the whole remainder of the trust funds and property shall be divided equally" among three of the children already favoured. There was one child in whose favour no

appointment was made. **Held** that the sum invalidly appointed fell to be divided as "remainder" under the deed of appointment, and not as an unappointed fund.

Best's Trustees v Reid, 1885, 13 R. 121; 23 S.L.R. 82.

(1383)

Provision to daughter in her marriage contract.

A father, who had settled his whole estate by his marriage contract on his children, reserving to himself a power of appointment, and, failing an appointment, providing that the division should be equal, subsequently bound himself in a daughter's marriage contract to make payment of £2000 to her at his death. He died without making an effectual appointment. **Held** that the obligation to pay his daughter £2000 was a debt, and must be paid out of his estate before the equal division among the family could take place.

Gillon's Trustees v Gillon, 1890, 17 R. 435; 27 S.L.R. 338.

(1384)

Effect of discharge by appointees.

An antenuptial marriage contract conferred power on the spouses or the survivor to apportion a fund of about £60,000 among the children of the marriage. There were three daughters of the marriage. The two eldest daughters in their antenuptial marriage contract discharged their claims under their parents' marriage contract, each in consideration of a payment of £5000 paid to trustees for the daughters in *liferent* and their children in fee. After the mother's death the father entered into a second marriage and granted a trust deed, by which he directed £20,000 to be paid to the youngest daughter in full, and settled £30,000 on his second wife in *liferent* and the children of the second marriage in fee. The youngest daughter signed the settlement in token of her acceptance of the provisions. **Held** (1) that the discharges obtained from the daughters were ineffectual to limit their rights; (2) that there had been valid appointments in favour of the daughters of £5000, £5000 and £20,000; and (3) that the three daughters were entitled to participate equally in the unappointed balance of the fund.

Smith Cuninghame v Anstruther's Trustees; *Mercer v Anstruther's Trustees*, 1872, 10 M. (H.L.) 39; L.R., 2 H.L. Sc. 223; 44 J. 407; 9 S.L.R. 431.

(5) EFFECT OF APPOINTMENT AS REGARDS VESTING.

[See VESTING IX. 4.]

4. POWER TO ENCROACH ON CAPITAL—POWER TO CONSUME—POWER TO SELECT.

(1385)

Power to encroach on capital.

By mutual settlement a husband conveyed to his wife in the event of her *surviance* the whole estate which might belong to him

at his death and the wife made a similar conveyance to the husband. The conveyances were declared to be subject to the conditions (1) that a will left by the predecessor should receive effect to the extent of a defined proportion of the estate remaining at the death of the survivor, and (2) that the survivor should have power to "use or encroach on the funds, means and estate hereby conveyed on either side." The husband exercised the power to test, and was survived by the wife. **Held** that the power to encroach on the estate was limited to a power to encroach for the survivor's own use exclusively, and did not postpone vesting in the legatees under the husband's will.

Reddie's Trustees v Lindsay, 1890, 17 R. 558; 27 S.L.R. 514.

(1386)

By his will a testator directed his trustees to pay to his wife (1) £2100, with full power of disposal, and (2) £2000 "to be held by her during her lifetime, and the uncontrolled possession and profit of which she shall enjoy as long as she lives, which sum, however, should nothing occur to render it necessary to touch upon or induce her to dispose of it otherwise, which she shall have power to do, the same or balance thereof shall return and form part of my trust estate." In a supplementary settlement the testator directed his trustees to pay to his wife (1) the £2100 to be at her sole disposal, and (2) the £2000 "the free and unfettered use of which she shall enjoy so long as she lives, with power even to trench upon the principal, should she ever under any emergency require to do so," declaring, however, that the said £2000 so far as not required for my wife's personal use shall at her death return, and, if thought necessary, be ordered by her to return, to the trust estate." The wife survived. At her death she left the £2000 separately invested. **Held** that the wife had no power to dispose of the £2000 by will.

Barr's Trustees v Barr's Trustees, 1891, 18 R. 541; 28 S.L.R. 387.

(1387)

Power to encroach for maintenance—Capital intermixed with *liferenter's* estate.

A testator gave to his widow a *liferent* of his whole estate with power to encroach on the capital for her better maintenance and support. He gave the fee to his children. The widow lost part of the estate in investments and intermingled the rest with her own estate. **Held** that she did not become *fiar* except in so far as the estate had actually been used for her maintenance.

M'Kinlay's Trustees, (O.H.) 1897, 5 S.L.T. 253.

(1388)

Power to call up trust funds—Marriage contract—Purchasing and furnishing house or any other purpose.

In an antenuptial marriage contract the wife conveyed funds to the trustees for, *inter alia*, the following purposes:—

"Fourth, that if during the subsistence of the marriage the said" wife "shall by a writing or writings under her hand require the said trustees to do so, they shall be bound to pay over to her, for the purpose of purchasing a dwelling-house or residence for herself and her said intended husband and their family, and furnishing the same, or for any other purpose, such amount of the trust funds in their hands as shall be specified in such writing or writings, and if a house shall be purchased and furnished from the money so to be paid the title thereto shall be taken in favour of the said trustees, and the same shall form part of the said trust estate." Held that the clause was to be construed as entitling the wife to call up the whole trust funds for any purpose.

Fowler's Trustees v Fowler, 1898, 25 R. 1034; 35 S.L.R. 812.

(1389)

Power to consume—Gift over of portion unconsumed.

In a mutual settlement by spouses the husband conveyed his whole estates to trustees and directed them to pay to his wife, if she survived him, as an alimentary allowance for her and their children, the income of his estate and such portions of the capital as his trustees should deem necessary; "and in like manner and in consideration of what is above written," the wife conveyed her whole estates to her husband under the burden of maintaining her whole children, with full power to him "to consume such parts or portions of the capital during his lifetime as he may find or think necessary," and also power "to realise . . . said estates . . . and in general to deal and intromit therewith as freely as" she could have done herself. She appointed him to be her sole executor. Upon the death of her husband if he survived her (as he did), she conveyed her "said estate or such portion thereof as may be unconsumed" by him to trustees for certain purposes. The wife died in 1893. After the wife's death the husband realised certain properties which had belonged to her, and paid the proceeds into his own bank account, so that they became immixed with his own funds, and could not ultimately be traced or identified. The husband died in 1905. Held (1) that under the mutual settlement the husband was not bound to account to the wife's trustees for his intromissions with his wife's estate, and that consequently his trustees were not bound so to account; (2) that the onus of proving what part of the wife's estate was unconsumed by the husband was upon the pursuers; and (3) that the proceeds of the wife's properties sold by the husband having been immixed with the husband's funds, and being now incapable of identification, must be held to have been consumed by the husband in the sense of the mutual settlement.

Denholm's Trustees v Denholm's Trustees, 1908 S.C. 255; 45 S.L.R. 154; 15 S.L.T. 589.

(1390)

Gift of fee—Gift over of what might remain at beneficiaries' death.

Terms of a will on which held that, notwithstanding a gift of the testator's whole estate in terms importing an absolute fee to his wife, the gift was qualified by an express condition that what remained of the estate after the wife's death was to be divided among certain beneficiaries, and that this condition could not be defeated by the wife's will. Observed that the wife's interest was more than a life interest, but less than a fee.

Stephen's Executrix v Forsyth, (O.H.) 1905, 12 S.L.T. 778.

(1391)

Power to encroach for personal benefit.

Under a mutual settlement by a husband and wife, the survivor was given a life interest with a power of encroachment on the fee. Terms of the settlement under which opinion (per Lord Skerrington, Ordinary) that the survivor did not have a general power of disposal either inter vivos or mortis causa, but merely a power to encroach upon and use the capital for his personal benefit, and that in any event the right of the survivor remained a mere right of life interest until the power had been duly exercised.

Dingwall v Dow, (O.H.) 1909, 2 S.L.T. 311.

(1392)

Power to hold possession during life.

The holograph will of a testator provided, inter alia, "My wife, Mrs. M'C., to hold possession of all my belongings during her life." Held that the widow was entitled to a life interest of the whole estate heritable and moveable, but had no power to encroach on the capital.

M'Crorie's Curator Bonis v M'Crorie, (O.H.) 1909, 1 S.L.T. 544.

(1393)

Gift over of subjects so far as not consumed.

By mutual settlement executed by a husband and wife, the wife, in consideration of provisions made in her favour by the husband, gave to the husband if he survived (which he did) her whole estate, subject to certain burdens, "with full power to my said husband to consume such parts . . . of the capital during his lifetime as he may find or think necessary," and also power to sell, and to deal and intromit therewith, and upon the death of her husband she conveyed her estate or "such portions as may be unconsumed by my said husband" to trustees for certain trust purposes. The spouses reserved power to alter or revoke the settlement during their joint lives, with power to the survivor to alter or revoke, but only in so far as regarded his or her separate estates. In a question between the trustees under the mutual settlement and the husband's testamentary trustees under a will made by him after the wife's death, held that under the mutual settlement the

husband did not take a full and unlimited right of fee in the whole estate of the wife.

Denholm's Trustees v Denholm's Trustees,
1907 S.C. 61; 44 S.L.R. 42; 14 S.L.T.
394.

(1394)

Power to select articles of furniture — Testamentary exercise of power.

A testator directed his trustees to deliver to M, his widow, "such articles of jewellery, linen, silver plate, books, and other household furniture belonging to me as she may choose to select for her own absolute use," and to allow her and his daughter and the longest liver of them the life interest use of his mansion-house of Easter Livelands, "and also such articles of household furniture, plate, . . . and plenishing of every description which shall be found at the time of my death remaining after the said M shall have made her selection as aforesaid, or the whole in case of no such selection being made." After the testator's death his widow and daughter lived together at Easter Livelands for a number of years, in joint possession of his plate, jewellery, and furniture. The widow did not during her life exercise the power of selection given her by the testator, but she left a settlement whereby she bequeathed to different legatees certain of the articles to which the power applied. **Held** (1) upon the construction of the husband's settlement, that the power of selection given to the widow was a power to be exercised within a reasonable time after the testator's death; and (2) that the power had not been exercised within due time, and had lapsed.

Macdonald's Trustees v Bain's Trustees,
1896, 23 R. 913; 33 S.L.R. 649; 4
S.L.T. 69.

XX. ACCUMULATIONS—THELLUSSON ACT.

STATUTES.

Act 1800—The Thellusson Act—39 & 40
Geo. III. c. 98.

Act 1843—The Entail Amendment Act, 1843
—11 & 12 Vict. c. 36—sec. 41.

Act 1892—The Accumulations Act, 1892—
55 & 56 Vict. c. 58.

1. WHETHER ACCUMULATION DIRECTED.

(1395)

Implied direction to accumulate—Heritage to be purchased — Income not expressly disposed of.

A trustor left heritable and moveable estate, with directions that his moveable estate should forthwith be converted into heritage, which, with the heritable estate belonging to him at the time of his death, was to be held by his trustees until the death of the last survivor of his nephews and nieces (his heir at law and next of kin) and widow, and then entailed upon a series of heirs. He directed his trustees to pay the free rents and

income of his heritable estate to his widow during her life, and after her death, and until the death of the last survivor of his nephews and nieces, such income, together with the income derived from the heritage to be purchased with the proceeds of his moveable estate, should be accumulated and from time to time employed in the purchase of lands to be entailed as aforesaid; but the settlement did not contain any directions with regard to the disposal of the income derived from the heritage to be purchased with the proceeds of his moveable estate during the period between his own death and the death of his widow. **Held** that, although the testator had not expressly disposed of the free income arising from the proceeds of the said portion of the estate during the life of the widow, his intention that it should be accumulated and invested along with the capital in purchasing lands to be entailed was implied by the terms of the settlement.

Campbell's Trustees v Clarke, 1871, 10 M.
227; 44 J. 137; 9 S.L.R. 160.

(1396)

Implied direction to accumulate—Annuities not exhausting income of estate—Vesting of fee suspended.

A testator directed his trustees to pay certain annuities, which did not exhaust the revenue of his estate, and on the death of the last survivor of the annuitants to realise his whole estate and divide the residue among certain persons who until that event were to have no vested right. Two of the annuitants were in life at the expiry of twenty-one years from the death of the testator. **Held** that there was an implied direction to accumulate the surplus income, which was struck at by the Thellusson Act.

Logan's Trustees v Logan, 1896, 23 R.
848; 33 S.L.R. 638; 4 S.L.T. 57.

(1397)

Gift to heirs of body of B—B in life at death of testator—Income not expressly disposed of.

A testator directed that the residue of his estate should be conveyed to the heirs of the body of A, whom failing, to the heirs of the body of B. The income of the residue was not specifically disposed of. The testator was predeceased by A without issue, but was survived by B, and the heirs of B's body could not be ascertained until her death. **Held** that there was an implied direction to accumulate the income of the residue until the death of B, which was struck at by the Thellusson Act as from a date twenty-one years after the death of the testator.

Gollan's Trustees v Dallas, (O.H.) 1905, 13
S.L.T. 720.

(1398)

Power to set apart savings of income.

A testator conveyed the residue of his estate to trustees, and directed them to apply the annual income in forming an

"institute" for a town, with authority "to set apart and accumulate" the balance of income from such residue for the purpose of erecting a suitable building for the institute, but no power was given to them to employ the capital for this purpose. The trustees accordingly accumulated the income. **Held**, at a date more than twenty-one years after the testator's death, that, as the Thellusson Act strikes at accumulations, the directions of the trust, so far as they necessitated accumulations, ceased to be operative after twenty-one years, but that the Thellusson Act does not prevent savings out of income, and accordingly that the trustees might still continue to make savings out of income.

Lindsay's Trustees, 1911 S.C. 584; 48 S.L.R. 470; 1911, 1 S.L.T. 374.

(1399)

Accumulation due to trustees' inability to find proper objects of a discretionary trust.

A testator directed his trustees "from time to time, as they think proper, to make such special payments out of the free residue and remainder of my estate to such of my children or children's children as they may think most deserving, with special instructions to relieve any of them who may appear to be in want, provided always that they have not brought themselves into such circumstances by their own misconduct. My great desire is to assist merit and thrift, and not to acknowledge indolence or folly." For a period of twenty-one years from the testator's death the income of the residue was accumulated, no distribution thereof being made by the trustees, owing to the fact that they were not satisfied that among the testator's children and grandchildren any cases existed which warranted payments out of the trust funds. **Held** that as the accumulation of income was due, not to the direction express or implied of the testator, but to the extraneous circumstance that no occasion for payments out of income had, in the opinion of the trustees, as yet arisen, the Thellusson Act did not apply.

Mitchell's Trustees v Fraser, 1915 S.C. 350; 52 S.L.R. 293; 1915, 1 S.L.T. 97.

(1400)

Payment of premiums on insurance of life selected by testator—Sum insured to be applied for purposes of trust—Insured surviving testator more than twenty-one years.

A testatrix empowered her trustees, "if they see cause, to make insurances on the life" of a nephew, "in such a way as to enable" them "to receive a sum or sums at his death to be then applied for the purposes of" the trust. The testatrix died in 1841, and her trustees in 1845 effected insurances on the life of the nephew, paying the premiums out of the income of the estate until his death, in 1878. **Held** that the application of the accruing income in payment of the policies on the nephew's life did not constitute illegal accumulation within the meaning of the Thellusson Act.

Cathcart's Trustees v Heneage's Trustees, 1883, 10 R. 1205; 20 S.L.R. 798.

v 21

(1401)

Direction to accumulate beneficiary's share of income—Whether applicable to accreting share.

By his trust disposition and settlement A left directions to his trustees to retain one-third of the free income of his estate and invest it for behoof of B, paying her the interest annually until she attained the age of twenty-five years, when she was to receive the accumulated sum. He further directed his trustees to pay to C the remaining two-thirds of the free annual income, and declared that if either B or C died without issue before B attained the age of twenty-five years, "the share of the predeceaser shall accrete and belong to the survivor." C died within a year of the death of the testator, without issue. **Held** that B, the survivor, took her accreting share, subject to the same conditions as to accumulation, &c., as her original share.

Paris' Trustees v Gow, 1870, 8 S.L.R. 184.

2. WHETHER ACCUMULATION ILLEGAL.

(1402)

Accumulation of capital payments—Rent of mineral field opened after testator's death.

A testator conveyed his estate to trustees, with directions to hold the same for behoof of certain beneficiaries in liferent, and on the death of all of them to convey the same to the person who should then be the heir-male of the testator's father. Subsequent to the testator's death the trustees let the coal under the testator's lands for a fixed rent or lordships. The coal was not worked, and the fixed rent was paid to the trustees. **Held** that the fixed rent or lordships formed part of the corpus of the estate, and fell to be retained by the trustees for behoof of the person ultimately found entitled to a conveyance of the fee, and that the Thellusson Act did not apply.

Ranken's Trustees v Ranken, 1908 S.C. 3; 45 S.L.R. 10; 15 S.L.T. 385.

(1403)

Provision for payment of debt—Thellusson Act, sec. 2—Debts not in existence at testator's death.

A testator directed his trustees to pay certain annuities, and also to pay to B out of the free revenue of his heritable estate an allowance not exceeding £1000 per annum. The annuities and the allowance together did not exhaust the revenue of the heritage. On the death of B the testator directed his trustees to entail certain land on a series of heirs. He also authorised his trustees to purchase other lands to be entailed on the same series of heirs. Prior to the expiry of twenty-one years from the testator's death, the trustees had bought certain lands for that purpose, the price of which was partially paid out of the proceeds of a loan over the land belonging to the testator at his death. This loan was outstanding, to the extent of £15,000, at the

expiry of twenty-one years from the testator's death (at which date B was still in life). **Held** that subsequent to the expiry of the twenty-one years the trustees were not entitled to accumulate income for the purpose of paying off the debt, any implied direction so to do being struck at by the Thellusson Act.

Observed (per Lord Gifford) that the debts for the payment of which accumulation is permitted by sec. 2 of the Thellusson Act must be debts in existence at the death of the trustor, and must be subsisting at the time when the trust comes into operation.

Smyth's Trustees v Kinloch, 1880, 7 R. 1176; 17 S.L.R. 783.

(1404)

Portions to children—Direction to reserve and invest sum out of income of residue—Accumulations to be paid to children of life-renter at majority or on life-renter's death.

By a codicil to his settlement a testator directed his trustees to pay the income of the residue of his estates to A, his nephew's widow, during her life, and by a later codicil he directed them out of this income "to reserve £1000 annually, and to invest the same, with the interest . . . accruing thereon" in the trustees' names for behoof of A's two daughters "equally between them, share and share alike, or in the event of one dying without leaving lawful issue then the whole to the survivor." **Held** that the direction as to the annual reservations for behoof of A's daughter was a "provision for raising portions" for the children of a person taking an interest under the testator's settlement within the meaning of the second exception in sec. 2 of the Thellusson Act.

Colquhoun's Trustees v Colquhoun, 1907 S.C. 346; 44 S.L.R. 269; 14 S.L.T. 647.

(1405)

Direction to accumulate surplus income—Income of accumulations to be paid to children at majority—Capital to be set apart for children at death of testator's widow.

A testator directed his trustees to pay a certain annuity to his widow, and in the event of there being any surplus income from his estate, to accumulate the same for behoof of his children, and to divide among his children equally, on their attaining majority, the income derivable from the accumulated surplus. On the widow's death the trustees were directed to set apart for each of his children "an equal share of the capital estate and accumulations." The testator was survived by his widow and three children. Twenty-one years having elapsed since the testator's death and the widow being still alive, **held** that the provisions for the testator's children were not provisions "for raising portions" in the sense of the exception in sec. 2 of the Thellusson Act, and that consequently the Act applied, and the direction

to accumulate after twenty-one years was void.

Mackay's Trustees v Mackay, 1909 S.C. 139; 46 S.L.R. 147; 16 S.L.T. 639.

(1406)

Direction to accumulate balance of revenue—Residue of estate and accumulations destined to children of testator in life-rent and their children in fee.

A testator directed his trustees to pay certain annuities to his widow and daughters and "to accumulate the balance of the revenue," and on the widow's death to realise his whole means and estate and dispose of the proceeds thereof as well as the accumulations of the same, if any, as follows, viz. (after providing certain sums for some of his children), "to hold and invest the residue and remainder of my said means and estate and accumulations of revenue, if any, for behoof of" his sons and daughters equally in life-rent allanarly and their respective children in fee. In the event of all his children dying before the period of division without issue, the testator directed his trustees to divide his estate between his own and his wife's next of kin. **Held** that the direction to accumulate was not a provision for raising portions to children of the grantor in the sense of sec. 2 of the Thellusson Act.

Moon's Trustees v Moon, 1899, 2 F. 201; 37 S.L.R. 140; 7 S.L.T. 257.

(1407)

Terminus a quo of period of legal accumulation.

Held that the Thellusson Act prohibits any accumulation after the lapse of twenty-one years from the date of a testator's death, although the time specified for accumulation may not commence until long after his death.

A testator directed his trustees to pay to his widow the rents of certain lands during her life, and on her death to accumulate the rents for the purchase of additional lands till the death of the longest liver of certain nephews and nieces, and upon that event to execute an entail in favour of a series of heirs. The testator's widow survived him for thirty-two years. **Held** that the whole directions in the settlement providing for accumulation were void.

Campbell's Trustees v Campbell, 1891, 18 R. 992; 28 S.L.R. 771.

(1408)

Date of settlement—Agreement between trustees and beneficiary.

A testator by his trust settlement directed his trustees to accumulate the income of his trust estate for behoof of the children of his marriage. The direction to accumulate was struck at by the Thellusson Act. After the death of the testator his trustees entered into an agreement with his only child, under which one-half of the income was to be accumulated in terms of the settlement. Terms of the agreement under which **held**

that the testator's child was not himself, in respect of the provisions of the agreement, the settler of the property so as to prolong the period during which accumulations were permitted by the Act,

Muir's Trustees v Jameson, (O.H.) 1903, 10 S.L.T. 701.

(1409)

Accumulation of income of heritage—Deed prior to 1848—Conversion—Act 1800, sec. 3—Act 1848, sec. 41.

A testatrix, who died in 1841, gave her trustees power to sell such of her heritable property as "they may think expedient," and reinvest it. The only heritable estate left by her consisted of house property and a heritable bond. The heritable bond was paid up in 1845, and the house property was sold in 1861, and the proceeds of both reinvested. The trustees having, in accordance with the testatrix's instructions, accumulated the income of the whole estate for thirty-six years, **held** that the discretionary power to sell given to the trustees, even though followed by a sale, did not operate as conversion of the heritable estate, and that therefore there had been no illegal accumulation of the income thereof, as heritage fell under the exception in the 3rd section of the Thellusson Act (which was not repealed at the death of the testatrix).

Cathcart's Trustees v Heneage's Trustees, 1883, 10 R. 1205; 20 S.L.R. 798.

(1410)

Direction to accumulate one-fourth of income from land purchased.

The granter of a trust disposition, on the narrative that he had executed an entail of an estate in favour of his nephew C and a series of heirs, directed his trustees to lay out the residue of the trust funds in the purchase of land near the entailed estate so soon as a favourable opportunity occurred, to entail the land so purchased on the heir of entail in possession of the estate, and to pay to him three-fourths of the interest or profits of the residue until a purchase could be made, "the surplus interest being applied to increase the amount of the disposable funds." **Held** that accumulation subsequent to the expiry of twenty-one years from the testator's death was struck at by the Thellusson Act.

Mackenzie v Mackenzie's Trustees, 1877, 4 R. 962; 14 S.L.R. 596.

(1411)

Direction to accumulate one-fourth of income of fund.

A testatrix directed her trustees to invest a sum of £4000 as a fund for payment of bequests to certain charitable institutions, to add one-fourth of the interest yearly to the capital and to pay three-fourths of the interest to the charitable institutions. **Held** that accumulation subsequent to the expiry of the statutory period of twenty-one years was prohibited by the Thellusson Act.

Maxwell's Trustees v Maxwell, 1877, 5 R. 248; 15 S.L.R. 155.

(1412)

Accumulation for equitable compensation.

By his trust disposition and settlement a testator directed his trustees to hold his estate for his only child, a daughter, in liferent, and, on her death, to convey the fee to her issue, whom failing, to other persons named. The daughter having claimed and received legitim, the trustees retained and accumulated the income of the estate. On the expiry of twenty-one years from the testator's death, the daughter brought an action against the trustees concluding for payment to her of the future income of the estate, on the ground that further accumulation was prohibited by the Thellusson Act and that the income fell to her as her father's heir. In defence it was averred that the accumulated income had not sufficed to replace the capital withdrawn by the pursuer in name of legitim; that under the principle of equitable compensation the income fell to be accumulated till the capital was so replaced; and that accumulation for this purpose was not within the operation of the statute. **Held** that further accumulation of the income was prohibited by the Thellusson Act, and decree pronounced in favour of the pursuer.

Hutchison v Grant's Trustees, (O.H.) 1913 S.C. 1211; 51 S.L.R. 6; 1913, 2 S.L.T. 31.

(1413)

A daughter, liferent in the residue of her mother's estate by the latter's will, claimed and received payment of her legitim. In consequence of this claim the trustees retained and accumulated the income of the residue for the purpose of making equitable compensation to the disappointed beneficiaries. On the expiry of twenty-one years from the testatrix's death, the accumulated income had not sufficed to replace the capital which had been withdrawn to pay the legitim. The daughter was still alive, and the fee of the residue was not vested, vesting being postponed under the will until her death. **Held** that further accumulation of the income was prohibited by the Thellusson Act, and that the income fell to be paid to the daughter as the heir ab intestato of her mother.

Innes's Trustees v Bowen, 1920 S.C. 133; 57 S.L.R. 86; 1920, 1 S.L.T. 6.

(1414)

A trustee directed his trustees to hold the residue of his estate, with accumulations of income, after payment therefrom of annual allowances to his children, during the lives of his children, and after their death to pay the capital and any accumulations to the lawful issue of his children. The trustee's only surviving child, who attained majority, a daughter, repudiated the settlement, and, a special case having been presented, the Court pronounced a judgment of which the effect was that the trustee's direction to hold the residue of his estate with accumulations of income till his daughter's death, and thereafter to pay

the capital and accumulated income to her lawful issue, became restricted to the dead's part. After the trustees had been in possession of and had been accumulating in come on the said fund for twenty-one years from the date of the trustor's death, **held** that the further accumulation of income was prevented by the Thellusson Act, and that the directions of the trustor on the matter not being applicable, the future income of the fund fell to be paid to the person who would have been entitled to succeed to it ab intestato, viz., the testator's daughter.

Gillies' Trustees v Bain, 1893, 30 S.L.R. 651.

(1415)

Accumulation for a purpose alleged to be void from uncertainty—Period for deciding as to disposal of accumulations.

A testator by holograph will, after expressly declaring that C, one of his nephews, was "to get nothing," and leaving legacies to certain of his relatives named, appointed four persons to be his trustees—two of them being legatees, the third a stranger, who got no legacy, and the fourth a sister, who also got no legacy—and directed his trustees to accumulate the income of his estate for fifty years, "After the fifty years is past, the money to purchase an estate in my name that cannot be sold nor indebted, and the income from it, after paying expenses, to be divided amongst those mentioned in my will yearly." There was no other direction as to the estate. In a multiplepounding raised a year after the testator's death it was maintained that the above quoted clause was void for uncertainty. **Held** that the direction to accumulate must receive effect in so far as permitted by the statute, and that it was premature to determine in hoc statu the rights of parties in the capital and accumulations.

Edward's Trustees v Edward, 1891, 18 R. 535; 28 S.L.R. 360.

(1416)

Personal bar.

Observed that personal bar cannot be pleaded so as to defeat the provisions of the Thellusson Act.

Maxwell's Trustees v Maxwell, 1877, 5 R. 248; 15 S.L.R. 155.

3. DISPOSAL OF ILLEGAL ACCUMULATIONS.

(1) WHETHER FALLING INTO INTESTACY.

(1417)

Annuities not exhausting income of estate—No gift of residue until death of annuitants—Intestacy.

A testator directed his trustees to realise his personal estate, and to lease out his heritable estate, and to pay certain annuities, and also directed them, when the accumulations of the surplus revenue of his estate should permit of it, to pay off a bond burdening his heritable estate, and on the

bond being paid off to invest any further accumulations on heritable securities. He further directed his trustees—"Ninthly. After the death of the last survivor of the said annuitants, my trustees shall sell and dispose of all my said heritable subjects, . . . and my estates, heritable and moveable, being totally realised, my said trustees shall pay over the whole surplus residue and remainder of my said estates in their hands to the directors of the Glasgow Royal Infirmary, to whom I leave, bequest, and destine the same for the use and behoof of that valuable institution." At the end of twenty-one years from the testator's death some of the annuitants still survived, and further accumulation of the surplus revenue became illegal under the Thellusson Act. **Held** that as there was no present gift of the residue the surplus revenue accruing from the end of the twenty-one years to the death of the last annuitant fell not to the Infirmary but to the testator's heirs ab intestato.

Smith v Glasgow Royal Infirmary, 1909 S.C. 1231; 46 S.L.R. 860; 1909, 2 S.L.T. 157.

(1418)

A testator directed his trustees to pay to his widow an annuity, declared to be in full of all claims in respect of terce and jus relictæ, and, with regard to the residue of his means and estate, he further directed them, "should my said wife survive me, to hold and retain the same and all accumulations thereof until her death, and on her death or at my own death should she predecease me my said trustees shall pay over the whole of said residue and all accumulations thereon" to an infirmary. The widow elected to take her annuity. After twenty-one years, the widow being still alive, it became impossible by operation of the Thellusson Act to continue to accumulate the surplus income. In a question as to the right to the surplus income thus set free. **Held** that, there being no present gift of the fund directed to be accumulated, further surplus income fell to be paid to the testator's heirs ab intestato.

Wilson's Trustees v Glasgow Royal Infirmary, 1917 S.C. 527; 54 S.L.R. 468; 1917, 1 S.L.T. 328.

(1419)

A testator directed his trustees to pay a certain annuity to his widow, and in the event of there being any surplus income from his estate to accumulate the same for behoof of his children, and to divide among his children equally on their attaining majority the income derivable from the accumulated surplus. On the widow's death and as the children respectively attained majority the trustees were directed to set apart for each child "an equal share of the capital estate and accumulations." The testator was survived by his widow and three children. Twenty-one years after the testator's death the widow was still alive, and further accumulation was

struck at by the Thellusson Act. **Held** that there was no present gift of the money directed to be accumulated, and that the income set free fell into intestacy.

Mackay's Trustees v Mackay, 1909 S.C. 139; 46 S.L.R. 147; 16 S.L.T. 639.

(1420)

A testator directed his trustees to pay annuities to his widow and daughters, to accumulate the balance of the revenue, and on the death of the widow, to realise his whole estate, and "dispose of the proceeds thereof as well as of the accumulations of the same, if any, as follows, viz., . . ." to hold and invest the residue and remainder of my said means and estate "and accumulations of revenue, if any," for behoof of his sons and daughters in liferent allenerly and their respective children in fee. In the event of all his children dying before the period of division without issue, he directed his trustees to divide his estate between his own next of kin and his wife's next of kin. The testator's widow survived the expiry of twenty-one years from the testator's death, and accumulation subsequent to that date was struck at by the Thellusson Act. **Held** that the income set free by the operation of the Act fell into intestacy in respect that no right either of liferent or of fee vested in the residuary legatees until the death of the testator's widow.

Moon's Trustees v Moon, 1899, 2 F. 201; 37 S.L.R. 140; 7 S.L.T. 257.

(1421)

A testator directed his trustees, upon the death of the last of certain annuitants, to "realise and convert into cash" his whole estate, and "divide" the residue among certain persons who until that event were to have no vested right. The surplus revenue was accumulated in the hands of the trustees. At the expiry of twenty-one years from the testator's death two of the annuitants still survived. **Held** (1) that there was an implied direction to the trustees to accumulate the surplus income; and (2) that further accumulations being prohibited by the Thellusson Act, and no one having a vested right to residue, the surplus income as it accrued fell to the testator's heirs ab intestato.

Logan's Trustees v Logan, 1896, 23 R. 848; 33 S.L.R. 638; 4 S.L.T. 57.

(1422)

—Gift to charitable institutions to be nominated by trustees—Date of nomination subsequent to expiry of statutory period.

A testator directed his trustees, after providing for an annuity to his wife, to hold the residue of his estate until the death of his wife, and upon her death to set aside £10,000 as an endowment of a chair in a Free Church college, to apply another sum of £10,000 in erecting and endowing a Free church, and also to apply such further sum as they should see proper in providing a manse for that church, and, "lastly, after all the above

purposes shall have been fulfilled . . . to apply and pay over the whole residue and remainder of my estate, if such there shall be, to and for the use and benefit of such four of the schemes of the Free Church of Scotland, and in such proportions as to my trustees shall appear most expedient." The income of the residue exceeded what was necessary to pay the widow's annuity. She survived the testator more than twenty-one years, and further accumulation of the surplus income was struck at by the Thellusson Act. **Held** that the four schemes could not be selected until the widow's death, and that, prior to that event, there could be no residuary legatee, and that the surplus income fell to the testator's heirs ab intestato.

Elder's Trustees v Treasurer of Free Church of Scotland, 1892, 20 R. 2; 30 S.L.R. 28.

(1423)

Accumulations for purchase of lands—Lands to be entailed on heirs under existing entail.

The granter of a trust disposition, on the narrative that he had executed an entail of an estate in favour of his nephew C and a series of heirs, directed his trustees to lay out the residue of the trust funds in the purchase of land near the entailed estate so soon as a favourable opportunity occurred, and to entail the land so purchased on the heir of entail in possession of the estate, and to pay to him three-fourths of the interest or profits of the residue until a purchase could be made, "the surplus interest being applied to increase the amount of the disposable funds." The trustees did not purchase any lands under this direction for thirty-four years after the truster's death. The Thellusson Act applied to the accumulations so made by the trustees after the lapse of twenty-one years from the testator's death. **Held** that the person entitled to these accumulations under the Act, as the person "who would have been entitled thereto if such accumulation had not been directed," was the heir of entail, who would have been entitled to the rents if the lands had been purchased, and not the testator's next of kin.

Mackenzie v Mackenzie's Trustees, 1877, 4 R. 962; 14 S.L.R. 596.

(1424)

Direction to accumulate—Entail at a future date—Institute not ascertained—Acceleration.

A testator directed his trustees to pay the rents of certain lands to his widow during her life, and on her death to accumulate the rents for the purchase of additional lands till the death of the longest liver of certain nephews and nieces, and on that event to execute an entail in favour of the heirs-male of the body of his nephew L C and a series of heirs. The testator's widow survived him for thirty-two years, so that accumulation subsequent to her death was struck at by the Thellusson Act. **Held** that the failure of the trust purpose for accumulation did not accelerate the date for executing the

entail, as until the death of the longest liver of the nephews and nieces it could not be known who should be the institute, and that the rents accruing subsequent to the widow's death fell into intestacy.

Campbell's Trustees v Campbell, 1891, 18 R. 992; 28 S.L.R. 771.

(1425)

—**Accumulation of entire income during life of A—Vesting of fee suspended till death of A.**

A testatrix, who died in 1841, left the residue of her whole estate to trustees, to be held "for behoof of the daughter or daughters, and, failing them, the son or sons, to be procreated of the body of" a nephew J. The income was directed to be invested, and no part thereof paid to any beneficiary during the lifetime of J. Upon his death the amount of capital of the estate was to be fixed, and upon the marriage of his daughter or daughters it was to be divided among them, but, in the event of there being no daughter, the estate was to be paid over to his sons or son. J died in 1878—upwards of thirty-six years after the testatrix—leaving one daughter, who was married, and a son. The trustees had accumulated the income of the estate during the whole thirty-six years, and a question arose as to who was in right of the fee of the estate, and of the accumulations of income after twenty-one years from the death of the testatrix. **Held** (1) that J's daughter, being married at her father's death, became then entitled to the fee of the estate; and (2) that the accumulations after the twenty-one years fell to the next of kin of the testatrix, there being no gift of the estate to J's daughter prior to the date of J's death.

Cathcart's Trustees v Heneage's Trustees, 1883, 10 R. 1205; 20 S.L.R. 798.

(1426)

—**Annuity to A out of rent of lands—Implied direction to accumulate surplus—Direction to entail on second son of A on A's death.**

A testator directed his trustees to pay an annuity to A, and on A's death to execute an entail in favour of A's second son and a series of heirs. A survived the expiry of twenty-one years from the testator's death, and any implied direction to accumulate the rents thereafter was struck at by the Thellusson Act. **Held** that the surplus rents accruing subsequent to the expiry of twenty-one years from the death of the testator did not belong to A's second son, but went to the person who would have succeeded to the lands if the testator had died intestate.

Smyth's Trustees v Kinloch, 1880, 7 R. 1176; 17 S.L.R. 783.

(1427)

—**Gift of specified estate with accumulations on death of liferenter—No residuary gift.**

A testator directed the interest on his estate to be accumulated until the death of

the survivor of three liferenters, and then the whole estate and accumulations to be given over to a certain beneficiary. **Held** that accumulations struck at by the Thellusson Act fell into intestacy, and not to the beneficiary, who, although entitled to the fee of the whole estate as at the death of the survivor of the liferenters, had not been made residuary legatee.

Magistrates of Ayr v Shaw, (O.H.) 1904, 12 S.L.T. 126.

(1428)

—**Three-fourths of income of residue payable to charities—One-fourth to be accumulated to increase fund—Right of charity to receive whole income.**

A testatrix directed her trustees, after the lapse of certain annuities, to invest a sum of money as a fund for payment of certain bequests to charitable institutions, and for the purpose of increasing said fund to add thereto yearly one-fourth part of the interest payable on the said sum, and to pay the remaining three-fourths of the interest to the charities equally. The direction to accumulate was struck at by the Thellusson Act after the expiry of the statutory period. **Held** that the capital of the fund having been bestowed on the trustees for behoof of the charities, and the direction to accumulate being a mere burden or limitation of the bequest, the whole income, after the lapse of the statutory period, fell to be paid over to the charities.

Maxwell's Trustees v Maxwell, 1877, 5 R. 248; 15 S.L.R. 155.

(1429)

—**Direction to accumulate proceeds of mines—Accumulated sum to be paid at future date to heir under entail—Heir's right to receive proceeds.**

A testator directed the proceeds of his mines and minerals to be accumulated until a sum of £25,000 should be raised. The sum of £25,000 was to be paid over to the heir in possession of the testator's entailed lands. The interest of the accumulations was not to be accumulated, but was to be paid over as it accrued to the heir in possession of the entailed lands for the time being. Before the sum of £25,000 was raised, further accumulation was stopped by the operation of the Thellusson Act. **Held**, on a construction of the whole terms of the settlement (1) that the testator's sole purpose in postponing the payment was accumulation; and (2) that further accumulation being impossible, the heir in possession for the time being was entitled to the fund.

Colquhoun v Colquhoun's Trustees, 1892, 19 R. 946; 29 S.L.R. 797.

(1430)

—**Advances to children—Maintenance.**

Held that the Thellusson Act does not prohibit advances to children for maintenance and education out of revenue after the date when accumulations are prohibited.

Muir's Trustees v Jameson, (O.H.) 1903, 10 S.L.T. 701.

(2) PERSONS ENTITLED TO SUMS FALLING INTO INTESACY.

(1431)

Heir of provision.

A, the proprietor of an estate under a destination in favour of himself, whom failing, of B, one of his heirs-portioners, left a trust settlement, in which he directed his trustees to pay an annuity to B, and on his death to execute an entail in favour of B's second son and a series of heirs. B having survived the expiry of twenty-one years from the date of the testator's death, held that surplus income accruing subsequent to the expiry of the twenty-one years fell to be paid to B as heir of provision to the testator.

Smyth's Trustees v Kinloch, 1880, 7 R. 1176; 17 S.L.R. 783.

(1432)

Widow—Jus relictæ.

Held that a widow was not entitled in virtue of her *jus relictæ* to claim any portion of surplus revenue falling into intestacy under the Thellusson Act, in respect that it did not form part of the testator's estate at his death.

Wilson's Trustees v Glasgow Royal Infirmary, 1917 S.C. 527; 54 S.L.R. 468; 1917, 1 S.L.T. 328.

(1433)

By a settlement disposing of his whole estate a testator made certain provisions in favour of his wife which were declared to be in full of *jus relictæ*. The wife accepted the testamentary provisions. Held that she was entitled to claim *jus relictæ* out of accumulations of income, which fell into intestacy in consequence of the operation of the Thellusson Act.

McGregor's Trustees v Kimbell, 1911 S.C. 1196; 48 S.L.R. 950; 1911, 2 S.L.T. 154.

(1434)

Jus relictæ—Terce.

A testator directed his trustees to pay an annuity to his widow in full satisfaction of terce, share of moveables, and other legal claims. The widow accepted the provision. In consequence of the operation of the Thellusson Act, income of the estate accruing subsequent to the expiry of twenty-one years from the testator's death fell into intestacy. Held that the widow was entitled to *jus relictæ* out of the income falling into intestacy in so far as it was derived from moveable estate, and to terce out of the income falling into intestacy in so far as it was derived from heritage.

Moon's Trustees v Moon, 1899, 2 F. 201; 37 S.L.R. 140; 7 S.L.T. 257.

(1435)

Date of ascertainment of heirs—Rents of heritage.

A testator was survived by his widow for thirty-one years. In consequence a direction to accumulate the rents of certain heritage became void, and the rents fell into intestacy. Held that each term's rent as it accrued belonged to the person who at that

date possessed the character of heir in heritage ab intestato of the testator.

Campbell's Trustees v Campbell, 1891, 18 R. 992; 28 S.L.R. 771.

(1436)

Heritable or moveable—Conversion.

A testator directed his trustees to pay certain annuities which did not exhaust the revenue of his estate, and on the death of the last survivor of the annuitants to "realise and convert into cash" his whole estate and "divide" the residue among certain persons who, until that event, were to have no vested right. At the expiry of twenty-one years from the testator's death two annuitants were still in life, so that surplus income thereafter accruing fell into intestacy. Held (1) that the direction to realise did not operate conversion of the heritage until the date of division; (2) that the rents of each term as they accrued fell to the person holding at that time the character of heir at law of the testator; and (3) that the rents accumulated by the trustees prior to the expiry of the twenty-one years being moveable estate, the surplus income derived therefrom fell to the heirs in *mobiliis* of the testator as at his death.

Logan's Trustees v Logan, 1896, 23 R. 848; 33 S.L.R. 638; 4 S.L.T. 57.

(1437)

Heritable or moveable—Conversion—Incidence of annuities.

When by the operation of the Thellusson Act the accruing revenue of a mixed estate falls to be divided as intestate succession, the funds are to be distinguished as heritable or moveable, according to their source as existing at the testator's death without regard to any conversion authorised or directed by him for the purpose of his settlement. Annuities left by the testator fall to be deducted from the income of heritage.

Moon's Trustees v Moon, 1899, 2 F. 201; 37 S.L.R. 140; 7 S.L.T. 257.

(1438)

Collation between heir and next of kin.

Held that when by the Thellusson Act the income of the heritable and moveable estate of a person deceased falls to his heirs ab intestato, an heir in heritage, who is also one of the next of kin, cannot take his share of the moveable succession without collating the heritage.

Moon's Trustees v Moon, 1899, 2 F. 201; 37 S.L.R. 140; 7 S.L.T. 257.

XXI. ELECTION.

1. GENERALLY.

(1439)

The doctrine of "approbate and reprobate" in Scotland is identical with that of "election" in England.

Crum Ewing's Trustees v Bayly's Trustees, 1911 S.C. (H.L.) 18; [1911] A.C. 217; 48 S.L.R. 401; 1911, 1 S.L.T. 397.

(1440)

Necessity for immediate election.

A testator directed his trustees to pay to his widow until her death or re-marriage an annuity of £500 in full of her legal rights, or such other sum, more or less, as they in their discretion might think reasonable, and that at such times as they might think fit, and provided that the balance of the income, and on the death or re-marriage of the widow the fee, of the estate should be paid to her children. The testator died survived by his widow and children. **Held**, in a special case submitted to the Court shortly after the testator's death, that as none of the other beneficiaries could show any present interest which required the widow to make an immediate election between the testamentary provisions and her legal rights, she was not bound to do so.

Watson's Trustees v Watson, 1910 S.C. 795; 47 S.L.R. 723; 1910, 2 S.L.T. 62.

(1441)

Special powers granted to curator bonis.

The Court granted special power to the curator bonis of a lunatic to elect between testamentary provisions and legal rights where it was necessary in the interests of other beneficiaries that an election should be made at once.

Skinner's Curator Bonis, 1903, 5 F. 914; 40 S.L.R. 677; 11 S.L.T. 196.

(1442)

Right of trustees to require discharge of claim for legitim before paying legacy.

Laing v Laing, 1895, 22 R. 575; 32 S.L.R. 443; 2 S.L.T. 562, No. 879, *supra*.

2. WHETHER PARTIES PUT TO ELECTION.

(1443)

Impossibility of approbating cum effectu—English Statute of Mortmain.

A legatee, who has also a claim *ex lege* to part of the testator's estate, included by that testator in a general settlement, cannot be called on to make his election between the legacy and his legal right, if, by his abandonment of his legal right, the estate to which that right entitles him will not be surrendered to the uses of the will, but will be treated as undisposed of. A testator in a general trust disposition and settlement, *inter alia*, left to a nephew, who was also his heir, three legacies. The testator directed that the residue of his estate should be divided among certain charities. Part of the trust estate consisted of real estate in England. By the English Statute of Mortmain neither the real estate nor the proceeds of it, if sold, could pass under the trust settlement to charities, while, if the heir waived his right to it, the effect of that statute was that the real estate would be treated as undisposed of. **Held** that in

these circumstances the heir was not put to his election.

Hewitt's Trustees v Lawson, 1891, 18 R. 793; 28 S.L.R. 528.

(1444)

Impossibility of subjecting share to trusts of settlement.

A testator, who was domiciled in Scotland and was survived by seven children, by his settlement conveyed his whole estate (including immoveable property in the Argentine) to trustees in trust equally for six of the children in fee and for the other child, a daughter, in *liferent* and her issue in fee. By Argentine law trusts are not recognised or allowed effect; and, accordingly, the settlement was declared null *quoad* the Argentine property by the Courts of that state, and each of the testator's children entered into possession of one-seventh of that property in accordance with Argentine law. The daughter having claimed legitimum and thereby forfeited her interests under the trust, the daughter's issue (as the ultimate heirs, under the settlement, of a one-seventh share of the estate) maintained that the testator's other children were bound to elect between their testamentary provisions and their shares of the Argentine property. **Held** that they were not put to their election, in respect that it was impossible for them to render the Argentine property subject to the uses of the trust, and that they could not be called upon to make an equivalent benefit.

Brown's Trustees v Gregson, 1920 S.C. (H.L.) 87; [1920] A.C. 860; 57 S.L.R. 391; 1920, 1 S.L.T. 311.

(1445)

Repudiation by beneficiary of part of deed—Invalid appointment by testator—Effect of challenging appointment—Fund available for equitable compensation.

A testator in his trust disposition and settlement directed his trustees to hold a share of his estate for behoof of his daughter in *liferent* and her children in fee, in such proportions as she might direct, and, failing such direction, then equally among them. The daughter professed to exercise this power by a settlement by which she conveyed to trustees (1) this share of her father's estate; (2) a sum settled by her marriage contract on her in *liferent* and her children in fee, subject to a power of apportionment by her; and (3) her own estate, and directed the trustees to hold the sums conveyed to them for her children in *liferent*, for their *liferent* alimentary uses only, and for their issue in fee. *Quoad* the share of her father's estate the appointment was bad, in respect that it restricted the children's interest to a *liferent*, and conferred the fee on persons who were not objects of the power. **Held** (1) that the doctrine of "approbate and reprobate" in Scotland is identical with that of "election" in England; (2) that, in accordance with that doctrine, the children were, in the circumstances, put to their election, the circum-

stance whether or not their mother knew that the appointment was bad being immaterial; (3) that the fact that the children's shares of their mother's estate were restricted to alimentary liferents did not prevent the income being available for equitable compensation, and so did not bar election.

Crum Ewing's Trustees v Bayly's Trustees, 1911 S.C. (H.L.) 18; [1911] A.C. 217; 48 S.L.R. 401; 1911, 1 S.L.T. 397.

(1446)

A testator, by his trust disposition and settlement, disposed of the residue of his estate, and also, in like manner, of certain antenuptial marriage contract funds, in virtue of a power of apportionment conferred on him by the contract, to certain residuary legatees, one of whom was not a proper object of the power contained in the marriage contract. **Held** that the other residuary legatees were not barred from objecting to any part of the marriage contract funds being paid over to one who was not a proper object of the power, but that if they did so, they were put to their election, and if they elected to take their shares of the marriage contract funds as appropriated by the settlement, they could take no share of the residue without making good therefrom the loss occasioned to the other residuary legatee by their challenge of his right to share in the marriage contract funds.

Cattanach's Trustees v Cattanach, 1901, 4 F. 205; 39 S.L.R. 154; 9 S.L.T. 284.

(1447)

Invalid appointment under power—Testamentary bequest.

A testator, who had a power of apportioning among his children certain funds derived from his wife's estate, and held by his marriage contract trustees for their behoof, exercised the power in his settlement, but qualified the apportionment of a daughter's share by conditions which were *ultra vires*. The testator at the same time made a large provision for the daughter out of his own estate. The settlement contained a declaration that the sums provided to the children were in full not only of all claims "competent to them by or through my decease in any manner of way, but also in full of all claims competent to them under my contract of marriage." **Held** that the provision to the daughter from her father's estate was conditional on her acquiescing in the apportionment as made, and that she could not take the provision from her father's estate and quarrel with the conditions attached to the appointment.

Bonhotes v Mitchell's Trustees, 1885, 12 R. 984; 22 S.L.R. 648.

(1448)

Valid appointment under power—Invalid conditions.

Under a marriage contract spouses had power to apportion a fund among their children. The husband's settlement, which was signed by the wife, contained a valid

joint appointment of the fund, with invalid conditions added. **Held** that the children were not put to their election, but were entitled to claim both their shares of the marriage contract fund free of restrictions, and their share of the husband's own estate bequeathed to them by the settlement.

Matthews Duncan's Trustees v Matthews Duncan, 1901, 3 F. 533; 38 S.L.R. 401; 8 S.L.T. 443.

(1449)

A testator died, leaving a trust disposition and settlement and relative codicils, and also a deed of directions, whereby he purported to exercise a power of appointment which he had over certain shares of a trust estate. The power of appointment was invalidly exercised. Circumstances where **held** that beneficiaries taking under the trust disposition and settlement were barred, on the principle of approbate and reprobate, from challenging the exercise of the power of appointment.

Ogg's Trustees v Forbes, (O.H.) 1912, 1 S.L.T. 431.

(1450)

Election between legal rights and testamentary provisions—Legacy in full of legitim.

Held that a daughter who claimed a legacy left in her father's trust deed as in full of legitim, &c., was barred from also claiming legitim.

McLaren v Howie, 1869, 8 M. 106; 42 J. 52; 7 S.L.R. 56.

(1451)

Testamentary writings disposing of whole estate.

Held that when a mortis causa settlement disposes of the whole estate of the grantor the widow is not entitled to take provisions under it and at the same time claim her legal rights.

Caithness' Trustees v Caithness, 1877, 4 R. 937; 14 S.L.R. 585.

(1452)

Special destinations contained in titles to heritable property in favour of the widow of the proprietor were revocable. The proprietor left a will disposing of his whole estate. **Held** that the special destinations formed part of the scheme of testamentary disposition, and that the widow accordingly could not take benefit under these destinations if she claimed her legal rights.

Dallas's Trustees v Dallas, (O.H.) 1905, 13 S.L.T. 332.

(1453)

Inter vivos disposition of heritage to wife—Whether part of general settlement—Wife claiming *jus relictæ*—Whether bound to elect between heritage and legal rights.

A husband, by an antenuptial contract of marriage entered into on the occasion of his second marriage, assigned to trustees the whole estate, heritable and moveable, which might belong to him at his death, and gave directions as to its disposal. His second wife having died, he married a third wife, without

a marriage contract. During the subsistence of the third marriage he conveyed his dwelling-house and furnishings to his wife by an inter vivos disposition. The third wife survived her husband, and claimed *ius relictæ*. **Held** that she was not put to her election between the provisions in the inter vivos disposition and her *ius relictæ*, in respect that, as the antenuptial marriage contract operated only on estate belonging to the husband at the time of his death, the inter vivos disposition did not fall to be read along with it as forming a universal settlement of the husband's estate.

Leslie's Trustees v Leslie, 1921 S.C. 940; 58 S.L.R. 592; 1921, 2 S.L.T. 192.

(1454)

———**Child claiming legitim forfeiting gifts under will—Whether forfeiture extends to gifts in codicil.**

Wingate v Wingate's Trustees, 1921 S.C. 857; 58 S.L.R. 604; 1921, 2 S.L.T. 163, No. 1505, *infra*.

(1455)

———**Right to aliment and education out of father's estate.**

A testator conveyed his estate to trustees for payment of his whole estate to his wife, subject to payment of his debts and to payment of the cost of upbringing and maintaining his children. **Held** that the children were entitled to legitim out of the testator's moveable estate, and also to the expense of their upbringing and education out of the remainder of the estate, but only in so far as the shares of legitim were insufficient for their upbringing and education.

Urquhart's Executors v Abbott, 1899, 1 F. 1149; 36 S.L.R. 896; 7 S.L.T. 114.

(1456)

———**Legitim from mother's estate—Father's will expressly putting children to election.**

In his trust disposition and settlement a testator, who died in 1876, declared that the provisions therein made in favour of his children should "be accepted of by them, and the same are hereby declared to be in full of all legitim, portion natural, bairns' part of gear, executry, and all others whatsoever which they or any of them can ask or demand by or through my decease, or by and through the death of their mother, or in any other manner of way." The testator's widow died in 1907, and, on her death, a son who had accepted the provision made to him in his father's trust disposition and settlement claimed legitim from her estate under the Married Women's Property Act, 1881. **Held** that the above clause in the father's trust disposition and settlement had the effect only of protecting the father's estate from adverse claims, and did not exclude the son's claim to legitim from his mother's estate.

Moon v Moon's Trustees, 1909 S.C. 185; 46 S.L.R. 165; 16 S.L.T. 622.

(1457)

A father who died in 1863 by his trust disposition and settlement made certain provisions for his children, declaring them to be in full satisfaction of legitim. On the death of the mother in 1905, **held** that the only surviving son who had accepted his father's conventional provisions was not excluded from claiming legitim out of his mother's estate by reason of the declaration contained in his father's settlement.

Buckle v Buckle's Curator, (O.H.) 1907, 15 S.L.T. 98.

(1458)

Election between legal rights and other provisions—Provision by father to child in child's marriage contract—Power to child to test on one-half of marriage contract funds—Remaining half destined to father's heirs—Claim of legitim out of remaining half.

H S, in his daughter's antenuptial marriage contract, bound himself to convey £8000 to trustees, to hold for the spouses and the longest liver of them in liferent allenerly, the fee to belong to the children of the marriage, whom failing, to such persons as H S might appoint, whom failing, to his heirs and successors whomsoever, but with power to his daughter to test on one-half. There was no clause by which the daughter accepted these provisions as in full of her legal rights over her father's estate. H S executed a trust settlement by which, in the event of his daughter and her husband dying without issue, the whole property liferented by the spouses was to be divided amongst certain legatees. After the father's death the daughter claimed her legitim. The Court found that she was not barred by her acceptance of the provisions in the marriage contract from claiming legitim. The daughter thereafter, there being no issue of the marriage, exercised the power to test on the £4000, and also to claim as legitim half of the remaining £4000. **Held** that the daughter was not barred from testing on the £4000, either (1) by having claimed legitim generally; or (2) by having claimed as legitim half of the remaining £4000.

Somerville's Trustees v Dickson's Trustees, 1887, 14 R. 770; 24 S.L.R. 543.

(1459)

———**Legitim not discharged by marriage contract—Children claiming both legitim and provisions.**

A husband by antenuptial marriage contract undertook to make over to his children at his death one half of his whole estate, reserving a power of apportionment. The marriage contract did not exclude legitim. Certain of the children having claimed legitim, **held** that, this being an onerous provision due to the children by contract, it fell to be deducted from the estate before the amount of legitim was computed, and that the children claiming legitim were entitled both to legitim and to their share of the provision.

Murray's Trustees v Murray, 1881, 18 S.L.R. 690.

(1460)

Election between testamentary and other provisions—Policy of insurance.

A effected a policy of insurance on his life, the policy having on it, as issued, a memorandum signed by the secretary of the insurance society, setting forth that "the amount insured by this policy to be in favour of" A's wife "should she survive him, but in the event of her predeceasing him, then the policy to revert to his executors, administrators, or assigns." The policy was delivered to A's wife, but was afterwards handed back to A. He deleted the memorandum, and wrote on the policy, "I hereby revoke and cancel the above bequest in my wife's favour. I have provided for her in my will." A died, survived by his wife. At the date of A's death the policy of insurance had the above quoted revocation deleted. A left a trust disposition and settlement by which he, inter alia, made certain provisions in his wife's favour to be accepted by her "as in full satisfaction of all *jus relictae*, terce, or other claim of any kind, competent to her through my decease." Held that the wife was the primary creditor under the policy of insurance; that the sum due under the policy did not form part of A's estate at his death; and that the widow was entitled to the sum in the policy, as well as to the provisions in her favour under A's settlement.

Hay's Trustees v Hay, 1904, 6 F. 978; 41 S.L.R. 809.

(1461)

Pension to widow from military fund.

A husband subscribed during his lifetime to a military fund, whereby after his death his widow became entitled to a pension, payable to her alone. He left a trust disposition and settlement dealing with his whole estate, and containing certain provisions in favour of his widow, which she repudiated, electing to claim her legal rights. Held that on so doing she was not bound to account to the estate for the pension, and that she was entitled to her legal rights in the estate in addition to the pension.

Craigie's Trustees v Craigie, 1904, 6 F. 343; 41 S.L.R. 254; 11 S.L.T. 628.

(1462)

Forfeiture on "taking exception to any of the provisions hereinbefore contained"—Right to challenge deed so as to ascertain rights.

By an antenuptial contract of marriage a husband was given, in the event of his survivance, an alimentary liferent of his wife's whole estate, and he renounced his legal rights as a husband. After the marriage the husband and wife entered into an agreement to make an immediate termination of the marriage trust, which provided that the husband's renunciation of his legal rights contained in the marriage contract should remain effective. Subsequently the wife made a will containing certain provisions in favour of the husband, and a forfeiture

clause providing that on the husband stating any other claim or right the provisions in his favour should be cancelled. Held that a challenge by the husband of the inter vivos deed did not involve forfeiture of his provisions under the will.

Hay v Hay's Trustees, (O.H.) 1913, 1 S.L.T. 54.

(1463)

Election between marriage contract and testamentary provisions.

Opinion (per Lord Barcaple, Ordinary) that the principle of approbate and reprobate applied to a claim for conventional provisions as well as to a claim for legitim, and that a child taking under her father's general settlement could not claim a share of a sum which the father bound himself by antenuptial contract to pay to the children of the marriage in lieu of legitim.

Darling's Executor v Darling, (O.H.) 1869, 41 J. 545.

(1464)

Provisions in father's settlement in full of marriage contract provisions.

A father, in the marriage contract of his daughter, directed trustees, who held for him a policy for £3000 on his life, to assign it, to the extent of £2000, to the marriage contract trustees for behoof of the daughter in liferent and her children in fee. This and other provisions were declared to be in full of the daughter's legal rights out of her father's estate. The father died leaving a settlement, by which he directed one-third of the residue of his estate to be held for behoof of the daughter in liferent and her children in fee, declaring that the provisions for her should be in full of all his obligations under her marriage contract remaining unimplemented. Held that if the daughter and her husband took the share of the residue, they were not entitled to any part of the policy fund.

Crum Ewing's Trustees v Bayly's Trustees, 1888, 15 R. 507; 25 S.L.R. 367.

(1465)

Express clause of election.

Lord Inverclyde's Trustees v Lord Inverclyde, 1910 S.C. 420; 48 S.L.R. 1062, No. 1363, *supra*.

(1466)

Legacies in satisfaction of provisions over entailed estate.

An heir of entail, by his trust disposition and settlement, left the residue of his estate to the heir entitled to succeed him in the entailed estates, and by a codicil thereto directed his trustees to hold, apply, and pay over, inter alia, legacies of £5000 each to three younger sons, "which provisions of £5000 shall include and comprehend and be subject to abatement and deduction, or shall consist, as the case may be," of the sums to which these sons should be entitled under their father's marriage contract, and under a bond of provision over the entailed estates, "it being my will and intention that each of my three younger sons shall receive in all

a provision of £5000." By a second codicil the trustee revoked the destination of the residue in his settlement, and directed that it should be divided among the three younger sons. He further confirmed the settlement and first codicil except in so far as thereby altered. In an action by one of the younger sons against the heir of entail, **held** that, under the combined effect of the settlement and codicils, the legacies and shares of residue bequeathed to the younger sons were given to them in satisfaction of their claims as creditors in the bond of provision, and that they were not entitled to payment of their shares of the bond of provision except on condition of making compensation to the heirs of entail out of the general estate of the testator.

Somervell v Somervell, 1884, 11 R. 1004; 21 S.L.R. 688.

(1467)

Legal rights out of part of estate falling into intestacy — Testamentary provisions declared to be in full of legal rights.

Held that a declaration by a testator in his settlement that certain provisions he had made for his wife and children were to be in full of all claims by them for terce, jus relictæ, legitim, or otherwise, were to be construed as excluding such claims in so far only as conflicting with the settlement, and that his widow, who had accepted her provisions, was entitled in addition thereto to terce and jus relictæ out of such heritage and moveables as fell to be disposed of as intestate succession.

Naismith v Boyes, 1899, 1 F. (H.L.) 79; [1899] A.C. 495; 36 S.L.R. 973.

(1468)

Held that a declaration by a testator in his settlement that a provision which he had made for his wife was in full satisfaction to her of terce, share of moveables, and every other claim competent to her by law through his decease, was to be construed as excluding such claims in so far only as conflicting with the settlement, and that his widow, who had accepted the provision, was entitled in addition thereto to terce and jus relictæ out of the income of heritage and moveables which fell to be disposed of as intestate succession owing to the stoppage of accumulation under the Thellusson Act.

Moon's Trustees v Moon, 1899, 2 F. 201; 37 S.L.R. 140; 7 S.L.T. 257.

(1469)

As a general rule, a clause in a universal settlement whereby provisions to a widow or children are declared to be in full of legal rights is to be regarded as intended solely for the protection of the settlement, and acceptance of the provisions will not bar the acceptors from claiming their legal rights in any portion of the estate which may fall into intestacy. By a settlement disposing of his whole estate, a testator made certain provisions in favour of his wife, which, by a clause in the will, she accepted as in full of jus relictæ and

all other claims competent to her in consequence of his death, and signed the will together with her husband. After her husband's death the widow received and accepted payment of the provisions under the settlement. **Held** that, in addition to her conventional provisions, she was entitled to jus relictæ out of accumulations of income (prohibited by the Thellusson Act) which had fallen into intestacy.

M'Gregor's Trustees v Kimbell, 1911 S.C. 1196; 48 S.L.R. 950; 1911, 2 S.L.T. 154.

(1470)

Held that a child who took a provision under her parent's settlement was also entitled to legitim out of provisions which had fallen into intestacy through the death of the legatees to whom they were destined. Farquharson v Kelly, 1900, 2 F. 863; 37 S.L.R. 574; 7 S.L.T. 442.

(1471)

Division of intestate estate—Computation of legitim paid.

The executor of a daughter claimed and was paid legitim out of her father's estate. In events which happened part of the residue of the father's estate fell into intestacy. **Held** that the daughter's representatives were entitled to her share of the intestate succession without deduction in respect of any portion of the sum paid as legitim.

Scott v Gowans, (O.H.) 1916, 1 S.L.T. 404.

(1472)

Forfeited share falling into intestacy — Right of beneficiaries incurring forfeiture to share as heirs ab intestato.

A trust disposition and settlement contained a clause in terms of which any of the testator's children who claimed legitim forfeited all rights competent to them under the settlement. The deed also contained a clause giving direction as to the disposal of lapsed provisions, but not of provisions forfeited by claims of legitim. **Held** that the forfeited provisions of certain of the children who had claimed legitim fell into intestacy, and that the children who forfeited the provisions were entitled to share in the provisions so forfeited along with the other heirs ab intestato.

Crawford's Trustees v Crawford, (O.H.) 1899, 7 S.L.T. 205.

(1473)

Forfeiture of liferent—Residuary clause held inapplicable.

Wingate v Wingate's Trustees, 1921 S.C. 857; 58 S.L.R. 604; 1921, 2 S.L.T. 163, No. 1505, infra.

(1474)

Bequest of residue void for uncertainty—Residue falling into intestacy—Discharge granted by child claiming legitim.

A testator made certain provisions in favour of his only child, a son, which he declared should be accepted by him as in full satisfaction of his legal rights. He

further directed his trustees, in the event of his son claiming his legal rights, to distribute the residue of the trust estate among certain beneficiaries. The son claimed his legal rights and, on receiving payment thereof, he granted a discharge in favour of his father's trustees, discharging them of all he could have asked or claimed out of his father's estate. It was afterwards found that the bequest of residue was void from uncertainty, and the son, as his father's sole heir ab intestato, claimed payment of the residue as having fallen into intestacy. **Held** that the son, in granting the discharge, had not thereby discharged his rights as heir ab intestato, and that he was accordingly entitled to receive payment of the residue.

Symmers's Trustees v Symmers, 1918 S.C. 337; 55 S.L.R. 280; 1918, 1 S.L.T. 185.

(1475)

——— **Clause declaring legacies void if legatee impugned settlement.**

A testator provided that, if any party claiming benefit under her will should take any objection thereto or to the exercise by his trustees of any of the powers thereby conferred, the legacies . . . left to him should become null and void. The bequest of residue in the testator's will was void from uncertainty. **Held** that, apart from this provision, legatees who were also heirs ab intestato were not bound to elect between their legacies and their rights on intestacy, and that the special provision was in the circumstances ineffectual, as its only effect would be to forfeit the objecting legatees' legacies for the benefit of the objecting legatees and of other objectors who were not legatees.

Brown's Trustees v M'Intosh, (O.H.) 1905, 13 S.L.T. 72.

3. WHO MAY ELECT.

(1476)

——— **Married woman—Right of husband to elect—Testamentary provision to wife exclusive of jus mariti.**

Millar v Birrell, 1876, 4 R. 87; 14 S.L.R. 58, No. 131, *supra*.

(1477)

——— **Husband's consent — Married Women's Property Act, 1881, sec. 1, subsec. (2).**

Held that neither at common law nor under the Married Women's Property Act, 1881, is a married woman entitled to discharge a claim to legitim without her husband's consent.

Miller v Galbraith's Trustees, 1886, 13 R. 764; 23 S.L.R. 533.

(1478)

——— **Dispensing with husband's consent—Curator ad litem.**

A married woman, living apart from her husband against his will, presented a petition for authority to dispense with her husband's consent to her election between her

legitim and the testamentary provisions in her father's will. The Court, **holding** that the husband was in such a position that he could not be called on to advise his wife, appointed a curator ad litem to the wife for the purposes of her election; and on the curator reporting in favour of acceptance of the testamentary provisions, granted the prayer of the petition. **Observed** (per Lord President Dunedin) that an election by a wife must be an election by an advised wife, not by an unadvised wife.

Sillars v Sillars, 1911 S.C. 1207; 43 S.L.R. 858; 1911, 2 S.L.T. 100.

But see *Married Women's Property* (Scotland) Act, 1920, sec. 1.

(1479)

——— **Conveyance of whole estate to marriage contract trustees—Exclusion of trustees by father's settlement.**

A lady conveyed to her marriage contract trustees the whole means and estate "to which she might succeed or acquire right during the subsistence of the marriage." Her father died during the subsistence of the marriage, and by his will made certain conventional provisions in her favour, subject to conditions designed to prevent her share of his estate falling under her marriage contract. Her marriage contract trustees called upon her to claim legitim, but she declined to do so. **Held** that the right of election is personal and not transmissible, and that the lady was not barred by the terms of the conveyance of acquirenda in her marriage contract from electing to take the conventional provisions under her father's will.

Mackenzie's Trustees v Beveridge's Trustees, 1903 S.C. 1185; 45 S.L.R. 889; 16 S.L.T. 337.

(1480)

——— **Wife's representatives.**

Per Lord Watson—"Where there is no antenuptial contract, and the husband makes a voluntary provision in favour of his widow, as in full of her legal claims, she is put to her election upon his predecease; and, in the event of her death before she has had the opportunity of making her choice, the right of election passes to her representatives. On the other hand, if the wife has, during the subsistence of the marriage, consented to accept the provisions in substitution for her legal claims she may retract her consent as a donatio inter virum et uxorem, but her right of revocation being strictly personal cannot be exercised by her representatives."

Edward v Cheyne, 1888, 15 R. (H.L.) 33; 13 App.Cas. 373; 25 S.L.R. 422.

(1481)

——— **Terce.**

Question, whether when a widow dies without electing between her conventional provisions and her right to terce, her right to claim terce transmits to her representatives.

Pringle's Executrices, 1870, 8 M. 622; 42 J. 317; 7 S.L.R. 335.

(1482)

Jus relicte.

Mackenzie v Mackenzie's Trustees, 1873, 11 M. 681; 45 J. 433; 10 S.L.R. 470, No. 103, *supra*.

(1483)

Child's representatives.

A testator died in 1867 survived by three sons, Alexander, James, and John. James died in 1884 survived by five children. John died intestate and childless in 1891 without having elected between his legitim and the provisions made to him in his father's settlement. Thereafter one of the children of James brought an action against Alexander, who had been appointed John's executor-dative for a share of the legitim which the latter might have claimed from his father's estate. The defender, who had the residuary interest in that estate, objected that James had barred himself by his actings from making any claim in respect of said legitim, and that the pursuer as representing her father under the Intestate Moveable Succession Act, 1855, was equally barred from making such a claim.

Held (1) that the pursuer claimed in her own right, and therefore that her claim was not barred by anything that her father might have done; and (2) that as John's right of legitim was of much greater value than the provisions made to him in his father's settlement, the defender, as his executor, was bound to claim the former.

Macnab v Macnab's Executor, 1894, 32 S.L.R. 177; 2 S.L.T. 350.

(1484)

Lunatic—Curator bonis.

Where a person is legally incapacitated from availing himself of a right of election between testamentary and legal provisions he does not lose the right, even though he receive temporary benefit for his maintenance and support out of the estate, and he may exercise it if the incapacity be removed, or, if it be not removed, the right may be exercised by his representatives after his death.

Circumstances which were held insufficient to justify a curator bonis for a lunatic in making such an election.

Morison's Curator Bonis v Morison's Trustees, 1880, 8 R. 205; 18 S.L.R. 160.

(1485)

Curator bonis.

The right of election between testamentary and legal provisions may be exercised by a curator bonis on behalf of his ward where the circumstances of the case warrant it.

M'Call's Trustee v M'Call's Curator Bonis, 1901, 3 F. 1065; 38 S.L.R. 778; 8 S.L.T. 299.

(1486)

Special power to elect.

In an application under the Judicial Factors Act, 1849, by the curator bonis of a lunatic for special powers to elect to accept testamentary provisions in his ward's favour under her husband's will in preference to claiming her legal rights, the Court granted

the powers craved in respect (1) that it was necessary in the interest of other beneficiaries that the election should be made at once; and (2) that it was in the interest of the ward that it should be made in the manner proposed. **Observed** that it rests with the Court to determine how such an election should be made.

Skinner's Curator Bonis, 1903, 5 F. 914; 40 S.L.R. 677; 11 S.L.T. 196.

(1487)

Settlement consisting of two separate deeds—Challenge by party who in ignorance of one took under the other.

A father executed a trust deed for payment of certain debts and regulating his succession, in fraudem of his antenuptial marriage contract, and to the prejudice of the heir of the marriage, and afterwards another trust deed, the two forming together a complete settlement of his whole estate, heritable and moveable. The heir made up a title under the marriage contract, and under it possessed the lands contained in the first trust deed, and took benefit under the second deed, but in ignorance of the existence of the first trust deed. **Held** that his trustees and executors were not barred from challenging the earlier deed, but were entitled to elect either to abide by his approbation of his father's settlement or to renounce and restore the benefit he had taken and challenge the first deed.

Earl of Glasgow's Trustee v Earl of Glasgow, &c., 1872, 11 M. 218; 45 J. 145; 10 S.L.R. 144.

4. PROOF AND VALIDITY OF ELECTION.

(1488)

Ignorance of rights.

A widow cannot be held to homologate her husband's testament so as to bar her from claiming her legal rights in lieu of the provisions made for her by the will without proof that she knew what her rights were under the will and what her legal rights were apart from the will.

Logan v Logan, 1869, 7 S.L.R. 40.

(1489)

Acquiescence.

Actings which were held not to bar a claim for legitim made after the lapse of two years and ten months from the father's death where both parties were in ignorance of their legal rights.

Countess Dowager of Kintore v Earl of Kintore, 1886, 13 R. (H.L.) 93; 11 App.Cas. 394; 23 S.L.R. 877.

(1490)

Mora—Legitim—Claim for legitim by trustee in bankruptcy.

A trustee in bankruptcy claimed legitim from the estate of the bankrupt's father, who had died twelve years before the son's sequestration. Circumstances in which it was held that the bankrupt himself would not have been entitled at the date of his bankruptcy

to claim his legitim, and that consequently his trustee could not do so.

Bell's Trustee v Bell's Trustee, 1907 S.C. 872; 44 S.L.R. 588; 14 S.L.T. 941.

(1491)

Implied discharge of legal rights.

Pringle's Executrices, 1870, 8 M. 622; 42 J. 317; 7 S.L.R. 335, No. 54, *supra*.

Mackenzie v Mackenzie's Trustees, 1873, 11 M. 681; 45 J. 433; 10 S.L.R. 470, No. 109, *supra*.

Wick v Wick, 1898, 1 F. 199; 36 S.L.R. 180, No. 147, *supra*.

(1492)

Personal bar—Conditional acceptance of testamentary provision.

The widow of a manufacturer of smallwares was by her husband's settlement left the liferent of his house, along with the fee of the furniture and plenishing. The trust deed provided that the widow should be allowed, if willing, and so long as she remained unmarried, to carry on her husband's business for behoof of herself and their children; and that the provisions for the widow should be accepted by her in full satisfaction of all her legal claims. A family of children survived their father, whose whole assets amounted to £2800, in addition to the house and furniture. The widow continued to occupy the house with her children for upwards of a year, and carried on the business for her and their behoof, borrowing, under the provisions of the deed, £1000 from the trustees to enable her to do so. She then executed a deed of obligation, in which she bound herself to redeliver the stock and business to the trustees in the event of her resolving to marry again, and declared that she accepted these provisions in full satisfaction of her legal rights "so long as I continue to carry on said business." On her desiring to enter into a second marriage, *held* that, in the peculiar circumstances of the case, and it being still possible to give effect to what she asked without prejudice to any one, she was not barred from making her legal claims against her husband's estate.

M'Fadyen v M'Fadyen's Trustees, 1882, 10 R. 285; 20 S.L.R. 189.

(1493)

Minute approving of husband's will.

Circumstances in which a minute signed by a widow approving of her husband's will, which gave her a liferent of his estate till her death or second marriage, was *held* not to bar her after the lapse of three years from repudiating the will and claiming her legal rights.

Donaldson v Tainsh's Trustees, 1886, 13 R. 967; 23 S.L.R. 680.

(1494)

Conveyance by daughter to trustees.

A father's settlement left a fourth of the residue to A, his daughter, which exceeded in value her share of legitim, but was contingent upon her surviving her mother. A, who never intimated any election, conveyed to her marriage contract trustees her rights

under her father's settlement to the extent of £4000, and subsequently executed a will leaving her whole estate to testamentary trustees for behoof of her husband. In an action of multiplepinding raised after her death, A's marriage contract trustees claimed the £4000 under her father's settlement. No claim was lodged by A's testamentary trustees. *Held*, in an action for legitim at the instance of A's testamentary trustees (1) that the marriage contract being *res inter alios*, the defender was not entitled to found on it as implying election; (2) that no claim had been made in the multiplepinding by A's testamentary trustees; and (3) that, as the claim for legitim had not been discharged or satisfied, the pursuer was entitled to recover it.

Crellin v Muirhead's Judicial Factor, 1892, 20 R. 51; 30 S.L.R. 72.

(1495)

Essential error—Error in law.

A daughter, who had intimated to her father's trustees her election to take legitim in place of her testamentary provisions, in the belief that her right to the whole legitim fund was admitted by the trustees, of whom her brother was one, subsequently, when her brother declared his intention to dispute her right to more than half of the legitim fund, withdrew her election and claimed her testamentary provisions. *Held* that she was not barred from doing so. *Opinion* (per Lord Shand, 14 R., at p. 759) that, even if the error had been one of law, and whether induced by another or not, the daughter would have been entitled to withdraw her election.

Inglis v Breen, 1890, 17 R. (H.L.) 76; 15 App.Cas. 169; 27 S.L.R. 1033.

(1496)

Circumstances in which *held* that a widow had not made a final and irrevocable election between her rights under her antenuptial marriage contract and those under her husband's will, and that, even if what she had said and done amounted to election, it might be recalled, because made under error, and without independent legal advice.

Younger v Younger's Trustees, (O.H.) 1900, 7 S.L.T. 453.

(1497)

Ignorance of rights—No independent agent—Undue haste.

Decree of reduction of a deed of election by a widow granted, the Court *holding* (1) that, considering that the widow's liferent provision was to cease in the event of her entering into a second marriage, and that there was nothing in the circumstances of the trust to require an early decision, she had been prematurely called upon to make her election; (2) that though no fraud or intentional misstatement by the trustees had been established, the information upon which she made her election was in fact inadequate; and (3) that, in the circumstances, the trustees should have insisted on her having an independent law agent.

Stewart v Bruce's Trustees, 1898, 25 R. 965; 35 S.L.R. 780; 6 S.L.T. 79.

(1498)

—Acceptance of certain articles and payments.

A testator left his son his household furniture and the income of half the residue of his estate. **Held** that the son was not barred from claiming legitim by the mere fact that he had accepted delivery of the furniture and payment of a few sums out of the income of the estate.

Duff, (O.H.) 1899, 7 S.L.T. 46.

(1499)

Right to withdraw an election.

Question, whether an election well made and intimated can be withdrawn.

Inglis' Trustees v Inglis, 1887, 14 R. 740; 24 S.L.R. 521.

Action appealed, and appeal withdrawn, Inglis v Breen, 1890, 17 R. (H.L.) 76; 15 App.Cas. 169; 27 S.L.R. 1033.

(1500)

Observations (per Lord Kinnear) on the circumstances in which a widow, who had expressly accepted the provisions made for her in her husband's settlement, might still be entitled to recall her election and to claim *jus relictæ*.

Dawson's Trustees v Dawson, 1896, 23 R. 1006; 33 S.L.R. 749; 4 S.L.T. 101.

5. EFFECT OF ELECTION.**(1) APPLICATION OF SURRENDERED SHARE.****(a) Forfeiture or Equitable Compensation.**

(1501)

General rule.

Where, under a general settlement of a father's estate, a provision is expressly given to a child in satisfaction of legitim, legitim cannot be claimed either in whole or in part without a complete surrender of the provision. But where the provision is not stated to be in full of legitim, and there is no express condition or declaration of forfeiture, the child's claiming and receiving legitim will not infer entire forfeiture of the testamentary provision, but only equitable compensation to those prejudiced by his claim.

Macfarlane's Trustees v Oliver, 1882, 9 R. 1133; 19 S.L.R. 850.

(1502)

Testamentary provision to child not declared to be in full of legal rights—Equitable compensation.

A testator made provision by way of life-ent for his daughter by general settlement, but did not declare the provision in full of legitim, or otherwise exclude the claim. The daughter claimed and received legitim. The trustees thereafter accumulated the income otherwise payable to the daughter, until they had restored to the estate the amount withdrawn for her legitim, and compensated the beneficiaries injured by the withdrawal. **Held** (by a majority of the whole Court) that, there being no declaration of forfeiture of the testamentary provision in the event of legitim being claimed, and no express ex-

clusion of legitim, none such was to be implied beyond what was necessary to give effect to the settlement, and that after the amount of legitim, with interest, was restored to the estate, the daughter was entitled to the life interest bequeathed to her for the remainder of her life.

Macfarlane's Trustees v Oliver, 1882, 9 R. 1133; 19 S.L.R. 850.

(1503)

Testamentary provision declared to be "in full of legal rights"—Forfeiture.

A testatrix, by her trust disposition and settlement, made certain provisions for her son, which were declared to be "in full of" his legal rights. The son claimed legitim. **Held** (by a majority of seven judges) that, by electing to claim legitim, the son had finally lost all right to the conventional provisions in his favour, even though, by the operation of equitable compensation, the estate should afterwards be restored against the loss occasioned by the claim of legitim.

Rose's Trustees v Rose, 1916 S.C. 827; 53 S.L.R. 630; 1916, 1 S.L.T. 382.

(1504)

By a general settlement a husband made certain provisions for his wife which, he declared, should be "in full of all her claims of terce, *jus relictæ*, and others legally competent to her" against his estate, but there was no declaration that the provisions should be forfeited if she claimed her legal rights. **Question**, whether her election not to accept the provisions of the settlement in her favour, but to claim her legal rights, resulted in her forfeiting her testamentary provisions finally, or merely gave rise to a claim of equitable compensation to the estate.

Jacks's Trustees v Jacks, 1913 S.C. 815; 50 S.L.R. 536; 1913, 1 S.L.T. 341.

(1505)

—Whether declaration applicable to gifts in codicil—Disposal of forfeited share.

A testatrix, by the second purpose of her trust disposition and settlement, directed her trustees, on her death, to convey to her son a capital sum. By the fifth purpose she bequeathed to him her household furniture, and by the sixth purpose she directed her trustees to pay to him the whole free annual income from the residue of her estate. By the seventh and eighth purposes the trustees were directed, on the death of the son, to divide and pay the residue among his children and the issue of predeceasers, whom failing, among certain charities. The trust purposes were followed by a declaration that "the foregoing provision in favour of my said son shall be accepted and held by him in full satisfaction of his claim of legitim." By a codicil the bequest of capital contained in the second purpose of the trust disposition and settlement was revoked, and in lieu thereof the trustees were directed to invest the amount in their own names, and to pay the free income to the testatrix's son during his lifetime, and, on his death, to divide the capital among his issue, whom failing, among certain named beneficiaries. On the testa-

trix's death the son, her only child, claimed and was paid his legitim. **Held** (1) that the declaration in the trust disposition and settlement applied to the whole provisions in favour of the son contained in both the trust disposition and the codicil, and accordingly that, by claiming legitim, the son had finally lost all right to the testamentary provisions in his favour; and (2) that the income of the residue did not fall to be disposed of as residue in terms of the seventh and eighth purposes of the trust disposition and settlement, but was intestate estate of the testatrix; and accordingly that, after the estate had been compensated for the sum withdrawn to meet the claim of legitim, the income fell to be paid to the son as his mother's heir.

Wingate v Wingate's Trustees, 1921 S.C. 857; 58 S.L.R. 604; 1921, 2 S.L.T. 163.

(1506)

Clause of forfeiture—Annuity payable out of forfeited share.

A testatrix directed her trustees to hold four-tenths of her estate for her son in liferent, and on his death to pay to his widow out of the income of the four-tenths an annuity of £100. There was a provision in the will that the son should forfeit for himself and his issue all claim to any share of the estate in the event of his claiming his legal rights. The son died shortly after the testatrix, and his representatives claimed his legal rights. **Held** that the widow's annuity was not forfeited.

Gunn's Trustees v Macfarlane, (O.H.) 1897, 4 S.L.T. 334.

(b) Disposal of Forfeited Interest.

(1507)

Gift of liferent to child—Forfeiture of liferent—Right of other beneficiaries.

A testator directed his trustees to invest a sum of £3500 for the children of his son R, nominatim, and any other children that might be born to him, payable on the death of their father; and till his death to pay the income to him for the maintenance of himself and the maintenance and education of his children; and the testator expressed his desire that the trustees should secure that the children should receive a good education. It was declared that the provision in favour of the son should be alimentary and that the provisions were in full of legal rights. The son claimed his legitim. **Held** (1) that he had forfeited his right of liferent, (2) that the children had no such independent interest therein as would entitle them to claim, and (3) that it was payable to the beneficiaries, who were prejudiced by the father receiving his legitim.

Jack v Marshall, 1879, 6 R. 543; 16 S.L.R. 326.

(1508)

A testator directed his trustees to divide the residue of his estate into three equal portions, one-third to be paid to the children of a deceased daughter, another third to

another daughter, whom failing, her issue, and the remaining third to be held by the trustees for a third daughter in liferent and her issue in fee. These provisions in favour of daughters and grandchildren were declared to be in satisfaction of legitim. The third daughter claimed legitim and thus forfeited her right of liferent, but her children's right of fee was not forfeited. **Held** that the income of the share of residue destined to the daughter who claimed legitim fell to be applied in compensating the beneficiaries who had suffered through legitim being claimed.

Snody's Trustees v Gibson's Trustees, 1883, 10 R. 599; 20 S.L.R. 392.

(1509)

—Heritable subjects conveyed to child in liferent and his issue in fee—Forfeiture of liferent—Right of residuary legatees.

A testator in his *mortis causa* settlement directly conveyed specific subjects to his children in liferent alienarily, and to certain of his grandchildren in fee, conveying the remainder of his estate to trustees, with directions to divide the free residue among his grandchildren. Three of his children repudiated the settlement and claimed legitim. **Held** (1) that they thereby forfeited the liferents; (2) that the fiars did not on that account at once take the fee free from the burden of the liferents; (3) that the liferents thus set free did not go to the heir ab intestato; but (4) that they went to the residuary legatees who were injured by the claim for legitim.

Davidson's Trustees v Davidson, 1871, 9 M. 995; 8 S.L.R. 646.

(1510)

Clause of forfeiture containing destination of income—Forfeiture of liferent—Power to trustees to accumulate income.

A testator who was survived by seven children directed his trustees to divide the residue among all his children, and declared that if any of them should repudiate the settlement and claim their legal rights such child should forfeit all share in the estate which the testator might dispose of by law, and that "the share or shares of such child or children shall in that event accrete and belong equally to my other children or their issue." By a codicil the testator directed his trustees, instead of paying over her share to one of his daughters, to hold that share for her behoof and to pay her the income, "or in their discretion to pay and apply the said income or so much thereof as they may consider necessary for her behoof"; and he directed that on the daughter's death the share of residue "and any accumulations of income thereon in the hands of the trustees" should be divided among the daughter's children then alive and the issue of predeceasers. The daughter claimed her legal rights and forfeited her testamentary provisions, but her children's right of fee was not forfeited. **Held** that in spite of the discretionary power to accumulate the in-

come of the daughter's share for her children, the whole of that income was carried during her lifetime to her brothers and sisters by the destination over in the forfeiture clause.

Brown's Trustees v Gregson, 1916 S.C. 97; 53 S.L.R. 80; 1915, 2 S.L.T. 283.

(1511)

———**Forfeiture of liferent and fee on life-rentrix claiming legitim.**

A testator directed his trustees to pay a sum of £2000 to his son and to hold the residue of his estate for his two married daughters in liferent and their "heirs and successors equally amongst them" in fee. These provisions were declared to be in full of any claims they might have against the testator's estate after his death. The testator provided that in the event of any child creating any dispute in regard to his will, the child so acting should forfeit all rights competent to him thereunder, and the trustees were directed to deal with such child's share, if it were a daughter's share, as follows:—"To hold the half of such share for behoof of my other daughter in liferent, and pay the fee of the same to her heirs as aforesaid, and pay and make over the other half to my said son and his heirs." A daughter claimed legitim, and the rights of herself and her heirs and successors under the settlement were thereby forfeited. **Held** that the repudiated share of residue fell to be divided in terms of the deed among the beneficiaries who had not repudiated.

Campbell's Trustees v Campbell, 1889, 16 R. 1007; 26 S.L.R. 699.

(1512)

———**Child claiming legitim—Clause of forfeiture of interest of issue—Right of child to plead clause of forfeiture—Intestacy.**

A testator directed the residue of his estate to be held by his trustees, who were to pay annual allowances to his children during their lives, and after their death to pay the capital, and any accumulations, to the lawful issue of his children, and, failing lawful issue of any of his children, then to the lawful issue of the survivors or survivor, equally among them per stirpes. He further declared that any child repudiating the above provisions should forfeit for him or herself, and his or her issue, all right and interest under the settlement; and that the provisions made for the child or children so repudiating, and their issue, should pass to and be held for the child or children abiding by the settlement, and their issue. The trust's only surviving child who attained majority, a daughter, while still unmarried, repudiated the settlement. **Held** (1) that, having done so, she was not entitled to found on the declaration as to the forfeiture of the right and interest of her possible issue, to the effect of throwing the dead's part into intestacy, and herself taking as heir ab intestato; and (2) that as the clause of forfeiture was in favour

of children who did not repudiate, and their issue, and as no such persons existed, the clause did not take effect, and that the residue must be retained by the trustees for behoof of any issue that might be born to the daughter.

Gillies v Gillies' Trustees, 1881, 8 R. 505; 18 S.L.R. 323.

(1513)

Annuity to widow—Claim for jus relictæ—Disposal of annuity between liferenters and fiars.

A testator, who died survived by a widow and family, by his settlement provided his widow in an annuity of £900, and left the residue of his estate, including the capital set aside to secure the provision to his widow, to his three daughters in liferent and to their children in fee. The settlement declared that its provisions should be in satisfaction to the widow of jus relictæ. The widow having claimed jus relictæ and received £27,000, one-third of the moveable estate, **held** that the annuity of £900 fell to be applied in compensating those prejudiced by the widow's claim in proportion to their loss.

Claims by the daughters for one-third share each of the liferent of the capital sum required to secure the £900 annuity were disallowed, and the Court found that each annual instalment of £900 should be apportioned between the daughters as liferenters and their children as fiars in the proportion of the losses respectively sustained by them through the widow's claim.

Russell's Trustees v Gardiner, 1886, 13 R. 989; 23 S.L.R. 719.

(1514)

Widow rejecting testamentary provision and claiming liferent of lands under inter vivos trust—Son entitled to liferent of lands—Right of son to surrogatum out of income of testamentary estate.

A husband by trust disposition and settlement gave his widow a liferent of the residue of the testamentary trust estate, and in respect thereof "recommended" and "enjoined" her "to discharge or abstain from exacting" from a son of the marriage her liferent right in certain lands under a previous inter vivos trust deed. This deed gave to the son, on his surviving his mother, an alimentary liferent of the lands. The widow having elected to take the liferent of the lands, **held** (by Lord Mure, Ordinary, and acquiesced in) that the son was entitled during his mother's life to payment of an equivalent provision out of the annual proceeds of the residue as a surrogatum for the liferent of the lands.

Johnston v Johnston, 1875, 2 R. 986.

(c) Operation of Equitable Compensation.

(1515)

Equitable compensation completed—Residue or intestacy.

Where a child forfeits a testamentary

provision on claiming legitim, and out of his provision compensation is completely made to those who suffer by the withdrawal of legitim, question, whether the remainder of his provision will fall into residue or intestacy.

Macfarlane's Trustees v Oliver, &c., 1882, 9 R. 1138; 19 S.L.R. 850.

(1516)

Accumulation for equitable compensation—Effect of Thellusson Act.

Innes's Trustees v Bowen, 1920 S.C. 133; 57 S.L.R. 86; 1920, 1 S.L.T. 6, No. 1413, supra.

Gillies' Trustees v Bain, 1893, 30 S.L.R. 651, No. 1414, supra.

(1517)

Compensation out of heritable estate destined to son—Son claiming legitim.

By a universal settlement a testator conveyed his heritable estate to his widow in trust, for behoof of herself in liferent and of his son in fee. He conveyed his whole moveable estate to his widow absolutely. The son having claimed legitim, the widow raised an action against him for declarator that the heritable estate belonged to her in fee simple. The Court appointed the son to state in a minute whether he averred that the value of his interest in the heritable estate, subject to the pursuer's liferent, exceeded the value of his legitim with the interest accrued thereon, and the son having lodged a minute stating that he did not make this averment, the Court held that the pursuer was entitled to the lands in fee simple to compensate her pro tanto for the loss which she had sustained in consequence of the defender's election.

Ross v Ross, 1896, 23 R. 1024; 33 S.L.R. 765; 4 S.L.T. 89.

(1518)

Compensation out of capital to liferentrix—Alimentary provision to wife out of income.

A testator directed his trustees to pay the income of three-fifths of his estate to his widow for her liferent alimentary use and to pay the income of the remaining two-fifths to his children during her life, and on her death to divide the whole trust fund equally among the children then surviving and the issue of predeceasers. These provisions were declared to be in full of jus relictae and legitim. Owing to the character of the investments the legitim fund extended to one-half of the estate. The children having claimed legitim, held (1) that the trustees were not entitled to encroach annually on the capital of the half of the estate remaining in their hands to the extent required to pay the widow a sum equal to the income of three-fifths of the whole estate; and (2) that the question whether her representatives could claim to be compensated from capital for her loss of income due to the claim would not arise until her death.

M'Leod v Love, 1914 S.C. 983; 51 S.L.R. 779; 1914, 2 S.L.T. 165.

(1519)

Son claiming legitim not a beneficiary under settlement—Provisions to son's issue forfeited—Resulting loss to liferentrix.

A testator left the free income of his estate to his widow for behoof of the children of the testator's son James in liferent and their issue in fee. The testator further provided that in the event of James impugning the settlement the provisions in favour of his children and their issue should be cancelled and the testator's wife should have right to dispose of the difference between the sum paid to James in name of legitim, and the one-fourth share of the estate destined to James' children. James, who was not a beneficiary under the will, claimed legitim, and the amount of his legitim was larger than one-fourth of the residue. Held that the testator's wife was not entitled to equitable compensation out of the capital of the estate for the loss of income caused to her by James electing to claim legitim.

Hood's Trustees v Hood, (O.H.) 1905, 13 S.L.T. 564.

(1520)

Beneficiary prejudiced by election entitled to compensation—Heritage specially destined to sons subjected to terce.

Heritable properties specially destined to a testator's sons became subject to terce in consequence of the testator's widow claiming her legal rights. Held that the sons were entitled to equitable compensation.

Dallas' Trustees v Dallas, (O.H.) 1905, 13 S.L.T. 332.

(1521)

Whether party actually prejudiced.

A trustor directed his trustees to hold a portion of his estate for the liferent behoof of one of his daughters who was married and had issue, under deduction of a sum advanced by him on behalf of the said daughter and her son. This advance was to form part of the free residue, and on the death of the said daughter the trustees were to divide amongst her children in certain proportions the moneys held for her in liferent. The daughter claimed legitim, and it was held by the Court (see No. 1527, *infra*) that the income of the share of residue destined to her and her family vested in the trustees, and was to be applied by them in compensation of the legitim received by her and that her children had a separate and independent interest in the fee of the provision. In a question as to the appropriation of the income of the share of residue held by the trustees the Court found that the daughter's legitim had suffered abatement in consequence of the advance above mentioned being imputed to it, and that the share of residue falling to the children was thereby enlarged to a greater extent than it was diminished by the withdrawal of legitim, and therefore held that the children were not entitled to any portion of the income.

Snody's Trustees v Gibson's Trustees, 1897, 24 S.L.R. 493.

(1522)

Whether party actually prejudiced—Bequest of share of free residue.

A testatrix left the free residue of her estate to be divided into three shares and held for her three sons A, B, and C in life-rent, and their children in fee, one share to each son and his children, these provisions being declared to be in full of all their claims against her estate. She was survived by A, B, and C, and by three daughters. The three daughters claimed legitim. A repudiated the settlement and also claimed legitim. B and C accepted the provisions in their favour. Before any division of the estate had been made, A and B died without issue, and the shares provided for them and their children fell into intestacy. In a multipointing raised to ascertain the rights of the parties, C contended that he and his children were entitled to the share of the residue bequeathed to them without any deduction being made to meet the claims for legitim, or alternatively that they were entitled to receive as equitable compensation out of the sum set free by the death of his brothers without issue, such a sum as would make his and his children's share equal to what it would have been before the residue was reduced by payments of legitim. **Held** that the free residue of the testator's estate consisted of what remained after the claims for legitim had been satisfied, and that if C and his children got their share of the free residue as ascertained, they got all that the will gave them, and thus no room was left for the application of the principle of equitable compensation.

Gunn's Trustees v Macfarlane, 1900, 37 S.L.R. 499.

(1523)

Legitim claimed by all children—Interest of one child not sufficient to make equitable compensation—Effect on equitable compensation by others.

A testator left the residue of his estate to his five children equally among them and the survivors in life-rent and their respective issue in fee. All the children claimed legitim, and one child, A, died before the estate had been fully compensated in respect of the sum paid to her as legitim. **Held** that a child B was not entitled to ascribe in compensation of the sum paid to her as legitim any of the life-rent destined to her by the survivorship clause until full compensation had been made to the ultimate heirs in respect of the legitim paid to A.

Clark v Clark's Trustees, (O.H.) 1905, 13 S.L.T. 694.

(1524)

Computation of equitable compensation—Gift to daughter in life-rent and issue in fee—Daughter claiming legitim—Advances to daughter's issue both before and after opening of life-rent—Interest on advances.

A testator, who died in 1882, left the residue of his estate to be life-rented after the death of his widow, to whom he be-

queathed an annuity, by his five daughters in equal shares, and to go in fee to their children. A daughter claimed and received legitim, reserving in the discharge her right under the trust disposition after compensation. The income of the trust left a large surplus after meeting the annuity to the widow. Certain advances were made towards the maintenance of the trust's grandchildren out of the surplus income undisposed of. The widow died in 1893, and in 1906 the daughter claimed the life-rent of a share of the residue on the ground that compensation for the withdrawal of her legitim had been fully made. She maintained that the whole amount of her children's said advances should be debited against their interest in the capital of the trust funds. The trustees maintained that these should be charged against the annual income which would have fallen to the daughter had she not elected to take her legitim. **Held** that in estimating to what extent compensation to the estate had been made, the advances for the maintenance of the grandchildren both up to the widow's death and thereafter fell to be charged against the capital falling to the grandchildren; but that the daughter was not entitled to be credited with anything as interest on those advances, the trust having de facto received no interest.

Main v Clark's Trustees, 1909, 47 S.L.R. 118; 1909, 2 S.L.T. 375.

(1525)

Expenses — Litigation between father's trustees and son's creditors as to son's right to elect.

In February, 1891, A, whose estates were then sequestrated in bankruptcy, granted to his father a discharge of his claim to legitim. In March, 1891, the father died, leaving a trust disposition and settlement by which he directed his trustees to pay a life-rent alimentary provision to A. The trustee in A's bankruptcy then claimed A's legitim from his father's trustees, and the father's trustees having put forward A's discharge in answer to the claim, the trustee in bankruptcy brought an action against the father's trustees for reduction of the discharge and for payment of A's legitim. The father's trustees lodged defences, and the action was ultimately compromised by the father's trustees paying to the trustee in bankruptcy about half of the estimated amount of A's legitim, the trustee in bankruptcy assigning his claim to A's legitim to the father's trustees, and each side paying its own expenses. In 1899 A brought an action against his father's trustees for an accounting, and for payment of the alimentary life-rent provided to him in his father's settlement. He averred that the amount paid to the trustee in his bankruptcy had been compensated by the amount of the life-rent provision hitherto retained by the defenders. **Held** that as the father's trustees had litigated with the trustee in A's bankruptcy in the interest

of all the trust beneficiaries, the amount of the expenses incurred by them in that litigation did not fall to be compensated out of A's liferent provision, but was a charge against the trust estate generally.

Paton v Paton's Trustees, 1903, 5 F. 528; 40 S.L.R. 402; 10 S.L.T. 707.

(1526)

Equitable compensation not completed—Right of fiar to immediate payment—Contingent rights of liferentrix.

A trustor directed her trustees to hold the residue of her estate for behoof of her daughter in liferent and her grandchildren in fee, with an express declaration that the fee should vest a morte testatoris. The daughter claimed legitim, and, on receiving it, discharged her liferent. Upon the fiars coming of age, they claimed immediate payment of the estate, and the daughter maintained that the trust must be kept up during her lifetime to meet the possibility that the liferent might revive by the accumulations of income exceeding the legitim. **Held** that as the estate vested a morte testatoris, and as there was no probability that the accumulations of income would equal the amount of the legitim, either during the probable lifetime of the daughter or during the twenty-one years allowed for accumulation of income by the Thellusson Act, the fiars were entitled to succeed.

Lee's Trustees v Fingzies, (O.H.) 1896, 34 S.L.R. 613; 4 S.L.T. 227.

(2) LIFERENT TO PARENT AND FEE TO CHILDREN—EFFECT OF PARENT'S REPUDIATION ON CHILDREN'S RIGHTS.

(1527)

Parent claiming legitim.

A testator directed his trustees to hold a third of his residuary estate for the liferent behoof of a daughter (who was married, and had issue), under deduction of the sum advanced by him, and to divide between and among her children "after named the moneys held for her liferent behoof as aforesaid, and that in the following proportions:— . . . the legacies to my said grandchildren being intended to vest at my death." The trustor further declared "that the provisions in favour of my daughters and grandchildren hereinbefore written shall be accepted by them . . . in full satisfaction to them of all legitim, bairns' part of gear, or any other claim competent to them on my death." The third daughter claimed legitim. **Held** that the children had a separate and independent interest in the fee of the provision, and that their interest was not affected by their mother's election to claim legitim.

Snody's Trustees v Gibson's Trustees, 1883, 10 R. 599; 20 S.L.R. 392.

(1528)

A testator, who was survived by seven children, directed his trustees to divide the residue of his estate equally among all his

children, and declared that, if any of them should repudiate the settlement and claim their legal rights, such child should forfeit all share in the estate which the testator might dispose of by law, and that "the share or shares of such child or children shall in that event accresce and belong equally to my other children or their issue."

By a codicil, the testator directed his trustees, instead of paying over her share to one of his daughters, to hold that share for her behoof and to pay her the income thereof, "or, in their discretion, to pay and apply the said income or so much thereof as they may consider necessary for her behoof"; and he directed that on the death of that daughter "the share of residue retained as aforesaid, and any accumulations of income thereon in the hands of my trustees, shall be equally divided among the children of my said daughter then alive, and the issue of any who may have predeceased per stirpes." The daughter, who had children, having claimed her legal rights and thereby forfeited the testamentary provisions in her favour, **held** (1) that, as the gift of the fee of the daughter's share to her children was a separate and independent bequest, it was not affected by the forfeiture of her liferent interest in that share; (2) that, in spite of the discretionary power to accumulate the income of the daughter's share for her children, the whole of that income was carried during her lifetime to her brothers and sisters by the destination over in the forfeiture clause.

Brown's Trustees v Gregson, 1916 S.C. 97; 53 S.L.R. 80; 1915, 2 S.L.T. 283.

(1529)

—Liferent to parent for maintenance of his children—Fee to children.

A testator directed his trustees to invest a sum for behoof of the children, nominatim, of a son and of any children that might be born to him, payable on the death of their father, and till his death to pay to him the income for the maintenance of himself, and the maintenance and education of his children; and he desired the trustees to secure that the children should receive a good education. It was declared that the provisions should be in full of legal rights. The son having claimed his legitim, **held** that though the grandchildren had an independent right to the fee of the provision, which was not forfeited by the act of their parent, they had no independent interest in the income, which was accordingly forfeited.

Jack v Marshall, 1879, 6 R. 543; 16 S.L.R. 326.

(1530)

—"Share" construed to include rights of fee and liferent.

A testator, who was survived by six children, directed his trustees to divide the residue of his estate into six equal shares, one share to be paid to his son "Peter and his heirs," one share to his daughter Mary Ann and her heirs, one share to his son James and his heirs, and,

"with regard to the three remaining shares," one share to be held and applied for behoof of each of his three other children, John, Alexander, and Duncan, and their children, whom failing, their other next of kin as thereafter directed. The testator further provided that in the event of any of his children claiming their legal provisions such children should forfeit all right to any "share or shares" of that part of his estate, which the testator could dispose of by law, and that the shares of such children should accresce to the children who should abide by the settlement, any shares accrescing to John, Alexander, or Duncan to be held by the trustees for their liferent use alienarily and their issue in fee. John declined to accept the provision made for him, and claimed legitim. Held that on a construction of the whole settlement the word "share" was throughout used in the sense of an aliquot sixth part of the residue, and that John by his repudiation forfeited not only his own rights under the deed, but also those of his issue or other next of kin.

McCaull's Trustees v McCaull, 1900, 3 F. 222; 38 S.L.R. 107; 8 S.L.T. 299.

(1531)

Clause of forfeiture applying to issue — Child claiming legitim.

A testator directed the trustees under his settlement to pay over a sum of £2000 to his son, and to hold the residue of his estate for behoof of his two married daughters in liferent, and their "heirs and successors equally amongst them" in fee; declaring that these provisions should be in full to them of any claims they might have against his estate after his death, "and that in the event of any of my children creating any dispute in regard to these presents, the child so acting shall forfeit all claims competent to him or her under the same, and my trustees are hereby directed to deal with such child's share in the event of it being that falling to my son in the same manner as I have appointed in regard to the residue of my means and estate, and in the event of its being in regard to the share conceived in favour of either of my daughters, then to hold the half of such share for behoof of my other daughter in liferent, and pay the fee of the same to

her heirs as aforesaid, and to pay and make over the other half to my said son and his heirs." One of the daughters repudiated the provisions in her favour and claimed legitim. Held that on a construction of the special terms of the deeds the daughter by her repudiation forfeited not only her own rights under the settlement but those of her heirs and successors.

Campbell's Trustees v Campbell, 1889, 16 R. 1007; 26 S.L.R. 699.

(1532)

Revocation of provision in favour of one of children—Claim for legitim by that child—Effect on provision for issue of child.

A testator directed his trustees to hold and convey one-fourth of the residue of his estate for behoof of his son John in liferent, and John's children in fee, and made similar provisions in favour of his sons Thomas and George, and their children, and provided the remaining one-fourth part to the children of his deceased son James. The settlement contained this declaration—"Declaring that in the event of any of my said sons or their descendants repudiating this settlement, or by any means preventing it from taking effect in whole or in part, then such sons, as well as their descendants, shall forfeit their whole right and interest in those portions of my means and estate that I am entitled to dispose of, which right and interest shall in that event accresce and belong to such of my sons, the said John, Thomas, and George, and their descendants, and the descendants of my son James, as shall abide by this settlement and accept of the provisions herein contained." By codicil the testator revoked the liferent provision of one-fourth share in favour of his son John, and instead directed his trustees to hold and apply the said share for behoof of John's children, "and with this alteration I confirm the said trust disposition and settlement in every respect." John claimed and received payment of legitim. Held that the right to the portion of the trust estate bequeathed to John's children by the trust disposition and codicil had not been forfeited by John having claimed and received payment of his legitim.

Urie's Trustees v Urie, 1896, 23 R. 865; 33 S.L.R. 671; 4 S.L.T. 61.

SUCCESSION DUTY. See REVENUE.

SUMMARY CONVICTION. See JUSTICIARY.

SUMMARY DILIGENCE. See BILLS OF EXCHANGE.

SUMMARY EJECTION. See LANDLORD AND TENANT.

SUMMARY PROCEDURE. See JUSTICIARY; SHERIFF.

SUMMONS. See PROCESS.

SUNDAY TRADING. See JUSTICIARY.

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I. CONSTITUTION OF ESTATES OF SUPERIOR AND VASSAL.

1. GENERALLY.

(1)
Obligation to give land to feuars—Non-enforceable obligation.
The superior of a village bound himself in a contract with feuars and intending feuars to make streets and a market-place, and to

give each feuar a patch of moor ground. The contract further contained the following clause :—“[The superior] is also to give each feuar or tenant patches of arable or improved land, at an adequate rent, with access thereto.” **Held** that the obligation to give arable land was not so expressed as to give the feuars the power of enforcing it.
Lord Clinton v Brown, 1874, 1 R. 1137; 11 S.L.R. 665.

(2)

Verbal contract followed by rei interventus—Receipts for feu-duty.

A proprietor of land entered into a verbal contract to feu, and upon receiving the first term's feu-duty granted a holograph receipt, which contained a note of the extent of the ground feued and the amount of the feu-duty. The vassal entered into possession of the ground, and built certain erections on a part of it, and continued to pay feu-duty to the proprietor and his representatives, for which he obtained receipts as for "feu-duty," but these subsequent receipts were not holograph. **Held** that a contract of feu had been constituted effectual against the superior and his representatives.

Stodart v Dalzell, 1876, 4 R. 236; 14 S.L.R. 164.

(3)

—Agreement as to subjects to be feued and rate of feu-duty.

Where two parties, who had been negotiating with reference to a feu, were at variance as to whether the feu was to be subject to certain building restrictions, a matter vital to the contract in the view of both parties, **held** that the alleged vassal was not entitled to declarator that a binding verbal agreement to feu had been entered into, on proof by writing that the parties had agreed as to the subject to be feued and the feu-duty payable, and that the agreement had been followed by rei interventus.

Kerr v Forrest's Trustees, (O.H.) 1902, 10 S.L.T. 67.

(4)

Pro indiviso right to commonalty accessory to feus — Vassal possessing divided lot without title—Right of superior to remove possessor.

A superior in 1679 feued out a town site in forty-five steadings, giving each feuar right to a proportional pro indiviso part of certain waste lands in the neighbourhood. In 1750 the feuars divided among them by agreement a portion of the commonalty, and in 1808 a process of division of the remainder was brought, in which a scheme of division was settled and acted on, though decree was never pronounced. Thereafter the titles to many of the divided lots were feudalised, but others continued to be held on the former pro indiviso titles, as defined by the possession of a divided portion. **Held** in 1886 that the superior, in virtue of his title of superiority, was entitled to remove the possessor of one of the divided lots of the commonalty, who could not produce a title thereto or connect himself with a holder of one of the pro indiviso rights, though it was proved that the lot had been in possession of him and his predecessors since 1818.

Edmonstone v Jeffray, 1886, 13 R. 1038; 23 S.L.R. 646.

(5)

Superior's title in question with vassal—Onus of proof.

Macdougall v Earl of Breadalbane, 1881,

8 R. (H.L.) 92; 18 S.L.R. 748, No. 106, *infra*.

Earl of Loudoun v Morton, 1909 S.C. 880; 46 S.L.R. 519; 1909, 1 S.L.T. 462, No. 107, *infra*.

(6)

Feu ultra vires of granter—Reduction by successor in feu—Title to sue.

A feu granted by trustees in 1867 was sold by the vassal in 1888 to A, who recorded the disposition in his favour in the Register of Sasines, and thereby obtained an implied entry. In 1895 A raised an action against the trustees for reduction of the feu charter, on the ground that it was ultra vires of the trustees. **Held** that the ground of reduction stated was not relevant, in respect (1) that the pursuer, if prejudiced, was not prejudiced by the feu charter, but by the contract he had made with the original vassal, to which the trustees were not parties; (2) that the pursuer, being an entered vassal, was not entitled to reduce the feu contract without clearing the record of the disposition in his favour.

Tayport Land Co. v Dougall's Trustees, 1895, 23 R. 287; 33 S.L.R. 214.

(7)

—Disposition in security—Power to security holder to sell or feu the estate—Feu granted by disponent without concurrence of security holder—Disposition by security holder of dominium utile of feu—Validity.

The proprietor of an estate, which was burdened with a disposition in security containing power to the security holder to sell or feu the estate in whole or in part, granted a feu charter of 18 acres of the estate, at a feu-duty of £274, without obtaining the concurrence of the security holder. Thereafter the security holder, professing to act under his power of sale, disposed to a purchaser these 18 acres "to the extent of the dominium utile only," but under the burdens contained in the before-mentioned feu charter, and in particular under burden of payment of the feu-duty of £274 to the superior. In a competition as to the right to the 18 acres between the successor of the original feuar and the disponee of the security holder, the Court granted decree in favour of the successor of the original feuar, **holding** that the disposition of the dominium utile of the feu by the security holder was ineffectual, in respect that no one could acquire right to the dominium utile under the feu charter as a distinct estate except by disposition from the vassal infeft under the charter.

Alston v Nellfield Manure and Chemical Co., 1915 S.C. 912; 52 S.L.R. 730; 1915, 2 S.L.T. 50.

(8)

—Prescription.

Question, whether a feu charter granted by trustees in 1867, and bearing to be granted in the exercise of powers conferred by a private Act of Parliament (which was mentioned), and only in so far as consistent with the

Act, could be validated by prescriptive possession, so as to exclude the plea that it was *ultra vires* of the trustees in respect that the conditions of the Act had not been complied with.

Tayport Land Co. v Dougall's Trustees, 1895, 23 R. 287; 33 S.L.R. 214.

(9)

—Udal lands in feudal form—Superior's author obtaining Crown charter subsequent to constitution of vassal's right—Liability of vassal to casualty.

The proprietors of certain lands in Shetland held the lands by a long progress of titles in feudal form, and subject to an annual payment to the grantor and his successors under the name of feu-duty. The present successor of the grantor raised an action for payment of a casualty of composition against the present holders of the lands. The pursuer founded upon a decree of judicial sale of date 1774, by which the superiority of the lands was awarded to his ancestor, and upon a Crown charter of resignation and confirmation of the superiority in 1857, both subsequent to the grant of the lands to the defenders' authors. Held that the casualty was not due, in respect

that the pursuer's authors had no feudal title at the date when the lands were conveyed to the defenders' authors, and, the original grant being of udal lands, the position and obligations of the defenders and their authors could not be affected or the feudal burdens imposed by subsequent charter from the Crown.

Spence v Union Bank of Scotland, (O.H.) 1894, 31 S.L.R. 904; 1 S.L.T. 648.

(10)

Error in records—Plan incorrect as to superior's obligation to make roads—Common error—Partial reduction of a feu contract.

By a feu contract the grantor became bound to form certain roads on the ground disposed, in so far as delineated and tinged brown on a plan appended to the contract. On the plan appended a number of other roads were by mistake also tinged brown. The feu contract, with the erroneously coloured plan, was duly recorded. None of the parties to the contract observed the blunder at the time of signing, and it was not discovered until some years afterwards, when the ground had been sold by the original vassals to a building company. The company then raised an action against the superior for payment of the cost of forming the roads erroneously tinged brown on the plan, and the superior brought an action against the company for reduction of the feu contract, in so far as it imported an obligation on him to form these roads. Held that as the original feu contract was not intended to impose an obligation to make the roads in question on the superior, and as the company in contracting with the vassals did not stipulate for and did not understand that they were getting such an obligation, the mere fact that such an obligation

erroneously appeared in the feu contract and in the record did not entitle the company, though bona fide purchasers for value, to object to the Court rectifying the feu contract and the records. Observed (per Lord Young) that one purchasing on the faith of the records is not entitled to rely on the validity or subsistence of such incidental obligations as an obligation to make roads although appearing on the records undischarged.

Glasgow Feuing and Building Co. v Watson's Trustees, 1887, 14 R. 610; 24 S.L.R. 429.

(11)

Extent of grant—Tenendas clause.

Opinion (per Lord Justice-Clerk Moncreiff) that the rule that the tenendas clause may only be looked at to interpret the meaning of a grant or to specify pertinents is not to be so strictly applied in feu charters from subject superiors as it is in Crown charters.

Lord Advocate v M'Culloch, 1874, 2 R. 27; 12 S.L.R. 1.

(12)

Whether teinds conveyed to vassal.

A proprietor separately infeft in lands and the teinds thereof feued part of the lands as possessed by a tenant, excepting from the warrandice "cess, teind, and other public burdens" imposed or to be imposed on said lands. The feuar possessed the teinds, and was localised on for stipend in various localities. Held that the feu-contract had conveyed the teinds to the vassal.

Watt's Trustees v King, 1869, 8 M. 132.

(13)

Disposition of superiority—Disposer vested with mid-superiority of part under separate titles—Whether carried by terms of disposition.

In a joint deed of disposition A and B conveyed five parcels of land, declaring that the dominium directum only of these lands was conveyed. In four of these parcels the disponents were immediate superiors under the Crown, the dominium utile belonging to another. In the fifth, B was immediate superior under the Crown, and, in addition, had completed a title to the dominium utile by a writ of clare constat from himself as immediate lawful superior; part of this parcel he had feued out to a railway company, and thus split the dominium utile into an estate of mid-superiority in himself, and an estate of fee in the railway company. In the disposition four of the parcels conveyed were specifically described, the fifth was conveyed under the general terms "all other lands and others" in a certain county, parts of a certain estate. Held that the deed of disposition in conveying the dominium directum was not meant to convey, and did not convey, the mid-superiority of the ground feued to the railway company.

Lee v Alexander, 1883, 10 R. (H.L.) 91; 8 App.Cas. 853; 20 S.L.R. 877.

(14)
 —Whether “right and privilege” included right to a loaning—*Jus quæsitum tertio—Res inter alios acta.*

On 19th August, 1723, the proprietor of the barony of Struie granted feus of four portions thereof to different persons—(1) The wester half of Mains of Struie, with the privileges and haill pertinents thereof as marched from the other half, “with half of the right and privilege of the loan leading to and from that hill belonging to the haill Mains of Struie called Douchrie,” about six hundred yards distant, “according as the said loan lies meithed and marched betwixt the lands of Whitehill and Baulk of Struie.”

(2) The easter half of Mains of Struie described in the same way, *mutatis mutandis.* (3) Whitehill, “reserving the loan belonging to the Mains of Struie leading to the hill of the said Mains called Dochrie, as the said loan lies and is meithed and marched betwixt the lands of Whitehill and lands of Baulk of Struie, in which space the said loan is not to be cast upon by the possessors of Mains of Struie.” (4) Baulk of Struie, “reserving the loan” in similar terms. In 1889 the proprietors of the wester half of Mains of Struie, who had also acquired right from the proprietor of the easter half to the latter’s right to the hill of Dochrie, and to the loan, brought an action against the proprietor of Whitehill and Baulk for declarator that the pursuer had the right of property in the loan. The defender maintained that it belonged to himself, or, alternatively, to the superior, who, however, had no right of access to the loan. There was no trustworthy evidence of possession, the whole lands having been possessed together in tenancy for upwards of forty years. **Held** on a construction of the titles, aided by an estate plan dated in 1842, which showed Whitehill and Baulk as non-contiguous, and included the loaning within the boundary lines of Struie and Dochrie (1) that it was not to be presumed that the property in the loaning had been retained by the superior; (2) that the property in the loaning had not been given out to Whitehill and Baulk; and (3) that the phrase “right and privilege” was sufficient to carry it with Mains of Struie.

Reid v Haldane’s Trustees, 1891, 18 R. 744; 28 S.L.R. 511.

(15)

—Trout fishing.

A right of trout fishing, apart from possession of land, is not a feudal estate, and a grant of such right creates merely a personal obligation upon the grantor, and will not affect singular successors.

Earl of Galloway v Duke of Bedford, 1902, 4 F. 851; 39 S.L.R. 692; 10 S.L.T. 128.

(16)

Prescription of right to hold of the Crown.

The vassal in possession of certain lands, held under a lord of erection, in 1818 obtained from the Crown a charter of confirmation, and in 1841 a charter of resignation and

confirmation, which bore that the lands were to be holden of the Sovereign as immediate lawful superior—coming in place of the monastery and abbey of Melrose by virtue of the Acts of Annexation—for a reddendo of 10s. Scots, payable to the Crown or its donatory, the lord of erection. The vassal for the prescriptive period paid to the lord of erection £3 10s. Scots, which was the reddendo stipulated in a charter of the lands granted in 1627 by the lord of erection, and on which various writs by progress had followed down to 1776. No vassal had entered with the lord of erection, as superior, after 1776. The lord of erection having raised an action against the vassal for payment of a casualty, as having been impliedly entered with him as superior in 1874, the vassal pleaded that he had prescribed a right to hold of the Crown, and explained the payment made by him as being a payment to the donatory of the Crown under the Crown charter. The discrepancy between the sum actually paid and the reddendo in that charter he explained by producing a correspondence in 1866 between the agents of the parties, from which it appeared that a question having then been raised as to whether the reddendo was £3 10s., or 10s. Scots annually, the vassal agreed to pay the larger sum rather than raise any question. From that correspondence it appeared that the pursuer’s agents were then made aware of the existence of the Crown charter, and claimed the payments as due to their client as lord of erection and donatory of the Crown, not as feudal superior. **Held** that the vassal had by prescription obtained right to hold of the Crown, and must be assolvied.

Duke of Buccleuch v Boyd, 1890, 18 R. 1; 28 S.L.R. 19.

(17)

—A person in possession of lands which were alleged to be kirk lands resigned them in 1806 to the Crown for new infeftment and took a charter on a blench tenure for a penny Scots *si petatur tantum*. Up to this date the lands had been held in feu of a subject-superior (who held his superiority under a strict entail), for a reddendo of £6 Scots. After obtaining the Crown charter the vassal held the lands for more than the prescriptive period, but paid the feu-duty of £6 Scots to the subject-superior, who remained infeft in the superiority; no payment was ever demanded by the Crown, except some payment on the charter being granted, the character of which was not ascertained. Some of the vassals from 1806 downwards were enrolled as freeholders, and voted as such. The subject-superior having in 1871 brought against the vassal a reduction of the Crown title, as having been unwarrantably obtained in prejudice of his rights as superior, the vassal pleaded prescription. **Held** that there had been no sufficient possession by the vassal on that title, and the plea of prescription repelled, and the title reduced.

Duke of Roxburghe v Scott, (O.H.) 1871, 18 R. 8.

(18)

Personal title—School board possessing transferred school on personal title—Education (Scotland) Act, 1872, sec. 38.

In 1833 A granted a feu disposition of a portion of the lands of Craigrothie to B, who entered into possession but did not take infeftment. A schoolhouse was built on the ground, which was transferred by B's successors in 1873 to the school board, who took possession but were not infeft. In 1883 the lands of Craigrothie were bought by D, who completed his title by infeftment upon the disposition, which contained a clause of warrandice excepting all feu rights granted by the disposer or his predecessors.

In an action by the school board against D for declarator of the right to the piece of ground, the pursuers founded on the unfederalised feu disposition and on sec. 38 of the Education (Scotland) Act, 1872, which enacts that when a school has been transferred to a school board, the school and the site shall vest in the school board. The pursuers did not allege that D knew of their right at the date of his purchase.

Held (1) that D's right to the lands was not affected by the unfederalised feu disposition; and (2) that sec. 38 of the Act did not give the school board a better title than that of their author, and therefore that their title was not valid in competition with the title of D.

Ceres School Board v M'Farlane, 1895, 23 R. 279; 33 S.L.R. 158; 3 S.L.T. 198.

(19)

Double title—Evacuation of precept of sasine by infeftment on Crown charter.

Held that a precept of sasine in a feu disposition was not evacuated by the superior subsequently granting an *a me* disposition of the lands in which he assigned a Crown charter of resignation containing an unexecuted precept upon which the disponee was infeft, the disposition containing an exception of the feu right from the warrandice, and assigning the feu-duty and not the rents, and the person founding on the disposition being a representative of the disponee and not a singular successor.

Pringle v Pringle, 1890, 17 R. 1229; 27 S.L.R. 954.

(20)

Abolition of ward holding—Fortress—Possession by vassal as keeper of castle—Clan Act, 1747.

From ancient times the lands of Penny-castle of Dunstaffnage, with their parts and pertinents, were held by a vassal on a ward holding, the reddendo including (besides a feu-duty) the rendering of military services to the superior and the military guardianship of the castle of Dunstaffnage, as well as the duty of maintaining the castle fit for the residence of the superior. The property in the castle admittedly remained with the superior, but the vassal's duties as keeper of the castle involved the occupation and possession of it by him. After the passing of the Clan Act in 1747, by which ward holding was abolished, the military services were

commuted for a money payment, but the other obligations of the vassal still continued. In 1810 the castle was burned down, and was never rebuilt. In an action between the superior and the vassal brought in 1909, the vassal asserted a right of property in the castle, and maintained that, after the passing of the Clan Act, his possession of the castle was no longer that of military keeper for the superior, but was that of proprietor. **Held** that the superior was still the proprietor of the castle, in respect that the Clan Act, though abolishing military services, did not alter the proprietary rights in the subjects, and that after 1747 the vassal had continued in possession of the castle solely as keeper for the superior for the purpose of rendering the civil services enumerated in his charters.

Duke of Argyll v Campbell, 1912 S.C. 458; 49 S.L.R. 487; 1912, 1 S.L.T. 316.

2. BOUNDARIES.

[See HERITABLE PROPERTY II. 6.]

II. RESIGNATION, CONFIRMATION, SPLIT, CONSOLIDATION, AND EXTINCTION OF SUPERIORITY.

(21)

Resignation ad remanentiam — Salmon fishings.

A base right to lands with salmon fishings was resigned ad remanentiam into the hands of the superior, who had no title to salmon fishings. **Held** that the consolidation did not extinguish the base right to salmon fishings.

Earl of Zetland v Glover Incorporation of Perth, 1870, 8 M. (H.L.) 144; 42 J. 501; L.R., 2 Sc.App. 70; 7 S.L.R. 668.

(22)

Designation of procurator.

Question, whether in an instrument of resignation ad remanentiam the procurator must be designed.

Duke of Argyll v Dalgleish's Trustees, 1873, 11 M. 616; 45 J. 392; 10 S.L.R. 403.

(23)

Confirmation — Deviation from statutory form of writ of confirmation allowed.

Lauder v Shiels, 1873, 11 M. 605; 45 J. 384; 10 S.L.R. 409.

[Obsolete under the Conveyancing Act, 1874, sec. 4.]

(24)

Double conveyance of mid-superiority to vassal (1) a me, (2) a me vel de me—Infeftment on both—Effect of confirmation by over-superior.

Duke of Argyll v Dalgleish's Trustees, 1873, 11 M. 616; 45 J. 392; 10 S.L.R. 403.

[Obsolete under the Conveyancing Act, 1874, sec. 4.]

(25)

Error in date of sasine confirmed.

In a charter of confirmation an instrument of sasine was described correctly by its date, but an error was made in stating the date of recording. **Held** that as the sasine was sufficiently identified otherwise, the error in the date of recording did not invalidate the confirmation of the instrument.

Duke of Argyll v Dalgleish's Trustees, 1873, 11 M. 616; 45 J. 392; 10 S.L.R. 403.

(26)

Split—Effect on feudal title of a series of deeds beginning with a disposition of lands to trustees for payment of debts, on which they were infeft base, and a conveyance of the dominium directum by the grantor's successor—Whether permanent split of superiority and property effected.

A, a Crown vassal infeft in the dominium plenum of a barony, in 1776 disposed it heritably and irredeemably, under burden of certain family provisions, to trustees for payment of £10,000 of his debts, with precept a me vel de me, under the conditions that the trustees should enter only with the Crown to the extent of the lands sold by them, and that on the trust purposes being fulfilled the conveyance and infeftment of the trustees should become extinct, or otherwise that the trustees should be bound to execute the deeds necessary to reinvest the truster. The trustees in 1776 were infeft base, but never sold or possessed any part of the subjects. B, who succeeded to the estate as institute under a defective deed of entail executed by A in 1776, in 1801 sold "the superiority of S," part of the estate, to create a freehold franchise. In 1819 M, who had acquired the purchaser's right to the superiority of S, with an assignation to an unexhausted precept in a Crown charter, was infeft as Crown vassal in the lands of S. In 1832 the trustees under the deed of 1776 reconveyed the estates, including the dominium utile of S, to C, the heir of entail then in possession, who took infeftment. C's estates were sequestrated after his death, and the trustees, after the debts had been paid, granted a general conveyance of the barony to D, the succeeding heir of entail. D took up by special service to C the whole lands held of the Crown except S. In 1859 M (the holder of the superiority) conveyed the lands of S to D, who conveyed the whole estates to his testamentary trustees. In an action brought by a creditor of a succeeding heir of entail to adjudge the dominium utile of S as still in hereditate jacente of C, **held** that the right to the dominium utile of S had been vested in D, and was carried by his settlement to his trustees.

Williams & James v MacLaine's Trustees, 1872, 10 M. 362; 44 J. 213; 9 S.L.R. 242.

(27)

Consolidation—Effect of consolidation of superiority and property by institute in both

on right of substitute in dominium directum to reduce institute's deathbed deed.

Park's Curator v Black, 1863, 6 M. (H.L.) 147; 40 J. 642; L.R., 1 Sc.App. 392; 5 S.L.R. 726.

[Obsolete under the Reductions Ex Capite Lecti Abolition Act, 1871.]

(28)

Whether consolidation had brought dominium utile of lands within an entail.

An entail, dated in 1715, comprised, inter alia, certain lands the dominium utile of which had been disposed by the entailor or his predecessors prior to the date of the entail, so that the entail only carried the superiority thereof. The dominium utile was acquired in 1721 by the next succeeding heir of entail, who took a disposition in favour of himself and his heirs and assignees whomsoever, being a different destination from that contained in the entail. He was not infeft either under the entail or under the disposition. In 1765 the next heir was infeft upon the unexecuted precept in the conveyance of 1721, having previously served heir-in-general to the last heir. The next heir in 1780 made up a title under the entail, but no separate title to the said lands, which he possessed along with the entailed estate down to 1843, when he died. **Held** that consolidation had not operated so as to bring the dominium utile of the said lands within the entail, and that a subsequent heir was therefore proprietor thereof in fee simple.

Earl of Glasgow v Boyle, 1887, 14 R. 419; 24 S.L.R. 329.

(29)

Double titles to land—Prescription.

A, who was infeft in the dominium utile of certain lands, disposed these by a marriage contract in 1777 in favour of himself and the heirs male of his body, whom failing the heirs whatsoever of the marriage, whom failing his nearest heirs and assignees, subject to the declaration that if the lands should devolve on heirs portioners, the eldest heir portioner should exclude the others; but no infeftment was ever taken on this disposition. On A's death in 1791 B, his eldest son, succeeded to the lands, but he neither served heir nor made up a title. In 1794 B purchased the superiority of the lands, and in 1798 obtained a Crown charter of adjudication and resignation in favour of himself and his heirs and assignees, on which he was infeft in 1800. B possessed the lands till his death in 1868, when he was succeeded by his grandnephew C, who was infeft by expeding and recording a decree (in which the lands were described as in the Crown charter) of special and general service to B, and who thereafter granted a writ of clare constat in his own favour. In a question between two nieces to whom the succession opened on C's death, **held** that by B's possession of the lands on the superiority title for the prescriptive period, the dominium utile had been consolidated with the superiority, and that the destination in the

superiority title (the Crown charter) ruled the succession to the lands.

Hay v Paterson, 1910 S.C. 509; 47 S.L.R. 470; 1910, 1 S.L.T. 283.

(30)

Extinction—Feu acquired under Lands Clauses Act, 1845—Compensation.

Where a railway company, which had compulsorily taken land forming part of lands held by the same owner under one title, completed a statutory title thereto under sec. 80 of the Lands Clauses Act and entered into possession without compensating the superior for the loss of casualties, **held** that, notwithstanding the failure of the company to pay compensation, sec. 126 of the Lands Clauses Act, 1845, excluded any claim by the superior against the company for feu duties or casualties. **Opinion** (per Lord President Inglis) that when a title is completed by a railway company under sec. 80 of the Lands Clauses Act, 1845, no feudal relation is completed between the promoters and the superior of the lands taken, and therefore that any action founded on that relation is incompetent.

Question, whether the superior, having allowed the company to enter into possession without paying compensation, could afterwards recover it.

Magistrates of Elgin v Highland Railway Co., 1884, 11 R. 950; 21 S.L.R. 640.

(31)

Feu acquired under Lands Clauses Act, 1845—Charter of confirmation—Compensation.

Sec. 80 of the Lands Clauses Act, 1845, enacts, with reference to purchases of lands under the Act, that conveyances duly executed in the form prescribed by the Act and registered in the Register of Sasines "shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking." **Held** that when a title is completed by a company under the above enactment no feudal relation exists or can be established between the company and the superior of the lands taken, and therefore that a charter of confirmation granted by a superior to a company which had completed a statutory title under sec. 80 was null.

Magistrates of Inverness v Highland Railway Co., 1893, 20 R. 551; 30 S.L.R. 502.

(32)

Feu acquired under Lands Clauses Act, 1845—Failure of company acquiring lands to register conveyance timeously—Right of superior to demand casualty—Process—Form of action.

A railway company acquired certain lands, being the whole lands held by the same owner under the same title, by compulsory powers under the Lands Clauses Consolidation (Scotland) Act, 1845, and on 12th August, 1867, obtained a conveyance thereto, substantially in the form prescribed by sec. 80 and Schedule A of that Act. This conveyance was not registered until after the expiry of

sixty days from its date, and the feudal charges upon the lands remained unredeemed. In October, 1885, on the death of the seller, the superiors obtained payment of a casualty of composition from the railway company. In 1910, after the lapse of the statutory period of twenty-five years, the superiors demanded a further casualty, which the railway company refused to pay. In a petitory action by the superiors for payment of this casualty the company pleaded in defence that no casualty was now, or ever had been, exigible from them, in respect that they had completed a valid statutory title to the lands to the effect of extinguishing the pursuers' rights of superiority therein.

Held that the defenders, having failed to comply with sec. 80 of the Act of 1845, by not registering the conveyance within sixty days, held only on a common law title, and not upon a statutory title acquired under that Act, and that the composition sued for was exigible under sec. 5 of the Conveyancing (Scotland) Act, 1874. **Held** further that a petitory action was the appropriate method of enforcing payment. **Opinions** that prior to the Conveyancing (Scotland) Act, 1874, in a case where a corporation had acquired a statutory title under sec. 80 of the Act of 1845, no petitory action could be brought by the superior against the corporation for recovery of a composition, but that, since the Act of 1874, such an action was competent where the lands acquired by the corporation were the whole lands of the same owner held under the same title. Nature and effect of a statutory conveyance and a statutory title **discussed**.

Heriot's Trust v Caledonian Railway Co., 1915 S.C. (H.L.) 52; [1915] A.C. 1046; 52 S.L.R. 549; 1915, 1 S.L.T. 347.

(33)

Feu acquired under Lands Clauses Act, 1845—Compensation to superior—Mora.

In 1874 a railway company acquired certain lands by compulsory purchase under the Lands Clauses Act, 1845, and obtained a statutory conveyance thereto, which was duly recorded. The lands were a portion of an estate held by the same owner under the same titles. In 1908 the superior brought an action against the railway company for declarator that the company were bound to pay compensation for the loss of the superiority of the lands thus acquired, including the feu-duties and casualties appertaining thereto. The superior did not aver any pecuniary loss through failing to recover these feu-duties or casualties. The company maintained that the claim for compensation was irrelevant, as the pursuer had suffered no loss. **Held** that the action was relevant as a claim for compensation, in respect that the superior, having by the effect of sec. 126 of the Act been deprived of the security of these subjects for feu-duties and casualties, was entitled to be compensated therefor in terms of that section.

Held further, that the superior was not barred from now claiming compensation.

either by having allowed the company to enter on possession or by mere lapse of time.

Magistrates of Inverness v Highland Railway Co., 1909 S.C. 943; 46 S.L.R. 676; 1909, 1 S.L.T. 407.

(34)

Feu acquired under Lands Clauses Act, 1845—Compensation to superior.

In 1846 a railway company compulsorily acquired a portion of an estate under the Lands Clauses Act. As the proprietor refused to grant a conveyance, the company consigned the compensation due to him, and entered into possession without making up a title. In 1875 the company obtained a statutory conveyance from the proprietor's successors and recorded it; and in 1903 the superior, for the first time, claimed compensation for the loss of his rights as superior.

In an action brought by the superior in 1908 against the company, held that the pursuer was entitled to compensation for the loss of the superiority, and that it fell to be valued as at 1903.

Fraser v Caledonian Railway Co., 1911 S.C. 145; 48 S.L.R. 76; 1910, 2 S.L.T. 367.

(35)

Tinsel of superiority—Act 1474, c. 57.

Tinsel of the superiority under the Act 1474, c. 57, is temporary merely, and endures only during the life of the vassal by whom it was obtained.

Rossmore's Trustees v Brownlie, &c., 1877, 5 R. 201; 15 S.L.R. 129.

(36)

Transference of Lands Act, 1847.

Forfeiture of superiorities below £5 under the Transference of Lands Act, 1847 (10 & 11 Vict. c. 48) sec. 8, is ineffectual unless directed against those having the personal right to the superiority.

Rossmore's Trustees v Brownlie, 1877, 5 R. 201; 15 S.L.R. 129.

(37)

Under both the above Acts.

The last entered superior of the lands of M, which were held of the Crown, died in 1799. The right of superiority passed to his daughter, who, without making up a title to it, conveyed it in 1819, under a general conveyance of her whole estate, to her marriage contract trustees. The right to the superiority remained personal from 1799 till 1872, when the trustees, the trust still subsisting, made up their title to it. The right to the property of the lands of M fell in 1803 to A. M., who was served and infeft as heir of the last vassal, and who in 1813 brought a process of tinsel of the superiority under the Act 1474, c. 57, against the heir of line of the superior last infeft, on which the Crown confirmed his infeftment. In 1849 W. C. M., who was served and infeft as heir of A. M., obtained decree of forfeiture of the superiority (the reddendo being below £5) under the Transference of

Lands Act, 1847, sec. 8, against the heir of line and heir male of the superior last infeft, but without calling the trustees, who were de facto (though without his knowledge) the persons in right of the superiority. In a process of reduction, and for recovery of the casualties of non-entry, held (1) that the tinsel of superiority in 1813 under the Act 1474, c. 57, was only temporary, and fell with the death of the vassal obtaining it; and (2) that the decree of forfeiture of the superiority obtained in 1849 under the Transference of Lands Act, 1847, was invalid, the persons de facto in right of the superiority not having been called in the process.

Rossmore's Trustees v Brownlie, 1877, 5 R. 201; 15 S.L.R. 129.

III. IRRITANCY.

(38)

Feu-duty payable in kind.

Irritancy incurred by the vassal not tendering the feu-duty payable in kind for upwards of two years.

Hope v Aitken, 1872, 10 M. 347; 44 J. 185; 9 S.L.R. 241.

(39)

Right to resume possession brevi manu.

A feued ground for building purposes to B, with entry at Whitsunday, 1880, and on condition that B should erect and finish certain prescribed tenements thereon by Whitsunday, 1881. A agreed to advance sums of money to B by instalments to enable him to erect the tenements; and it was stipulated that for the security of any advances made he should hold the subjects and tenements thereon erected, with power to sell them, and with power to finish any tenements left unfinished previous to selling the same. The work went on, and instalments were paid until A, having received a report by the architect that the work was very bad, intimated to B, first, that he must remedy the defective work, and then, since B had abandoned the work, that if he did not proceed with the work within a week A would resume possession of the subjects and complete the building. Thereupon B having neither remedied the defects nor resumed work, A entered into possession of the subjects, and proceeded to finish the work. In an action for damages against him at the instance of B's trustee in bankruptcy, held that A's conduct was justified in the circumstances, and A assoltied accordingly.

Borland & Co.'s Trustee v Paterson, 1881, 19 S.L.R. 261.

(40)

Ob non solum canonem—Effect on subaltern rights.

Held that when a vassal incurs the irritancy ob non solum canonem (whether under the statute or conventional) the feu reverts to the superior unaffected by any sub-feu rights granted by the vassal.

Per Lord Selborne, L.C.—“On principle,

and in the absence of positive law or authority to the contrary, it would have appeared to me to follow from the very nature of a subordinate right like the feu in question, that it must be subject to the conditions on which the principal feu, out of which it was derived, was created."

Sandeman v Scottish Property Investment Co. Building Society, 1885, 12 R. (H.L.) 67; 10 App.Cas. 553; 22 S.L.R. 850.

(40a)

Held (by a majority of the whole Court) that a decree of declarator of irritancy ob non solum canonem, whether conventional or under the statute of 1597, c. 17 (12mo ed. c. 250), annuls the vassal's right and all that has followed thereon, including the rights of sub-vassals, and that without inferring any obligation on the superior to recompense sub-vassals for buildings erected by them on their sub-feus.

Cassels v Lamb, 1885, 12 R. 722; 22 S.L.R. 477.

(41)

—"All parties not called"—Subjects held by spouses in liferent with power to alienate—Fee to children nominatim—Spes successionis in children.

A superior in one and the same action concluded for irritancy of the feu ob non solum canonem, and for payment of a casualty. The lands were held by spouses in liferent with power to alienate, with a fee to their children nominatim. The spouses alone were called as defenders. Plea of "all parties not called" repelled, on the ground that the children had a mere spes successionis, and consequently no interest to appear.

Brown & Co. v Brown, (O.H.) 1893, 1 S.L.T. 91.

(42)

—Superior proceeding against sub-feuar or unentered disponent.

Held that it is incompetent for a superior to pass over his vassal and bring a declarator ob non solum canonem against a sub-feuar or unentered disponent.

Nelson's Trustees v Tod, (O.H.) 1901, 9 S.L.T. 369.

(43)

—Right of vassal to retain feu-duties.

Held that it was no defence to an action of declarator of irritancy ob non solum canonem that there was a question between the superior and the vassal as to the latter's right to erect certain buildings.

Thom v Chalmers, 1886, 13 R. 1026; 23 S.L.R. 735.

(44)

—Failure to build—At what date incurred.

By minute annexed to articles of roup and feu, dated in 1873, a vassal was taken bound to erect buildings upon the subjects feued "within two years after the 17th December, 1873." The feu contract embracing this condition was not executed until 1876. The whole conditions in the feu contract were fenced by an irritancy. The buildings never having been erected, the superior in 1879 brought a declarator of irritancy, forfeiture,

and removal against the original vassal's disponees, who had purchased in 1877, founding upon the failure to erect "within two years after the 17th day of December, 1873." The defence was that the condition had become impossible, and must be held pro non scripto. On the conclusion of the summons being amended by the addition of the words "or at all events within two years from the date of the feu contract," the Court granted decree as craved.

Magistrates of Glasgow v Hay, 1883, 10 R. 635; 20 S.L.R. 419.

(45)

—Where separate subjects conveyed by one disposition—Effect of irritancy incurred in respect of one subject on right to the other.

In a feu contract a proprietor, "in consideration of the feu-duty and other prestations" therein written, disposed two pieces of ground, forming part of one feuing estate, to trustees for a firm, for separate feu-duties. The contract took the disponees bound to erect on each piece buildings yielding a rent equal to double the feu-duty, and to leave on one piece a pend to allow of access to the other. There followed a clause of irritancy in the event of the vassals failing to erect and maintain the specified buildings. The stipulations and irritancies were constituted real burdens on the subjects. One of these subjects, on which the stipulated buildings had been timeously erected, was acquired by a third party. The original vassals retained the other subject, but, having become bankrupt, they failed to erect the stipulated buildings thereon. In an action of declarator of irritancy of the feu raised by the superior against the holders of both the subjects, the singular successor alone defended the action. **Held** that his feu right was not irritated by the failure of the original vassals to implement the obligations in the feu contract applicable to the subject still remaining in their hands.

Welsh v Jack, 1882, 10 R. 113; 20 S.L.R. 82.

(46)

—Effect of irritancy—Whether superior or vassal's trustee in bankruptcy entitled to insist in claim of compensation against a railway company.

Held that a claim of damages under the Lands Clauses Act by a proprietor against a railway company on the ground that his land had been injured by the formation of the railway between it and the sea was, if competent at all, personal to the proprietor, and was not carried to the superior by a decree of irritancy ob non solum canonem.

Caledonian Railway Co. v Watt, 1875, 2 R. 917; 12 S.L.R. 592.

(47)

—Irritancy attached to obligations ad facta præstanda—Whether purgeable at the bar.

Held that conventional irritancies attached to obligations ad facta præstanda, or for payment of annual duties contained in conveyances of property, whether by way of

feu right or by contract of ground annual, are purgeable at any time before extract of a decree of declarator of irritancy.

Review of the law relating to the purging of irritancies.

Duncanson v Giffen, (O.H.) 1878, 15 S.L.R. 356.

(48)
Purging irritancy—Arrears of feu-duties due to superior as assignee of predecessor—Sheriff Courts Act, 1853, sec. 34.

A superior claiming arrears of feu-duties, partly in his own right and partly as assignee of his predecessor, presented a petition to the sheriff under sec. 32 of the Sheriff Courts Act, 1853, for removal of the vassal. The vassal in his defences tendered payment of the arrears due to the superior in his own right, and pleaded that this was sufficient to purge the irritancy. **Held** (1) that the tender by the defender was sufficient to purge the irritancy; and (2) that the proper interlocutor was one finding that the irritancy had been incurred, but that it had been purged, and not an interlocutor dismissing the action.

Maxwell's Trustees v Bothwell School Board, 1893, 20 R. 958; 30 S.L.R. 885; 1 S.L.T. 153.

IV. FEU-DUTY.

1. GENERALLY.

(49)
Personal obligation in feu contract—Liability of executors.

A feu contract bore that the vassal "binds and obliges himself and his heirs, executors, and successors whomsoever" to make payment of a certain sum in name of feu-duty. The vassal having died, his heir declined to take up the feu. In an action against the vassal's executors for payment of the feu-duties which had become due since his death, and for damages for breach of contract, in failing to take up the feu on the heir declining to do so, **held** (1) that there was no obligation upon the executors to pay feu-duties accruing after the date of the vassal's death; and (2) that they were not liable in damages for breach of contract.

Aiton v Russell's Executors, 1889, 16 R. 625; 26 S.L.R. 478.

(50)
Liability of executors—Conjunct and several liability.

A feu contract bore that the vassal "binds and obliges himself, his heirs, executors, and successors whomsoever, conjunctly and severally," to pay feu-duties and implement certain other obligations. **Held** that the personal obligation remained effectual on him and his representatives in perpetuity, notwithstanding that he had disposed the feu to a singular successor, who was duly infeft and entered with the superior.

Police Commissioners of Dundee v Straton, &c., 1884, 11 R. 586; 21 S.L.R. 410.

(51)
Stipulation for additional feu-duty for ground "on which buildings shall be erected"—Construction.

A feu contract provided that the vassal should pay to the superior "besides the feu-duty above stipulated, the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected." A singular successor of the original vassal acquired part of the subjects, upon one acre of which he erected a public laundry. The buildings occupied about one-half of the acre, the remainder being occupied by a road forming the approach to the laundry, a road of an average breadth of 7 feet surrounding it, and a grass slope separating the buildings from a reservoir. **Held** that the additional feu-duty was payable for the ground actually built on, and not for the road and other accessory ground not built on.

M'Farlane v Stirling-Maxwell, 1902, 5 F. (H.L.) 1; 40 S.L.R. 64; 10 S.L.T. 341.

(52)
Liability of bondholders inter se.

Prior bondholders who had entered into possession, and intromitted with the rents of a subject, **held** liable to relieve a postponed creditor, who held an ex facie absolute disposition of the subjects in security of debt, of the feu-duty paid by him to the superior.

Liquidators of the City of Glasgow Bank v Nicolson's Trustees, 1882, 9 R. 689; 19 S.L.R. 461.

(53)
Conversion—Vitual feu-duty—Bear or barley.

The reddendo of certain lands in the county of Fife held under a charter of date 1622 was a virtual feu-duty of "three chalders bear, guid and sufficient stuff." **Held** that the term "bear" occurring in deeds of the date of the original charter of 1622 applied equally to bear and barley, which were different varieties of the same species of grain, and that barley grown in that part of Fife was the "bear" to be delivered under the reddendo.

Ferguson's Trustees v Magistrates of Kinghorn, 1876, 3 R. 401.

(54)
Option to take in kind—Irritancy ob non solum canonem—Agricultural services.

A vassal was bound by his charter to pay as feu-duty "£2 Scots money, twelve capons, or 10s. Scots for each capon, and four shear dargs, or 6s. 8d. for each darg not performed, all in" the superior's "option." For many years 2s. 6d. had been paid for each capon to the superior in lieu of delivery in kind. The vassal subsequently refused to continue this payment, and tendered 10s. Scots as conversion money. The superior having refused conversion money, and the vassal having made no payment for six years, the superior

brought an action of declarator of irritancy against the vassal and his disponee, who had not entered with the superior. **Held** (1) that the superior, having refused the money conversion, had thereby sufficiently intimated his option of taking the capons; (2) that the vassal not having tendered the feu-duty for upwards of two years, the feu-duty was in arrear, and the irritancy had been incurred; (3) that the shear dargs could not be demanded after the year in which they were exigible was past, nor the conversion in lieu thereof.

Hope v Aitken, 1872, 10 M. 347; 44 J. 185; 9 S.L.R. 241.

(55)

Retention—Right to feu reserved in disposition in security—Feu-duties assigned to creditors—Vassal's right of retention against creditor for unfulfilled obligation of superior.

In a bond and disposition in security power was reserved to the granter of the bond to feu the subjects, the feu-duties being assigned to the holder of the bond, and the granter's right of superiority being declared to be subject to the security. The granter, after feuing ground, failed to implement an obligation to the vassal to form streets and sewers, and became bankrupt. In an action by the bondholder against the vassal for payment of feu-duties, **held** (1) that the holder of the bond had no claims or rights against the vassal, excepting such as would have been open to the superior; and (2) that the superior having become bankrupt, the vassal was entitled to retain the feu-duties so long as the obligation to form streets and sewers was unfulfilled.

Arnott's Trustees v Forbes, 1881, 9 R. 89; 19 S.L.R. 54.

See also Thom v Chalmers, 1886, 13 R. 1026; 23 S.L.R. 735, No. 43, supra.

(56)

Arrears.

Held (by Lord Ormidale, Ordinary) that the Crown, after granting to a vassal a charter of confirmation containing a discharge of one year's non-entry duties, was not entitled thereafter to claim arrears of feu-duties.

Lord Advocate v Lord Rollo, 1872, 10 M. 1024.

(57)

Interest — General rule — Relief — Extrajudicial demand.

Held that when a sub-vassal had undertaken the burden of relieving the superior of a part of the feu-duty due to the Crown, and had failed to pay, the superior, who had paid the feu-duties to the Crown, could only recover the principal from the sub-vassal, as the ordinary rule that feu-duties do not bear interest applied.

Question, whether interest runs on feu-duties after an extrajudicial demand has been made for them.

Marquis of Tweeddale's Trustees v Earl of Haddington, 1880, 7 R. 620; 17 S.L.R. 392.

(58)

—Stipulated — Purging irritancy — Arrears of feu-duty.

A feu contract stipulated for payment of interest on arrears of feu-duty without specifying any rate. **Opinion** that a vassal who had incurred an irritancy ob non solutum canonem was entitled to purge the irritancy by payment of the arrears of feu-duty without interest.

Maxwell's Trustees v Bothwell School Board, 1893, 20 R. 958; 30 S.L.R. 885; 1 S.L.T. 153.

(59)

Burgage — Feu-duty and corresponding casualty stipulated for in disposition.

Held that the owner of the subjects was personally liable for the annual payments and duplications thereof stipulated in his titles, but that the clauses relating to these payments had no feudal effect, being incompatible with a burgage holding, and did not constitute real burdens.

Magistrates of Arbroath v Dickson, 1872, 10 M. 630; 44 J. 347; 9 S.L.R. 389.

2. ALLOCATION.

(60)

Right of purchaser of heritage to require seller to obtain an allocation of cumulo feu-duty from superior.

A house was sold on the condition that "the feu-duty is understood to be not more than £4." The house was part of a tenement erected on ground held by the seller at a cumulo feu-duty of £35. The seller recorded a disposition in his own favour of his whole feu, in which he allocated £4 as the feu-duty of the portion sold, and subsequently tendered to the purchaser a disposition in which the feu-duty was stated at that sum, but he did not obtain the consent of the superior to the allocation. In an action by the seller to have the buyer ordained to implement the contract, **held** that the terms of the contract did not oblige the seller to obtain the consent of the superior to the allocation of the feu-duty in the disposition tendered.

Robertson v Douglas, 1886, 13 R. 1133; 23 S.L.R. 794.

(61)

Obligation to allocate—Obligation in favour of "singular successors"—Bondholder over part of feu.

A feu contract provided that "singular successors" in any portion of the ground feued should be bound to pay to the superior a rateable proportion of the cumulo feu-duty, "for which proportion only they shall be bound." **Held** that a creditor in a bond and disposition in security over part of the feu, duly recorded, was not a "singular successor" in the sense of the feu contract; and that, even if he should be assumed to have been entered with the superior by virtue of the implied entry of the Conveyancing Act of 1874, that entry could not affect the character of his right, which was a mere encumbrance on the right of the original

feuar, so as to make him a "singular successor," and therefore that he could not take the benefit of the clause providing for allocation of the feu-duty.

Campbell v Deans, 1890, 17 R. 661; 27 S.L.R. 521.

(62)

Obligation to erect buildings of certain value — Bankruptcy of vassal — Trustee's right to insist on allocation without undertaking to implement whole obligation as to buildings.

Under a feu charter the vassal was taken bound within three years to erect buildings on the feu of the value of £5000. The feu-duty was declared to be £50, and the vassal was to have the power as soon as buildings of the requisite value were erected to allocate the feu-duty in such proportions as might be approved by the superior. The vassal thereafter proceeded to erect a tenement of the value of £3000 on the eastmost half of the feu, and the superior by letter agreed to allocate thereon £20 of the cumulo feu-duty "when the same is completed." Before the tenement was completed the vassal became bankrupt. His trustee thereafter completed the tenement, and called upon the superior to allocate £20 of feu-duty thereon in terms of his letter. The trustee declined to give an undertaking that he would implement the rest of the obligation as to buildings, and the superior declined to make the allocation. **Held** (1) that the letter was to be construed as an obligation by the superior to allocate £20 of the cumulo feu-duty on the eastern portion of the feu as soon as the building thereon was completed; but (2) that the letter was not to be regarded as creating an independent obligation by the superior, but merely as modifying one of the terms of the feu charter, and that to entitle the trustee to take advantage of this modification he must be prepared to implement the other stipulations of the feu charter.

Mitchell's Trustee v Galloway's Trustees, 1903, 5 F. 612; 40 S.L.R. 436; 10 S.L.T. 679.

(63)

Effect on right of vassals to obtain allocation.

A consent to allocation of feu-duty "on condition that there be built on each part or portion into which the said steading shall be divided to which such subdivided feu-duty shall be applicable a house or houses yielding a yearly rent equal to four times the annual amount of the subdivided feu-duty payable for each part or portion," **held** to mean that there was to be no allocation until all the subdivisions supported buildings of the specified value.

Kemp v Bain, (O.H.) 1895, 3 S.L.T. 127.

(64)

Allocation not made in implement of condition of original feu right—Effect on heritable creditors.

Opinion that no allocation of a feu-duty by a superior which is not made in imple-

ment and in terms of some stipulation expressed in and forming a condition of the original grant can possibly affect prior heritable creditors of the superior who are not parties to it.

British Linen Co. v Ogg, (O.H.) 1904, 11 S.L.T. 756.

(65)

Allocation by insolvent superior in favour of insolvent vassal—Effect on rights of heritable creditors.

A vassal, after insolvency, granted gratuitous dispositions of his feu and made allocations of the feu-duty. The allocations were confirmed by the superior, who was at the time also insolvent. **Held** that the allocations were invalid and ineffectual against a prior heritable creditor of the superior who was also a creditor of the vassal at the time when he made the allocation.

British Linen Co. v Ogg, (O.H.) 1904, 11 S.L.T. 756.

(66)

Power of bondholder in selling the security subjects to allocate the feu-duty—Titles to Land Consolidation (Scotland) Act, 1868, secs. 119 and 121—Titles to Land Consolidation Amendment (Scotland) Act, 1869, sec. 7.

A bondholder who sells the security subjects in lots has no power to allocate the feu-duty as in a question between the owners of the lots, or to create real burdens between the different portions he is selling.

Johnston v Irons, 1909 S.C. 305; 46 S.L.R. 259; 1909, 1 S.L.T. 23.

(67)

Allocation in favour of bondholder—Effect on singular successors in superiority.

Opinion that an allocation of feu-duty cannot be made in favour of a mere bondholder so as to affect the rights of a singular successor in the superiority.

British Linen Co. v Ogg, (O.H.) 1904, 11 S.L.T. 756.

(68)

Unallocated feu-duty—Right of vassal on payment to assignation of superior's rights.

Held that a vassal, in tendering payment of his feu-duty, is not entitled to require from his superior an assignation of his rights to enable him (the vassal) to recover the proportion of feu-duty applicable to part of the feu he had disposed, although the assignation was qualified with a declaration that it should not prejudice the rights of the superior.

Guthrie v Smith, 1880, 8 R. 107; 18 S.L.R. 75.

(69)

Subdivision of feu and allocation of feu-duty without consent of superior—Pounding of the ground—Liability of one sub-feuar for arrears of cumulo feu-duty—Actings of superior in prejudice of sub-vassal's right of relief.

The vassals under a feu contract, dated in 1827, divided the feu into four lots, and apportioned the cumulo feu-duty exigible in respect of the whole lands among the lots,

but without the consent of the superior. In 1858 the superior granted a charter of confirmation in favour of Milne, the owner of one of the lots. The charter bore that the subjects were to be holden under the superiors as immediate lawful superiors for payment of a certain yearly feu-duty (being the amount previously apportioned), which was stated to be a proportional part of the cumulo feu-duty payable for the whole lands under the feu contract of 1827, "reserving always the bygone and current feu-duties, and our own right, and the right of all others concerned as accords of law." In 1902 the superior brought an action of poinding of the ground against the owner of another of the lots for recovery of arrears of the cumulo feu-duty. **Held** that the pursuer, by granting the charter of confirmation, had deprived the defender of the right of relief which would otherwise have been open to her against Milne and the portion of the feu possessed by him, and that the defender therefore fell to be assoltized.

Nelson's Trustees v Tod, 1904, 6 F. 475; 41 S.L.R. 332; 11 S.L.T. 692.

3. ACTION FOR FEU-DUTY.

(70)

Personal action — Action by over-superior against sub-vassal for proportion of Crown feu-duties of which mid-superior taken bound to relieve superior, and which made real burden in sub-vassal's disposition—Condition of tenure—Real burden.

In a personal action brought by A, an over-superior (a Crown vassal), against C, his sub-vassal, proprietor of part of the lands of W, for repayment of the proportion of Crown feu-duties effieiring thereto, due by the defender and predecessors whom he represented, it appeared that the sub-feu was held under, *inter alia*, the following titles:—(1) a disposition, *a me vel de me*, granted to B (the mid-superior) of the lands of W; (2) a feu disposition by B to the sub-vassal, conveying parts of the lands of W. At the date of the action the mid-superiority was in non-entry.

Held that the pursuer, as over-superior, was entitled to a personal decree against the defender for the proportion of Crown feu-duties sued for, on the ground that the obligation to relieve the disposer of feu-duties inserted in the *tenendas* of the disposition to the mid-superior (No. (1)) formed a condition of the tenure which the pursuer, as over-superior, was entitled to enforce by personal action against the sub-vassal.

Opinion (per Lord President Inglis and Lord Mure) that although, by the feu disposition in favour of the sub-vassal (No. (2)), a certain annual payment was effectually constituted a real burden on the lands, no personal obligation had been transmitted as against singular successors, arising either from the terms of the original contract or from the principles of tenure.

Opinion contra (per Lord Deas and Lord Shand).

Marquis of Tweeddale's Trustees v Earl of Haddington, 1880, 7 R. 620; 17 S.L.R. 392.

(71)

Liability of sub-vassal of part of feu to over-superior.

Held that an over-superior has not a direct personal action for the whole cumulo feu-duty against a sub-vassal holding part of the feu.

Opinion per curiam, that the over-superior is entitled to enforce for his own benefit the obligations come under by the sub-vassal to his own immediate superior.

Sandeman v Scottish Property Investment Company Building Society, 1881, 8 R. 790; 18 S.L.R. 559.

(72)

Delay in bringing action—Loss of evidence.

In an action by a superior against a vassal for arrears of feu-duty, it was admitted that the arrears had been paid to an agent of the pursuer, whose mandate, however, it was averred, had been withdrawn, and who at the date of the action was dead. **Held** that the pursuer by his delay in bringing the action had caused the defender to lose the agent's evidence, and action dismissed.

Jackson v Swan, 1895, 3 S.L.T. 149.

(73)

Maills and duties.

A superior has no title to pursue an action of maills and duties for recovery of feu-duty. Prudential Assurance Co. v Cheyne, &c., 1884, 11 R. 871; 21 S.L.R. 606.

(74)

Bond and disposition of superiority in security.

Held that the creditor in a bond and disposition in security of a superiority, with an assignation to feu-duties and casualties, has no title to sue an action of maills and duties against the vassal of his debtor for recovery of the feu-duties.

Nelson's Trustees v Tod, 1896, 23 R. 1000; 33 S.L.R. 727; 4 S.L.T. 80.

(75)

Poinding of the ground.

A superior who has divested himself of his superiority in favour of a third party has no title to sue an action of poinding of the ground for recovery of arrears of feu-duties due prior to his divestiture.

Scottish Heritages Co. v North British Property Investment Co., 1885, 12 R. 550; 22 S.L.R. 361.

(76)

Extent of superior's security—Arrears of feu-duty—Conveyancing (Scotland) Act, 1874, Amendment Act, 1879, sec. 3—Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887, sec. 2.

Held that, under sec. 3 of the Conveyancing (Scotland) Act, 1874, Amendment Act, 1879, and sec. 2 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887, a superior can obtain a decree of poinding of the ground for arrears of feu-duty after the sequestration of his vassal, but that the poinding is, in competition with

the trustee in the sequestration, available only for the current term's feu-duty and one year's arrears.

Campbell v Edinburgh Parish Council, 1911 S.C. 280; 48 S.L.R. 193; 1910, 2 S.L.T. 409.

(77)

Recovery of arrears — Sequestration of moveables — Vassal a company — Action by superior for sequestration for feu-duty after liquidation—Companies Act, 1862, sec. 163.

Held that an action by a superior against his vassal, a limited company in liquidation, for sequestration of the moveables on the feu for arrears of feu-duty, was not an "attachment, sequestration, distress, or execution" within the meaning of the Companies Act, 1862, sec. 163.

Anderson's Trustees v Liquidator of Donaldson & Co., 1908 S.C. 38; 45 S.L.R. 26; 15 S.L.T. 409.

V. ENTRY—CASUALTIES.

STATUTES.

Act 1874—Conveyancing (Scotland) Act—37 & 38 Vict. c. 94.

Act 1879—Conveyancing (Scotland) Act—42 & 43 Vict. c. 40.

Act 1887—Conveyancing (Scotland) Acts, 1874 and 1879, Amendment Act—50 & 51 Vict. c. 69.

1. ENTRY BEFORE THE CONVEYANCING ACT, 1874.

(78)

Corporation — "Managers and their successors in office."

An incorporation under royal letters patent, having purchased certain lands, the superior, by charter of resignation, disposed the lands "to and in favour of the managers of" the corporation "and their successors in office for the use and behoof of the said hospital and their disponees, heritably and irredeemably," and infeftment was taken in these terms. Held that the entry so given was an entry of the corporation, and was not an entry of individuals as trustees for the corporation.

Earl of Lauderdale v Hogg, 1897, 24 R. 914; 34 S.L.R. 689; 5 S.L.T. 43.

(79)

Right of adjudger to be entered—Jus tertii of superior to object to warrant of adjudication.

From 1774 to 1815 a feu was held under a series of base infeftments, although the dispositions throughout the progress contained both procuratory and alternative precept. From 1815, the date of the last infeftment, no title was made up until 1864, when a person who had been in possession from 1850 obtained decree of adjudication in implement, "in respect of no opposition," against the brother and alleged disponee of the person last infeft, and against his heir-at-law, he

being then dead. In 1868 the superior raised an action to reduce the adjudger's title, concluding alternatively for declarator of non-entry. Held that the subject having been transferred to the defender by due process of law, it was *jus tertii* of the superior to object that the documents upon which the decree of adjudication had been obtained were *ex facie* invalid and ineffectual as warrant for adjudication, and that the superior was bound to enter the defender on payment of the arrears of feu-duty.

Monteith v Ingels, 1869, 7 M. 523; 41 J. 282.

(80)

Declarator of non-entry.

Where the personal right under a Crown charter had transmitted to several parties in succession, infeftment on the open precept in the Crown charter and on a corroborative disposition and assignation by the original disponee in the Crown charter, granted in consequence of the loss of some of the writs constituting the progress, held a sufficient title to sue a declarator of non-entry against a vassal in the lands.

Mackenzie v Munro, 1869, 7 M. 676; 41 J. 374; 6 S.L.R. 438.

(81)

—In declarator of non-entry brought against the disponee of the last vassal, question, whether it is necessary to call the heir of the last vassal.

Tod's Trustees v Graham, 1869, 8 M. 264; 42 J. 115; 7 S.L.R. 155.

(82)

Acknowledgment by superior of sub-vassal—Effect of in reduction-improbation and declarator of non-entry against vassal and sub-vassal — Wadset right to superiority in person of sub-vassal as excluding claim for non-entry duties.

Mackintosh v Tytler, 1870, 8 M. 772; 42 J. 438; 7 S.L.R. 484. RES JUDICATA, No. 41.

(83)

Mora in taking entry.

Circumstances in which held that a vassal's representative had been in mora in taking an entry, and was therefore liable in the full rents from the date of citation.

Tod's Trustees v Graham, 1869, 8 M. 264; 42 J. 115; 7 S.L.R. 155.

(84)

Liability for non-entry duties while Crown charter is being adjusted.

Circumstances in which held that a Crown vassal obtaining a charter of confirmation was not liable in non-entry duties for the current half-year during which the draft charter was finally adjusted and the deed ready to be issued.

Observed that the period to which non-entry duties to the Crown are to be calculated is one of circumstances.

Hope v Lord Advocate, 1867, 6 M. 44; 40 J. 32; 5 S.L.R. 38.

(85)

Crown charter—Date of sealing.

In action of declarator of non-entry objection to a Crown charter, which formed part of superior's title, that the date of sealing was inconsistent with the date of its being written to the Seal and registered, repelled.

Mackenzie v Munro, 1869, 7 M. 676; 41 J. 374; 6 S.L.R. 438.

2. IMPLIED ENTRY UNDER THE CONVEYANCING ACT, 1874.**(1) GENERALLY.**

(86)

Recorded bond and disposition in security—Act 1874, sec. 4.

Question, whether the provisions of the Conveyancing Act of 1874 as to implied entry apply to the case of a bond and disposition in security which has been recorded by the creditor.

Campbell v Deans, 1890, 17 R. 661; 27 S.L.R. 521.

(87)

Udal lands—Lands held in feudal form—Superior's author obtaining Crown charter subsequent to constitution of vassal's right—Liability of vassal to casualty.

Spence v Union Bank of Scotland, (O.H.) 1894, 31 S.L.R. 904; 1 S.L.T. 648, No. 9, *supra*.

(88)

Declarator of non-entry—Competency—Act 1874, sec. 4.

A superior raised an action against his vassal, who had been entered in virtue of the implied entry given by the Conveyancing Act of 1874, concluding for declarator that the lands had been in non-entry from 1851 to 1874, and for decree against the vassal for payment of the non-entry duties for these years. **Held** (1) that by the law prior to the Act of 1874 the only competent mode of recovering non-entry duties was by a declarator of non-entry directed against the lands; (2) that the Act of 1874, by enacting that after 1st October, 1874, no lands should be deemed to be in non-entry, had deprived superiors of this remedy and had provided no other; and therefore (3) that the present action was incompetent.

Lord Advocate v Moray, 1890, 17 R. 945; 27 S.L.R. 766.

(89)

Superiority and dominium utile held by same person—Discharge of casualty confusion—Act 1874, sec. 4.

In 1876 William Motherwell, the superior of certain lands, acquired the dominium utile of the lands by disposition from Greer, who had been entered with the superior prior to the Conveyancing (Scotland) Act, 1874. Greer died in 1885. William Motherwell, who had recorded the disposition of the dominium utile in his favour and had not consolidated the superiority and the dominium utile, died in 1892, and his trustees made up separate titles to the two estates. Thereafter the trustees, in 1892, conveyed the

superiority to Gavin Motherwell, and in 1897 they conveyed the dominium utile to Manwell, who recorded the disposition thereof in his favour. Gavin Motherwell then, as superior, brought an action against Manwell for payment of composition, upon the ground that no casualty had been paid since the death of Greer, the last expressly entered vassal, in 1885. The defender maintained that as William Motherwell, and after his death his trustees, had been both superiors and vassals of the lands at a time when a casualty was exigible, the casualty so exigible must be held to have been discharged, or to have been extinguished confusion, and that no further casualty could be demanded until the death of the last survivor of William Motherwell's trustees. **Held** that the defender was liable to pay composition in respect of his own entry, as there was no former vassal in existence who had paid a casualty.

Motherwell v Manwell, 1903, 5 F. 619; 40 S.L.R. 429; 10 S.L.T. 768.

(90)

Right of superior to draw rents until composition paid—Assignability of right—Act 1874, sec. 4 (4).

Held that the right of action of a superior under the Conveyancing (Scotland) Act, 1874, to obtain a decree entitling him to draw the rents of the feu until the feuar pays an overdue composition, may be assigned.

Brown v Stirling, (O.H.) 1911, 2 S.L.T. 332.

(91)

Infetment in liferent—Act 1874, secs. 3 and 4.

A vassal infet in fee in certain lands, being sued for a casualty in respect thereof, maintained that the action was premature in respect that another person was infet in liferent in the lands upon an *a me vel de me* conveyance, that the conveyance to himself was under burden thereof, and that the liferent was by implication confirmed under the Conveyancing Act of 1874. The Court repelled this defence, holding that the infetment which implies an entry must proceed upon a title which was capable of extinguishing the prior vassal's right, and that the liferent right was a mere burden on the vassal's right of fee.

Stuart v Jackson, 1889, 17 R. 85; 27 S.L.R. 178.

(92)

Singular successor of existing incorporation—Liability for composition—Act 1874, sec. 4.

A superior raised against his alleged vassals an action under the Conveyancing Act, 1874, sec. 4, sub-sec. (4), for declarator that he was entitled to composition in respect that an incorporation, the last entered vassal under the old law, had ceased to be proprietors of the subjects, and that the defenders, their singular successors, were liable therefor in respect of their implied entry under the Act of 1874. **Held** that as the superior would not have been in a position to bring a declarator of non-entry had the Act of 1874 not been passed, by reason of the

incorporation remaining his vassal, the action was incompetent.

Governors of Heriot's Trust v Drumsheugh Baths Co., 1890, 17 R. 937; 27 S.L.R. 751.

(93)

Singular successor of trustees—Act 1874, sec. 5.

In defence to an action, under sec. 5 of the Conveyancing (Scotland) Act, 1874, by a superior against a singular successor of a body of trustees for a composition, as due upon the expiry of twenty-five years from the last payment of composition by the trustees, the vassal maintained that no payment was due by him under sec. 5, in respect that no composition had ever been paid by the trustees "in terms of" that section, the only composition paid by them having been paid in respect of the death of the vassal last entered before their entry. **Held** that this defence was not well founded, and that a composition was due by the defender under sec. 5 in respect of the expiration of twenty-five years from the payment of composition by the trustees.

Trades Maiden Hospital v Mackersy, 1907 S.C. 73; 44 S.L.R. 45; 14 S.L.T. 400.

(94)

Effect of payment of casualty, where intermediate vassal, also impliedly entered, has not paid.

A vassal duly entered with his superior conveyed the subjects to A, and died in 1871. A, who, having recorded his disposition, had been impliedly entered by the passing of the Conveyancing Act, 1874, but had paid no composition in respect of his entry, conveyed the subjects to B, who recorded his disposition. In 1883 the superior obtained payment from B of a casualty, and granted receipt therefor in these terms: "In full of the casualty payable for the subjects on the death of the last entered vassal in 1871." On the death of A the superior demanded from B a casualty in respect of B's entry, alleging that the first payment had been made in respect of A's entry. **Held** that the payment made by B in 1883 was the casualty due in respect of his own entry, and that the superior had no further claim against him on the death of the intermediate vassal.

Opinions, that where a series of implied entries have been taken during the life of the vassal who last paid a casualty, on the death of the latter the superior's right to another casualty emerges against the vassal last impliedly entered, but that he has no claim against any intermediate vassal in respect of his implied entry.

Mounsey v Palmer, 1884, 12 R. 236; 22 S.L.R. 118.

(95)

Act 1887, sec. 1—Whether retrospective.

Sec. 1 of the Conveyancing Acts Amendment Act, 1887, is not retrospective in its operation.

Stuart v Jackson, 1889, 17 R. 85; 27 S.L.R. 178.

(96)

Recording disposition in superior's chartulary—Act 1874, sec. 4.

When a casualty becomes due the superior's agent is not entitled to record at the vassal's expense in the superior's chartulary the disposition by the recording of which the vassal obtained an entry.

Magistrates of Edinburgh v Whitehead, &c., 1876, 3 R. 663.

(97)

Right of superior to grant receipt stating the date when casualty fell due.

Where a vassal offered to pay a casualty demanded by his superior, but objected to the insertion in the receipt granted to him of words to the effect that the casualty "fell due at —," **held** that an action of declarator by the superior that the casualty fell due at — fell to be dismissed.

Heriot's Trust v Cook's Trustees, (O.H.) 1894, 2 S.L.T. 324.

(2) UNDER SPECIAL STIPULATIONS AS TO ENTRY.

(98)

Duplicand of feu-duty payable on entry of each singular successor—Last vassal entered still alive—Act 1874, sec. 4.

Under a feu contract, certain subjects were held for payment of specified feu-duties, with a duplicand at the entry of each heir and singular successor. Subinfeudation was prohibited, and it was provided that heirs and singular successors of the vassal should be bound to enter with the superior and be infeft within three months of the date of their purchasing or succeeding. These conditions were fenced by an irritancy. In an action for payment of a duplicand of the feu-duty by the superior against a singular successor in the feu who had bought it in 1887, and had taken infeftment, and had been impliedly entered, the defender pleaded that, the last vassal who had paid the casualty being still alive, the demand was contrary to the provisions of the 4th section of the Conveyancing Act, 1874, sub-secs. (2) and (3), and to the common law. The Court, in respect of the obligation on the defender to enter and pay the casualty within three months after the date of his purchase, and of the irritancy by which that obligation could be enforced, **held** that the pursuer was entitled to payment of the casualty on the expiration of three months from the date of the defender's purchase.

Dick Lauder v Thornton, 1890, 17 R. 320; 27 S.L.R. 455.

(99)

—Last entered vassal still alive—Act 1874, sec. 4.

By a feu contract entered into in 1781, the subjects feued were to be holden of the seller and his heirs and successors for payment of a specified feu-duty. The vassal was also taken bound to pay "one full year's rent of the subject, according to the value

thereof, at the entry of every singular successor to the said subject, and that within one year and one day of the . . . singular successor . . . acquiring right thereto." A casualty of a year's rent was paid in 1884 on the entry of a body of trustees. The subjects were thereafter disposed to C by a disposition dated and recorded in 1900. In a special case presented in 1901, the superior contended that by the conditions of the feu right C was bound to enter and pay the casualty within one year of his acquiring right to the subjects. C contended that no casualty was due, on the ground that one of the trustees was still alive, and that by the law prior to 1874 the superior could not have compelled an entry. **Held** that no casualty was payable, in respect (1) that the superior could not by the law prior to 1874 have brought a declarator of non-entry, the fee being full; (2) that the feu contract did not require a singular successor to pay a casualty irrespective of his entry; and (3) that if the feu contract did make it a condition of the feu that a purchaser should enter within a year of his acquisition of the subjects, it did not contain machinery which the superior could use to compel an entry within that time.

Hamilton v Chassels, 1902, 4 F. 494; 39 S.L.R. 337; 9 S.L.T. 408.

(100)

—Last entered vassal still alive—Act 1874, sec. 4.

By the tenendas clause of a feu charter, dated in 1825, the vassal and his heirs and assignees whomsoever were taken bound to pay a certain feu-duty, "doubling the said feu-duty at the entry of each heir and singular successor." Subinfeudation and holding otherwise than of the granters and their successors were prohibited, and it was provided that all disponees of the vassals after the grantee taking infestment should be obliged to enter within six months of the dispositions in their favour, and to pay the duplicand for such entry although their author might be then in life, "and in case of their failing or refusing to enter as aforesaid, then the right of the said purchasers or disponees . . . shall be held and considered still to remain with the former vassals, and the said area . . . shall be subject and liable to his debts and deeds notwithstanding the dispositions . . . granted by him." **Held** that the superiors had a contractual right to recover a duplicand from a singular successor of the vassal holding under and in terms of the feu charter, and impliedly entered under a disposition recorded in 1903, although the last vassal who had paid a duplicand was still alive.

Church of Scotland v Watson, 1905, 7 F. 395; 42 S.L.R. 299; 12 S.L.T. 606.

(101)

—Last entered vassal still alive—Act 1874, sec. 4—Liability of trustees for com-

position due by deceased vassal and also for relief as holding for his heir.

A feu charter, dated in 1829, contained a prohibition against subinfeudation, fenced with an irritancy, and a clause providing that disponees of the vassal should be obliged to enter with the superior within a year and day of the disposition in their favour on pain of irritancy of their rights. The redendo clause contained no express stipulation for payment of casualties, or as to the amount payable, on entry. In 1901, A, the vassal who at that time was duly entered and infest in the feu, disposed the subjects to B, who recorded the disposition in the Register of Sasines. B died in 1903, leaving a trust disposition and settlement in favour of trustees, who expedite a notarial instrument in their own favour, which they recorded in 1904. The residuary legatee under B's settlement was B's heir-at-law. In 1905 the superior brought an action against B's trustees for payment of—(1) a casualty of a year's rent due by the deceased B and now due by his trustees as representing him, and (2) a casualty of relief for their own entry as holding for B's heir. **Held** (1) that as under the conditions of the feu the superior was entitled to compel an entry and payment of entry duty by each disponee within one year of the date of his disposition although the fee was full, B by recording his disposition became personally bound to pay composition, and the defenders as his executors were liable therefor. (2) That B's trustees, being bound to enter within one year by recording the disposition in their favour, became liable as disponees infest for the casualty of relief claimed from them.

Fife Coal Co. v Bernard's Trustees, 1907 S.C. 494; 44 S.L.R. 236; 14 S.L.T. 592.

(102)

Penalty on vassal for failure to enter — Payment of double feu-duty with personal obligation on vassals—Absence of compulsor to force an entry.

By a feu charter the entry both of heirs and of singular successors was taxed, and then followed this provision "and in case his heirs or successors shall fail to take out their charters and entries and grant the personal obligations aftermentioned within six months of their entry, they shall immediately, after expiry of the said six months, be liable and obliged to pay the double of the yearly feu-duty termly ay and until they take out the said charters and entries, and grant personal obligations as after specified." The personal obligations referred to were specified as follows:—"And sicklike declaring always that the said Gilbert More and all succeeding him, and singular successors to him, shall be obliged, within six months after their entry, to grant personal obligations for payment of the said feu and teind duties and all other public burdens." **Held** that these provisions laid no direct obligation on each heir and singular successor to enter with the superior, and gave the latter no direct compulsor by which he could force an entry,

and accordingly that the charter did not exact a casualty upon each transfer or sale.

Aberdeen Land Association v Magistrates of Aberdeen, (O.H.) 1899, 7 S.L.T. 204.

(103)

Singular successor—Statutory transference—Whether transferee singular successor—Poor Law Act, 1845, sec. 52.

In 1844 the magistrates of Glasgow held certain subjects, for behoof of the poor, under feu contracts, which stipulated for an additional year's feu-duty on the entry of singular successors. The Poor Law Amendment Act, 1845, enacted that thereafter the magistrates should either hold such subjects for behoof of the parochial board of the burgh, or convey the same to the board. In 1848 the magistrates of Glasgow conveyed the subjects to the parochial board of the City Parish of Glasgow for behoof of the poor, and they were infeft. The superior having in 1878 called upon the parochial board for the additional feu-duty payable by singular successors, held that the parochial board were singular successors, and as such were bound to pay the composition.

Crawford v Dempster, 1879, 6 R. 708; 16 S.L.R. 398.

(104)

Death of last survivor of statutory trustees entered with superior—Change in constitution of trust—Clyde Navigation Consolidation Act, 1858 (21 & 22 Vict. c. cxlix).

In 1839 lands were feued to a body of statutory trustees nominatim and their successors in office. In 1840 and in 1858 Acts were passed altering the constitution of the trust and the mode of election of trustees, and enlarging their duties, but making no alteration in the main purpose of the trust. Held, on the death of the last survivor of the trustees of 1839, that there had been no change in the investiture, and that the superiors were not entitled to a casualty.

Scottish Amicable Life Assurance Society v Clyde Navigation Trustees, (O.H.) 1897, 34 S.L.R. 676; 4 S.L.T. 312.

(105)

Statutory provisions as to liability—Part of feu acquired by railway company—Casualty on part taken to be paid by "original proprietor" of such grounds—Proprietor for time being or representatives of proprietor when ground acquired.

The Slamannan Railway Act (5 & 6 Will. IV. c. lv.) provides that casualties effeiring to grounds acquired for the purposes of a railway "shall be paid by the original proprietors of such grounds." A portion of the lands belonging to a feu were acquired under the Act by a railway company. In an action by the superior against the proprietor for the time being of the feu for payment of a casualty of composition effeiring to the ground acquired by the company, the defender pleaded that the Act imposed liability for the casualty not on the proprietor of the feu for the time being, but on the heirs and representatives of the proprietor at the date

when the company acquired the ground. Plea repelled.

Brown v Stirling, (O.H.) 1911, 2 S.L.T. 332.

(3) ACTION FOR CASUALTY.

(106)

Proof of superior's title—Identity of lands.

In 1821 A entered with B as his superior in the lands of S. A's predecessors had entered in the same way with B's predecessors in 1740 and 1795. The lands of S were subsequently sold, but no entry was asked by B or his successors from 1821 down to 1879, when B's successor brought an action for payment of a casualty against a singular successor of A. The defender maintained that there was no evidence to establish the identity of the lands of S possessed by him with the lands of which the pursuer held the superiority, and that his lands of S were really held of another subject superior. Held that as the defender had failed to prove that the superiority of his lands of S belonged to some one other than the representative of the superior with whom the previous entries had been made, he was liable in the casualty.

Macdougall v Earl of Breadalbane, 1881, 8 R. (H.L.) 92; 18 S.L.R. 748.

(107)

Onus of proof.

The Earl of L., as superior, brought an action for declarator and payment of a casualty against M in respect of certain lands in which M was infeft under a disposition, dated in 1905, in which the lands were described as being part of the lands "of Hillhead, some time possessed by William M'Kay." M's author had been in possession of the lands under an instrument of sasine dated in 1830, in which the lands were described as "the lands of Hillhead . . . some time possessed by William M'Kay," and a charter of confirmation of that sasine had been granted by the Earl of L.'s predecessor as superior in 1832. M defended the action and argued, from a criticism of the measurements and descriptions of the various parcels of land described in the titles, that the portion in dispute could not have formed part of "the lands of Hillhead," of which the Earl of L.'s predecessor had been the superior in 1832. Held that, as there was identity of description in the titles from 1830, the defender could only succeed in his defence by proving affirmatively that the lands in question were parts of other lands of Hillhead held by him from another superior, and that, as he had failed to discharge that onus, and had only raised a doubt whether the lands were in fact held from the pursuer, the pursuer was entitled to decree.

Earl of Loudoun v Morton, 1909 S.C. 880; 46 S.L.R. 519; 1909, 1 S.L.T. 462.

(108)

Onus.

In an action for payment of a casualty of composition, the defender objected to the pursuer's title on the ground that he was not

the superior of the lands. **Held** that the last entry being with the pursuer's author, the defender could only succeed by showing that the superiority was in some one other than the pursuer.

Earl of Morton v Callander, (O.H.) 1914, 2 S.L.T. 383.

(109)

Title to sue — Superior succeeding to superiority after casualty fell due.

In an action by a superior against a vassal for payment of the casualty of composition, the defender maintained that the pursuer had no title to sue, because he had succeeded to the superiority after the implied entry of the defender, and if any composition was due it was payable to the executors of the superior's predecessor, and not to him. **Held** that the title to sue was in the pursuer as superior.

Stewart v Watt, (O.H.) 1899, 7 S.L.T. 253.

(110)

——— Bailies of burgh of barony — Title of bailies as themselves superiors or as commissioners for baron.

In an action of declarator by the bailies and clerk of court of a burgh of barony for behoof of the burgesses, and for payment of a casualty, where the only title from the superior which the defender produced was a charter of confirmation granted by the bailies in 1812, "as immediate lawful superiors of the lands after mentioned," in favour of the vassal last vest and seised, and bearing that the subjects confirmed were "to be holden of them and their successors in office for payment of the feu and teind duties and others specified in the original charter of said lands," and where the pursuers produced a charter of confirmation dated in 1670 granted by the baron of the burgh as superior thereof which contained a disposition of the burgh lands to the bailies and burgesses, and which gave power to the former to grant charters and writs by progress, and to infeft and seise the proprietors within the burgh, along with certain other powers and privileges, **held**, in answer to an objection taken to the title of the pursuers, that the defender's immediate lawful superiors were the bailies for behoof of the burgh, and that the casualty was payable to them as themselves the superiors, and not merely as commissioners for the baron of the burgh.

Bailies of Kirkintilloch v Marshall, 1882, 19 S.L.R. 801.

(111)

Effect of implied entry when fee empty—Statutory action for declarator and payment of casualty—Competency — Act 1874, sec. 4 (2), (3), (4).

A feu charter granted in 1835 stipulated for payment of a certain feu-duty, and for payment the first year of entry of each heir or singular successor of double the feu-duty "in name of entry," and subinfeudation was prohibited. These conditions were fenced with an irritant and a resolute clause. The original vassal A died infeft in 1842, and the lands remained in non-entry

until 1903, when his heirs were impliedly entered by recording in the Register of Sasines an extract of a decree pronounced in their favour by the Sheriff of Chancery, but they did not pay a casualty. In the same year they disposed part of the subjects to B, a purchaser, who was impliedly entered by recording the disposition in his favour. In an action against B by the superior for declarator and payment of the casualty, raised in the statutory form provided by the Conveyancing Act of 1874, the defenders pleaded that the action was incompetent in this form, and that the only action that could be competently raised against him was an ordinary petitory action founded on the contractual obligations in the feu charter. **Held** that, as there was no vassal in life who had paid a casualty on entry, and as by the law prior to 1874 a declarator of non-entry could, in these circumstances, have been brought, the present action, as the statutory equivalent of a declarator of non-entry, was competent.

Christie's Trustees v M'Dougall, 1905, 7 F. 756; 42 S.L.R. 625; 13 S.L.T. 186.

See also Heriot's Trust v Caledonian Railway Co., 1915 S.C. (H.L.) 52; [1915] A.C. 1046; 52 S.L.R. 549; 1915, 1 S.L.T. 347, No. 32, supra.

(112)

Onus of proving death of last entered vassal — Act 1874, sec. 4 (4).

In an action for declarator and payment of a casualty in the form introduced by sec. 4 (4) of the Conveyancing (Scotland) Act, 1874, the onus lies on the pursuer of proving the death of the last entered vassal.

Marquess of Bute's Trustees v Crawford, 1914 S.C. 459; 51 S.L.R. 432; 1914, 1 S.L.T. 298.

(113)

Petitory action against singular successor of trustees—Competency—Act 1874, sec. 5.

Petitory action **held** competent to enforce a claim for payment of a composition as due by a singular successor of a body of trustees under sec. 5 of the Conveyancing (Scotland) Act, 1874.

Trades Maiden Hospital v Mackersy, 1907 S.C. 73; 44 S.L.R. 45; 14 S.L.T. 400.

3. RELIEF OR COMPOSITION.

(114)

Disposnee tendering heir of last vassal—Extinction of mid-superiorities—Act 1874, sec. 4.

Held that the implied entry given by sec. 4 of the Conveyancing Act, 1874, to a person holding an infeftment on an *me vel de me* precept unconfirmed, had the feudal effect of extinguishing the mid-superiority, so that it was no longer competent for him to demand an entry in the character (which he possessed) of heir to the mid-superior, although this resulted in his being subjected to a higher casualty than if the Act had not been passed.

Ferrier's Trustees v Bayley, 1877, 4 R. 738; 14 S.L.R. 480.

(115)

Extinction of mid-superiorities.

Held that the implied entry given by sec. 4 of the Conveyancing Act, 1874, to a person infet on an a me vel de me precept unconfirmed, had the feudal effect of extinguishing the mid-superiority, so that it was no longer competent for him, on a casualty of composition being demanded, to tender the heir of the vassal last infet for an entry on payment of relief duty merely.

Rossmore's Trustees v Brownlie, &c., 1877, 5 R. 201; 15 S.L.R. 129.

(116)

Implied entry of trustees.

A person succeeding by singular title to an estate in land was infet in 1850, and continued to hold the estate till her death in 1881. She was never called on to enter or pay a casualty. She conveyed her whole estates to trustees, who did not take infetment. After her death the superior raised action against her trustees for declarator and payment of one casualty due in respect of the implied entry of the truster on the passing of the Conveyancing Act of 1874, and of another in respect of their own right as trustees. Held that the former was due, but that the trustees being uninfet, and therefore unentered, were entitled to put forward the heir of the truster, and were liable in relief duty only.

Neill v Douglas's Trustees, (O.H.) 1882, 19 S.L.R. 827.

(117)

Entry of trustees.

Testamentary trustees took infetment in certain lands in March, 1874, by recording a notarial instrument on an a me vel de me disposition in their favour, their author being the vassal last infet in the lands. Held (1) that by the operation of the 4th section of the Conveyancing Act, 1874, the trustees were entered with the superior, and therefore that the heir of the last entered vassal could not be tendered for an entry; and (2) that the trustees by their implied entry were liable in a composition of a year's rent.

Rankin's Trustees v Lamont, 1880, 7 R. (H.L.) 10; 5 App.Cas. 44; 17 S.L.R. 416.

(118)

Entry of disponent from trustees.

A person died infet in certain lands, and duly entered with the superior. His trustees sold the lands, and the purchasers recorded the disposition in their favour in 1876. Held that the disponent, having obtained an entry, became liable for a casualty, and that the subsequent recording of a precept of clare constat, granted by the superior in 1873 in favour of the heir, was ineffectual.

Sivright v Straiton Estate Co., 1878, 5 R. 922; 15 S.L.R. 622.

(119)

Where implied entry not yet taken.

Held that where a stranger to an investiture having a personal right to lands, in

place of making up a feudal title, tenders the heir as vassal, the superior cannot refuse to enter the heir on payment of relief duty.

Duke of Hamilton v Guild, &c., 1883, 10 R. 1117; 20 S.L.R. 735.

(120)

Entry of heir without payment of casualty—Subsequent disposition to singular successor—Liability for casualty.

Sutherland v Tait's Trustees, 1902, 5 F. 90; 40 S.L.R. 135; 10 S.L.T. 398, No. 130, infra.

(121)

Disponent heir of last entered vassal—Act 1874, sec. 4.

A disponent, who has recorded his disposition, and is thereby entered with the superior, if he is heir of the last entered vassal, is liable in relief duty only.

Mackintosh v Mackintosh, 1886, 13 R. 692; 23 S.L.R. 471.

(122)

Effect of registration of marriage contract conveying husband's lands for spouses' conjunct fee and liferent, and wife's liferent alienarily, and for children in fee—Whether change of investiture—Whether husband's heir-at-law (there being no issue) entitled to entry on payment of relief.

By antenuptial marriage contract estates in which the husband was infet were conveyed to the spouses in conjunct fee and liferent, but for the liferent use alienarily of the wife, and to the children of the marriage in fee. The contract was registered in the Register of Sasines in 1878 on behalf of the spouses "for their respective rights of fee and liferent within mentioned." There was no issue of the marriage. The husband died in 1881, survived by his wife, and left a trust disposition conveying the estates to trustees, who conveyed them to his only sister, who was his heir-at-law. She served and was infet as heir-at-law in special to her brother in the estates, and thereafter raised an action to have it declared that she was duly entered with the superior, and that he was bound to accept one year's feu-duty as the casualty payable by her on her entry as an heir. The superior demanded a composition. Held that the heir-at-law was only liable in relief duty, by Lord President Inglis, Lord Deas, and Lord Mure on the grounds (1) that the registration of the marriage contract did not affect the previous infetment of the husband in the fee of the estate, and that his heir-at-law was duly entered as heir of the last vassal; and (2) that it was not relevant to inquire into any personal title she might have under her brother's trust disposition; by Lord Shand, on the ground that, whether the pursuer was to be regarded as an heir under the destination in the marriage contract or not, being heir of line of the last entered vassal she was only liable in relief duty.

Hope v Duke of Hamilton, 1883, 10 R. 1122; 20 S.L.R. 738.

(123)

Investiture changed.

In 1860 John Hamilton, a proprietor infeft in certain lands, and entered with the superior, disposed them a me vel de me to his brother James D. Hamilton, his heir-presumptive, who took infeftment but did not enter with the superior. On the passing of the Conveyancing Act, 1874, the mid-supremacy was extinguished, and he was impliedly entered with the superior. John Hamilton died in 1877, and James D. Hamilton died in 1886, without having been called upon by the superior to pay a casualty. He left a general disposition and settlement in favour of his brother and heir-at-law, William Hamilton, who was infeft thereon, and thus obtained an implied entry under the Conveyancing Act, 1874. The superior then raised an action against William Hamilton, concluding for declarator "that in consequence of the death of John Hamilton, who died upon the 27th day of February, 1877, and who was vassal last seised in" the lands, "a casualty, being one year's rent of the lands, has become due to" the superior, "and that the said casualty is still unpaid, and that the full rents" after the date of citation belonged to the superior till payment of the casualty. The defender pleaded that the superior was not entitled to a casualty of composition in respect that the defender was heir-at-law of James D. Hamilton and also of John Hamilton. **Held** by a majority of the whole Court (1) that by James D. Hamilton's statutory entry a new investiture was created, and the prior investiture evacuated; (2) that on the death of John Hamilton a casualty of composition became payable to the superior which could have been exacted from James; and (3) that this casualty not having been paid by James, a casualty of composition was payable by the defender.

Stuart v Hamilton, 1889, 16 R. 1030; 26 S.L.R. 710.

(124)

Trust for heir.

A vassal infeft in certain lands, and entered with the superior, died in 1865, leaving a trust disposition and settlement, whereby he conveyed his heritable estate to trustees, directing them to hold the same until his youngest child should attain the age of twenty-one, and then to divide it equally among his children, but declaring that if any child died before receiving payment of his share, and without lawful issue, the survivor or survivors should be entitled thereto. He also directed that if all his children predeceased the term of payment without issue, the trustees should on his widow's death realise the estate, and pay the proceeds in such way and manner as he should direct, and failing such direction, to and among his nearest lawful heirs. Power was given to the trustees, "for the better enabling my trustees to carry the foresaid purposes into effect," to sell the estate "when they shall consider it necessary." The truster left only one child, a son, who at the date of his

father's death was in pupillarity. In 1865 the trustees were infeft, and by the operation of the Conveyancing Act, 1874, were entered with the superior. In 1883, on the son attaining the age of twenty-one, they conveyed the estate to him in implement of the trust disposition and settlement, and he was infeft. The superior claimed payment of a composition. The heir maintained that he was only liable in relief duty, on the ground that he was his father's heir, and that the trustee had been holding for him. **Held** by a majority of the whole Court that the casualty to which the superior was entitled was relief and not composition; Lord President Inglis, Lord Justice-Clerk Macdonald, Lords Mure, Rutherford Clark, Lee, M'Laren, and Kinnear being of opinion that there was nothing in the trust settlement or in what followed upon it to affect the defender's right as heir to his father; Lords Adam, Lee, and Kinnear being of opinion that in determining the question of casualty the implied entry of the trustees by the operation of the Conveyancing Act of 1874 was to be disregarded, and that the defender's father was to be regarded as the vassal last seised in the lands, and the defender as his successor, and that accordingly, being his heir-at-law, the defender was only liable in relief.

Stuart v Jackson, 1889, 17 R. 85; 27 S.L.R. 178.

(125)

S, a vassal infeft in certain lands, and entered with the superior, died in 1835. He left a trust disposition by which he conveyed the lands to trustees with alternative holding, directing them to convey and make over the lands, under burden of his widow's liferent, "to and in favour of my eldest son alive at the time of my death, and the heirs of his body; whom failing, my other sons in succession, and the heirs of their bodies respectively"; whom failing, to the testator's daughters in succession, and the heirs of their bodies respectively, the eldest heir female always excluding heirs portioners. The trustees were infeft base in 1837, and in 1852 they disposed the lands with alternative holding to the testator's eldest son alive at the date of his death, viz., "A D S, his heirs and assignees whomsoever," and before 1874 he was infeft on their disposition. By the Act of 1874 the infeftments of the trustees and of A D S were confirmed. In 1887 the superior sued A D S for composition. A D S tendered relief, maintaining that he was only liable in relief in respect that he was the heir-at-law of the truster, and as such heir of the investiture. **Held** that A D S was not liable for composition, because the trust was one for the continuance of the existing investiture, and did not affect the character and right of A D S as heir.

Duke of Atholl v Stewart, 1890, 17 R. 724; 27 S.L.R. 590.

(126)

M, a vassal in certain lands, entered with the superior, died in 1870. He left a

trust disposition and settlement by which he conveyed his whole heritable and moveable estates to trustees, directing them to convey them to his only son on his attaining majority, and failing him, to certain other persons specified in their order. Power was given to the trustees to make up titles, and also to sell, "and in general to do . . . everything necessary for the execution of the trust. . . ." The trustees were infeft on the disposition at the time of the passing of the Conveyancing Act, 1874. In 1880, the trustees disposed the estates to the testator's only son, who had attained majority, and he was infeft. In 1887, the superior raised an action against him, concluding for declarator that, in consequence of the death of the testator, "who was the vassal last vest and seised," a casualty of one year's rent of the lands became due at the date of his death, and for payment. The defender tendered a casualty of relief. **Held** that the trust was one for conveyance to the defender as heir, and not one affecting his radical right as heir, and that the defender, being the heir of the last entered vassal, was only liable for relief duty.

Duke of Atholl v Menzies, 1890, 17 R. 733; 27 S.L.R. 595.

(127)

—Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887, sec. 1.

The testamentary trustees of the last-entered vassal in certain lands were directed to retain the residue of his estate including these lands until his eldest child, if a male, should attain the age of twenty-one, or, if a female, should attain that age or be married, and on the arrival of that period, if the truster then had a son or sons surviving, to hold the lands for behoof of his eldest son, and failing him before attaining the age of twenty-one, for behoof of his next eldest son on his attaining that age, and so on for his sons in the order of seniority. By a codicil the truster gave his widow a liferent of the lands, and postponed until her death the conveyance of the lands to the son who should be entitled to take them. In the event of failure of all the truster's issue under age, there was a bequest of residue, including the lands, to the truster's sister, whom failing to her children equally among them. The truster was survived by his widow and by two sons, the elder of whom was over twenty-one at his father's death. The trustees having made up a title to the lands by notarial instrument, duly recorded in the Register of Sasines, the superior called upon them for payment of a composition of a year's rent in respect of their implied entry. In a special case the Court found that the trustees were liable in relief duty only, **holding** that under the terms of the trust they had no power to introduce a stranger to the investiture, and, accordingly, that the truster's heir (even assuming that vesting was postponed till the widow's death) had the ultimate beneficial interest in the lands, in

the sense of sec. 1 of the Conveyancing Amendment Act, 1887.

Duke of Argyll v Graham's Trustees, 1912 S.C. 566; 49 S.L.R. 442; 1912, 1 S.L.T. 265.

(128)

—By a trust disposition inter vivos, executed in 1881 and duly recorded in the Register of Sasines, A, who was the entered vassal in certain lands, conveyed these lands to himself and B as trustees. The trustees were directed to hold for the truster's daughter in liferent, for her alimentary use only, and for such of her lawful children as she should appoint in fee. In the event of the daughter dying without issue, the trustees were directed to convey the subjects to the truster or to his heirs or assignees. A died in 1888, survived by his daughter, who was his only child and unmarried. In an action by the superiors against B, as the sole surviving trustee, claiming a composition in respect of the death of A and the implied entry of the trustees, B tendered relief duty only. **Held** that the superiors were entitled to a composition, in respect that the trustee was a singular successor impliedly entered with the superiors, and that as he did not hold under directions whereby the heir of the last entered vassal had necessarily the ultimate beneficial right to the estate, the right of the superiors to a composition was not excluded either by the law apart from sec. 1 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887, or by the provisions of that section.

Magistrates of Edinburgh v Irvine's Trustee, 1902, 4 F. 937; 39 S.L.R. 737; 10 S.L.T. 180.

(129)

—Moir primus was infeft and entered as vassal in certain lands by virtue of a charter of resignation, the destination in which was to himself and the heirs whatsoever of his body. Moir primus died in 1871 and was succeeded in the lands by Moir secundus, who took infeftment but did not enter. Moir secundus, who was never married, died in 1872, leaving a trust disposition and settlement whereby the lands were conveyed to trustees to hold for the liferent alimentary use of his brother James, and on his death to make them over to his heir in heritage being an heir of his body, whom failing to the testator's other brothers, called in their order, and their heirs in heritage being heirs of their bodies, whom all failing to the truster's heir in heritage whomsoever. The trustees had power to sell the whole or any part of the lands. James, who had a family of sons and daughters, was heir in heritage both of Moir primus and of Moir secundus. The trustees completed a title to the lands by notarial instrument, recorded in 1873, and became impliedly entered by operation of the Conveyancing Act, 1874. The superior claimed a composition from the trustees in respect of the death of Moir

primus and of their implied entry. The trustees objected that relief duty only was due. **Held** that the superior was entitled to a composition, in respect that the infettment and entry of the trustees created a new investiture under which they presently held the fee of the estate for beneficiaries other than the heir of the testator, although by a change of circumstances he might come to have an interest in the fee as a beneficiary, and that the right of the superior to a composition was not excluded by sec. 1 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887.

Moir's Trustees v Duke of Argyll, 1903, 6 F. 218; 41 S.L.R. 174; 11 S.L.T. 551.

(130)

—Trustees holding under charter by progress—Entry of trustees completed before 1874—Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887, sec. 1.

Held that when the superior in a blench holding has not received payment or a tender of the (illusory) relief duty on an implied entry by an heir, he is not precluded by the implied entry from recovering during the heir's lifetime a casualty of composition from a disponee of the heir who has recorded his disposition and obtained an implied entry.

Sec. 1 of the Conveyancing Amendment Act, 1887, limits the liability of trustees holding for an heir in cases where they had entered with the superior before the Act, or should subsequently enter, to relief duty, and, relief duty being paid, allows the heir thereafter to obtain an entry without payment of relief duty. **Held** that the section did not apply to a transaction completed under the law in force before 1874 by the entry of trustees under a charter from the superior.

Sutherland v Tait's Trustees, 1902, 5 F. 90; 40 S.L.R. 135; 10 S.L.T. 398.

(131)

—Trust merely burden on fee.

In 1836 the heir then in possession of an estate under a fee simple destination, dated in 1783, in favour of a series of heirs varying in some respects from the legal order of succession, on the narrative that he had resolved to execute a new settlement of his lands and estate, conveyed, *mortis causa*, the estate to his children nominatim and to the survivors or survivor of them, in trust for the purpose of managing the estate and of dividing the rents among themselves so long as one or more of them existed, and at the termination of the trust "then to and in favour of my heir-at-law at that time in fee." It was further provided that, if it should happen that the last survivor of the children was also the truster's heir-at-law, then, or if that event should not happen, then on the death of that last survivor, the trust should come to an end, and the subjects fall and belong to the truster's heir-at-law at the time of that event. The trustees were further given ordinary powers of administration, but they were prohibited from burdening or sell-

ing the subjects. On the death of the granter in 1852, A, his eldest son, completed his title by precept of *clare constat* as heir of provision to his father under the deed of 1783. The trustees were also infeft under this trust disposition in terms of the precept contained in the deed, which directed sasine to be given to them "in trust as trustees for the ends and purposes, and under the declarations, burdens, conditions, and provisions before specified, and upon the termination of this trust . . . then to my heir-at-law at that time in fee." A having died in 1875, the superior brought an action against the sole surviving trustee under the deed of 1836, concluding for declarator that on A's death a casualty of a year's rent became due by the defender as a singular successor of the last vassal, and impliedly entered with the superior in virtue of the 4th section of the Conveyancing Act of 1874. **Held** that the trust which was created by the deed of 1836 was purely temporary in its nature, and a mere burden on the fee of the estate, which was vested in A, and on A's death passed into his *hereditas jacens*.

In another action by the superior founding upon a *mortis causa* disposition of other subjects granted by the vassal of even date with the former, where the trustees were empowered to sell the subjects conveyed for the benefit of creditors, with a direction, in the event of any of the lands remaining unsold, to convey them to the testamentary trustees in similar terms with the first, a similar judgment was pronounced.

Earl of Home v Lyell, 1887, 15 R. 193; 25 S.L.R. 141.

(132)

Trust for entail on truster and other heirs of existing investiture—Propulsion of fee to heir apparent.

A, the heir under an existing investiture, who had made up title and paid a casualty of relief, created a trust for the purpose of, by means of an entail, (1) burdening with fettering clauses and certain ultimate destinations the radical right of fee vested in him as his uncle's heir; and (2) restoring the estate thus burdened to him and the other heirs of investiture, a proceeding which did not operate a displacement of the investiture already existing. Thereafter he executed a deed of propulsion of the lands in favour of his own heir-apparent and the other heirs specified in the deed of entail. **Held** that A was not liable to pay a casualty of composition.

Duke of Sutherland v Matheson, (O.H.) 1903, 11 S.L.T. 372.

(133)

Trust for payment of debts—Act 1874, sec. 4, sub-secs. (1) and (3).

Held (by Lord Kinnear, Ordinary) that the infettment of trustees under a trust disposition for payment of debts with power of sale does not divest the granter of the feudal fee, and that an implied entry obtained by

the trustees by recording the disposition does not entitle the superior to a casualty.

Marquis of Huntly v Earl of Fife, 1885,
14 R. 1091; 23 S.L.R. 234.

(134)

—Trust not for the heir of investiture.

By an inter vivos trust disposition dated in 1810, a proprietor (not entered with the superior) of lands inherited from an ancestor who was a singular successor of the last entered vassal, and who held an *a me* infestment unconfirmed, disposed the lands to trustees for payment of debts and for payment of annuities to himself and his wife for implementing the provisions of any settlement left by him, and finally for reconveyance to himself or his heirs of the lands not sold. Power was given to the trustees to sell with the grantor's written consent. In 1815 the trustees, having obtained decree of adjudication in implement against the trustor's heir, and having been infest thereon, were entered with the superior as trustees, for the purposes of the trust deed only, by a charter of sale, adjudication, and confirmation, which, *inter alia*, expressly confirmed the infestment of the trustor's ancestor. The trustees paid composition to the superior. In 1860 they granted a disposition of the lands not sold in favour of the trustor's heir-at-law, who was infest thereon, and by the Conveyancing Act, 1874, obtained an entry with the superior. The last surviving trustee having died in 1863, the superior claimed composition. The vassal tendered relief duty. **Held** that the vassal was bound to pay composition, in respect (1) that if the charter of confirmation obtained by the trustees created a new investiture, it did not operate as an enfranchisement of the trustor's heirs, and that the heir to whom they conveyed was a singular successor to them; (2) that if the trust title did not create a new investiture, but was a mere burden upon the trustor's right, the vassal was not the heir of any investiture recognised by the superior, as his ancestor's infestment had not been confirmed prior to the charter of confirmation obtained by the trustees, and as the confirmation of it contained in that charter was to be regarded as confirming it only to the limited effect of validating the trustees' title.

Johnstone v Duke of Buccleuch, 1892, 19 R. (H.L.) 39; [1892] A.C. 625; 29 S.L.R. 915.

(135)

Trust for distribution—Act 1887, sec. 1.

A conveyed his lands by *mortis causa* disposition to trustees, with directions to realise them and divide the proceeds. B, who was his heir in conquest, in 1869 obtained a writ of *clare constat* and disposed the lands to the trustees for the purposes of the trust. On B's death in 1888 the trustees denuded in favour of C, who was in point of fact B's heir. **Held** that the casualty due on B's death was a composition, the Act of 1887 not contemplating the case where the property was originally conveyed to trustees,

not to be handed on to the disponent's heir, but for division among his beneficiaries.

Magistrates of Edinburgh v Melvin, (O.H.)
1901, 9 S.L.T. 197.

(136)

Inter vivos trust—Act 1887, sec. 1.

A vassal, entered in certain lands in 1881, disposed them to trustees by inter vivos deed for payment of the rents to his wife during her life and thereafter to his daughter during her life, and after her death to convey them to such of her children or their issue as she might appoint, and in the event of the daughter dying without issue to convey them to the trustor or his assignees. The deed was registered in the Register of Sasines. The trustor died in 1888. **Held** that the trustees were liable to pay a composition on the death of the trustor, the last entered vassal, the Act of 1887 having no application to the circumstances.

Magistrates of Edinburgh v Wright, (O.H.)
1902, 9 S.L.T. 318.

(137)

Enfranchisement of destination—Heir of entail.

An institute under a deed of entail obtained an implied entry with the superior by the Conveyancing Act, 1874, and not being an heir *alioqui successurus* became liable in composition. The superior discharged his claim on payment of relief duty. On the next heir of entail—who was not heir of line—obtaining an implied entry the superior claimed composition. **Held** that the vassal being the heir of investiture was only liable in relief duty.

Opinion (per Lord Kinnear) that an implied entry must be subject to all the conditions and reservations by which the superior would have been entitled to qualify an express entry by progress.

Lord Advocate v Moray, 1894, 21 R. 553;
31 S.L.R. 432; 1 S.L.T. 573.

(138)

—Heir of entail.

In 1849 a vassal, on payment of a composition, obtained from his superior a charter of certain lands in favour of himself and his heirs and assignees whomsoever, under which he was duly entered. In 1851 he entailed the lands. The destination in the deed of entail was to himself and the heirs male of his body, whom failing, his younger brother and the heirs male of his body, whom failing, the heirs female of the body of the entailor's grandfather; and after various other substitutions there followed this clause, "The eldest heir female and the descendants of her body always excluding heirs portioners." The deed contained a double manner of holding, and the entailor took infestment *de me* under it, and held the lands base of himself as mid-superior. In 1860 he propelled the fee of the lands to his only son by disposition in favour of him and the other heirs of entail. The entailor died in 1861, survived by his son, who in 1872,

on payment of a casualty of relief, obtained from the superior a writ of confirmation, which confirmed the deed of propulsiion, but also contained a clause of reservation by which the superior reserved to himself and his successors any claim which he or they might have to a composition "whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered by me or my forebears." The son died in 1883 without issue, and was succeeded as heir of entail by his cousin, who would also have been the heir under the investiture of 1849, and who obtained an entry upon payment of relief. On the cousin's death in 1907 without issue, a variance for the first time arose between the line of succession under the deed of entail and that under the deed of 1849; the cousin's sister, Miss R., succeeding to the whole lands as heir of entail, while under the deed of 1849 she would have succeeded merely as an heir portioner along with her two sisters. The superior having claimed from Miss R. a composition on her entry to the pro indiviso two-thirds of the lands which, but for the entail, would have fallen to her sisters, **held** that the tailzied destination had not been enfranchised either by the writ of confirmation of 1872, with its clause of reservation, or by the entry of the cousin, and that as Miss R. was not the heir to two-thirds of the lands under the enfranchised investiture of 1849, she was liable in payment of a composition in respect of her entry thereto.

Duke of Argyll v Riddell, 1912 S.C. 694;
49 S.L.R. 342; 1912, 1 S.L.T. 221.

(139)

Partial insertion of destination contained in procuratory—Whether whole destination enfranchised.

By disposition and settlement A disposed his estate, after the heirs of his body, "to B, and the heirs whomsoever of his body; whom failing, to my own nearest heirs whomsoever." A having no heirs of his body, B succeeded to the estate, and made up his title by charter of resignation in 1856. Though the procuratory in A's deed was in accordance with the destination, the charter which B took was only in favour of himself and the heirs whomsoever of his body. Not being A's heir of line, B paid a composition on his entry. On B's death in 1881 without issue, C, as A's nearest heir whomsoever, made up a title to the estate by recording a decree of service as nearest lawful heir of provision in special of B under A's deed. The superior claimed from C, in respect of the implied entry thus obtained, a composition, on the ground that by his charter of resignation of 1856 he had enfranchised no more than the destination inserted in it, and therefore that C was not heir of investiture, but a singular successor, so far as he, the superior, was concerned. C maintained that he was liable in relief duty only, which he tendered. In a special case presented by C and the superior, in which the latter admitted that by recording the service as nearest heir

of provision to B under A's deed and the titles following thereon C was duly entered, **held** that on that assumption relief duty only was due. **Opinion** (per Lord Shand) that acceptance of resignation on A's procuratory enfranchised the whole destination therein contained though a portion only of it was inserted in the charter of resignation.

Heriot's Hospital v Carnegie, 1884, 12 R. 30; 22 S.L.R. 29.

4. COMPOSITION.

(1) NATURE OF AND RIGHT TO COMPOSITION.

(140)

Whether composition a debitum fundi—Poining of the ground.

The reddendo clause in a feu contract concluded thus: "Doubling the said feu-duty at the entry of each heir or singular successor, exclusive of the current year's feu-duty . . . which sums of entry-money and interest thereupon shall be and are hereby declared to be real burdens on the said subjects . . . and may be sued for and recovered as debita fundi." **Held** that under the special terms of the contract the compositions payable upon the death of a vassal and entry of a singular successor, validly constituted, were debita fundi, and so might be recovered by a poining of the ground after the feu had passed to singular successors. **Opinions reserved** whether, apart from special stipulations, composition on the entry of a singular successor was truly a casualty of superiority so as to be a debitum fundi.

Morrison's Trustees v Webster, &c., 1878,
5 R. 800; 15 S.L.R. 559.

(141)

Held that a composition due to a superior on the death of a vassal, where the entry is taxed by the feu contract, is a debitum fundi, and not merely a personal debt of the succeeding vassal.

Stewart v Gibson's Trustee, 1880, 8 R. 270; 18 S.L.R. 140.

(142)

Casualty—"Casualty of superiority."

Opinion (per Lord Kinnear, Ordinary) that the expression "casualties of superiority" in a feu disposition dated in 1701 did not include composition, in respect composition is not in its origin and character a "casualty," and was not commonly so spoken of at that period.

Stuart v Jackson, 1889, 17 R. 85; 27 S.L.R. 178.

Cf. Lord Kinnear's opinion in Lord Advocate v Moray, 1894, 21 R. 553, at p. 561 (last line); 31 S.L.R. 432; 1 S.L.T. 573, No. 137, supra; also Farquharson v Caledonian Railway Co., 1899, 2 F. 141; 37 S.L.R. 94; 7 S.L.T. 238. HERITABLE PROPERTY, No. 306.

(143)

Casualties of superiority held to include composition.

Hill's Trustees v Kay's Tutor, 1902, 4 F. 572; 39 S.L.R. 392; 9 S.L.T. 492, No. 178, *infra*.

(144)

Right to casualty in question between liferenter and fiar.

In a question between a fiar and a liferenter, held that the fiar had right to a sum paid under a feu contract every twenty-fifth year in lieu of casualties; and also to grassums falling due every twenty-fifth year from lands disposed under contracts of ground annual, as being of the nature of extraordinary profits.

Ewing v Ewing, 1872, 10 M. 678; 44 J. 375; 9 S.L.R. 416.

(145)

Composition payable by corporation — Act 1874, sec. 5.

By disposition dated and recorded in 1868, a vassal, who was entered with his superior, disposed his feu to a corporation. The vassal died on 5th March, 1877. No composition was demanded from the corporation by the superior till 1900, when a composition was demanded from and paid by the corporation. In October, 1902, the superior brought an action against the corporation for payment of a second composition, pleading that the first composition was payable on 5th March, 1877, the date of the death of the last entered vassal, and, consequently, that a second composition was due twenty-five years thereafter, i.e., 5th March, 1902. Held (1) that the composition demanded and paid in 1900 was not "payable" within the meaning of sec. 5 of the Conveyancing Act, 1874, till it was demanded, and, consequently (2) that a second composition was not due till twenty-five years thereafter, i.e., till 1925.

Governors of Heriot's Trust v Caledonian Insurance Co., 1904, 6 F. 442; 41 S.L.R. 313; 11 S.L.T. 688.

(146)

Writ of confirmation—Declaration that subjects shall be in non-entry after twenty-five years—Act 1874, sec. 4 (4).

In 1871 the superior of certain lands granted to their vassal, the Carron Company, a writ of confirmation which contained a declaration "that, notwithstanding the granting hereof, the subjects . . . shall fall and be in non-entry at the end of twenty-five years thereafter, so long as the subjects shall be held by the said Carron Company." In an action for declarator and for payment of a casualty, the vassal maintained that the superior, according to the law prior to the Conveyancing Act of 1874, would not have been entitled to bring a declarator of non-entry, and so could not take advantage of the proviso contained in sec. 4 (4) of the Act, in respect that he still had the company as entered vassal, and that the clause in the writ of confirmation, by declar-

ing what was feudally impossible, made no difference. The Lord Ordinary, holding that he was bound to give effect to the true intention and meaning of the parties in granting and accepting the writ of confirmation, which appeared to be to provide for a casualty of composition being payable every twenty-five years, allowed a proof as to the intention of the parties when the writ was granted.

Burns v Carron Co., (O.H.) 1905, 13 S.L.T. 560.

(2) MEASURE OF COMPOSITION.

(147)

On which year's rent casualty to be calculated—Act 1874, sec. 4.

A proprietor of heritable subjects was infeft in them by registration of his disposition in 1873. At this date the last entered vassal had been dead for several years, although the fact was not then ascertained. In 1891 the superior raised an action against the proprietor in statutory form for payment of a casualty, it being by this time ascertained that the last entered vassal had died before 1873. Held that the measure of the casualty was the rent of the year from Whitsunday, 1874, to Whitsunday, 1875, the year in which the statute giving the vassal an implied entry was passed.

Houstoun v Buchanan, 1892, 19 R. 524; 29 S.L.R. 436.

(148)

In an action by a superior against a singular successor of a body of trustees for payment of a composition, as due under sec. 5 of the Conveyancing (Scotland) Act, 1874, upon the expiration of twenty-five years after the last payment of a composition by the trustees, held that, in determining the year of which the rental was to be taken for ascertaining the amount of the composition, the twenty-five years fell to be reckoned from the date when the last composition was paid, and not from the date when it became exigible.

Trades Maiden Hospital v Mackersy, 1907 S.C. 73; 44 S.L.R. 45; 14 S.L.T. 400.

(149)

Date of death of last entered vassal unknown—Rental of year of implied entry as basis of casualty.

A purchaser of lands was infeft in 1877. The last expressly entered vassal paid a casualty and was entered in 1811. The exact date of his death was unknown, but it was prior to 1859, since when there had been no infeftment in the lands until that of 1877. Held that the casualty payable by the purchaser must be computed on the basis of the rent of the year 1877, and not the rent of the year in which the last entered vassal died.

Observed that had there been any implied entries interposed between the date of the death of the last vassal who paid a casualty, and the implied entry of the vassal from whom the casualty was demanded, the year

to be taken would probably have been that of the first intermediate implied entry.

Steuart v Watt, (O.H.) 1899, 7 S.L.T. 253.

(150)

———Year of implied entry—Interest on unpaid composition.

The rent of the feu as at the date of the death of the last entered vassal, and not as at the date of the action of declarator and payment, is the measure of the casualty due by a vassal entered by virtue of the implied entry provided by the Conveyancing Act, 1874, but interest is due only from the date of the summons in the action.

Steuart v Murdoch & Rodger, (O.H.) 1882, 19 S.L.R. 649.

(151)

———Year of implied entry—Lands let on lease—Sublease at increased rentals.

Held that the year the rent of which is to be taken as the amount of the casualty due in respect of an implied entry under the Conveyancing (Scotland) Act, 1874, is the year of the implied entry, and not the year in which the casualty may be demanded.

At the date at which the casualty due in respect of an entry fell to be estimated, the lands were under a lease and the tenant had sublet them at an increased rental. **Held** that the rent payable under the lease, and not that under the sublease, was to be taken as the measure of the casualty.

Campbell v Stuart, (O.H.) 1884, 22 S.L.R. 292.

(152)

———Year of implied entry.

In an action for payment of a casualty the only question was as to the year the rental of which should be taken as the measure of the casualty. The pursuer maintained that the vassal was impliedly entered subsequent to the death of the last vassal who paid a casualty. **Held** that the casualty fell to be reckoned on the rental of the year of implied entry of the vassal with the superior, and not of the year when the last-entered vassal died, or when the casualty was first demanded.

Campbell v Duncan, (O.H.) 1913, 1 S.L.T. 260.

(153)

———Year of implied entry.

In an action for payment of a casualty of composition, **held** that the rental of the year of the defender's infettment afforded the proper basis for estimating the casualty.

Earl of Morton v Callander, (O.H.) 1914, 2 S.L.T. 383.

(154)

“Year’s mail”—Valuation roll—Lands used for asylums.

The Barony Parish Parochial Board acquired, in 1871, the lands of Woodilee, on which they built a large pauper lunatic asylum, capable of accommodating 520 patients. They gave notice to the superior of the property of their intention to redeem the casualties of superiority under the 15th section of the Conveyancing Act, 1874. The

entry was untaxed, **Held** that, in estimating the redemption price, the amount of rent which, one year with another, the subjects might be expected to yield was to be taken as the guide, but that, in arriving at that amount, it was legitimate to consider that the subjects had a value to a particular person or body of persons which it had not in the open market, and that that value had a degree of permanency. **Opinion** (per Lord Craighill and Lord Rutherford Clark) that the valuation roll ought to be taken as the basis of value.

M’Laren v Burns, 1886, 13 R. 580; 23 S.L.R. 398.

(155)

———Valuation roll not conclusive.

In an action by a superior for declarator and for payment of a casualty of composition, where the parties were at issue as to the amount payable, **held** that the valuation roll was not conclusive as to the annual value of the lands, and that the superior was entitled to a proof.

Duke of Argyll v Bullough, 1904, 6 F. 949; 41 S.L.R. 737; 12 S.L.T. 258.

(156)

Building or agricultural value—Act 1469, c. 36.

A vassal disposed a piece of pasture ground for building purposes in consideration of a ground annual. The purchaser before building tendered to the superior the redemption price of the casualties of superiority which were untaxed, calculated on the agricultural rent of the land. The superior maintained that the price ought to be calculated on the annual value of the land as building ground. **Held** that the yearly mail of the subjects at the date, as defined by the Act 1469, c. 36, was their agricultural value.

School Board of Neilston v Graham, 1887, 15 R. 44; 25 S.L.R. 51.

(157)

———Act 1469, c. 36—Conveyancing (Scotland) Act, 1874, sec. 15.

A co-operative society purchased a lot of ground with buildings thereon in a street in a town, and demolished the buildings with a view to the erection of new premises for themselves. When the ground was vacant, except for the foundations of the new buildings, the society brought an action against their superior under the Conveyancing (Scotland) Act, 1874, for redemption of the casualties. They tendered as the redemption price £26 1s. 3d., which sum was reached on the basis of taking the rent which, as the pursuers averred, a builder or contractor would probably give as rent for the ground as vacant ground to be used as a store yard. **Held** that in calculating the “year’s mail” within the meaning of the Act 1469, c. 36, the ground was to be regarded as building ground, and that, as on the evidence £67 10s. would have been a fair subfeu-duty, that sum, together with 50 per cent. added in

terms of sec. 15 of the Act of 1874, viz., £101 5s., was the amount payable for the redemption of the casualties.

Pollokshaws Co-operative Society v Stirling-Maxwell, 1906, 8 F. 638; 43 S.L.R. 375; 13 S.L.T. 781.

(158)

Mineral rents—Whether to be included in valuing composition.

Held that in estimating the composition payable to a superior for an entry the annual value of the minerals in the course of being worked falls to be included in the rental.

Allan's Trustees v Duke of Hamilton, 1878, 5 R. 510; 15 S.L.R. 279.

(159)

Minerals let for term of years at fixed rent.

Where minerals were let for a term of years at a fixed rent, and were only being worked to a small extent, held that the actual rent was to be taken as the basis of the composition due to the superior, and the vassal was not entitled to have the value of the mineral rents capitalised and a percentage on that capital value taken.

Sturrock v Carruthers' Trustees, 1880, 7 R. 799; 17 S.L.R. 562.

(160)

Increased working.

The proprietor of lands died on 8th November, 1872, infest and duly entered with the superior. The trustee under his settlement made up his title by notarial instrument, recorded 9th July, 1873, and sold the lands by disposition, dated 10th, and recorded in the Register of Sasines 15th November, 1876. The entry being untaxed, the superior demanded a composition of a year's rent from the disponees, and on 8th May, 1877, raised an action to enforce his demand. The estate contained minerals, which were being worked to a much larger extent by the disponees than by the last vassal. The Court adopted as the basis for calculating the casualty a sum equal to the year's purchase of the average mineral rents payable for the three years ending Whitsunday, 1874, and took interest on this capital sum at 4 per cent. as the year's rent payable for the composition.

Sivright v Straiton Estate Co., 1879, 6 R. 1208; 16 S.L.R. 718.

(161)

Approaching exhaustion of minerals
—Acts 1469, c. 36, 1669, c. 18, and 20 Geo. II. c. 50.

Held (1) that the measure of the composition payable to a superior for the compulsory entry of an appriser fixed by the Act 1469 at "a zeirs mail, as the land is set for the time," remained the measure of the composition payable to a superior when the right to enforce an entry was given by statute to other singular successors; (2) that the year's rent included the money rent and royalties derived from minerals; (3) that the year's

rent of minerals was the money rent and royalties actually due to the vassal for the year, without regard to the exhaustion of the minerals.

Earl of Home v Lord Belhaven and Stenton, 1903, 5 F. (H.L.) 13; [1903] A.C. 327; 40 S.L.R. 607; 11 S.L.T. 44.

(162)

Unlet shootings.

When shootings are of such value that they might bring a rent if let, their value must be taken into account in computing the "year's mail as the land is set for the time," payable as a composition on the entry of a vassal under the Act 1469, c. 36.

Stewart v Bulloch, 1881, 8 R. 381; 18 S.L.R. 240.

(163)

Machinery in chemical works—Heritable or moveable.

In estimating the amount of casualty due by a vassal to his superior the rule for determining what are fixtures is that applicable to cases between landlord and tenant, and not that which governs cases of heir and executor.

Marshall v Tannoch Chemical Co., 1886, 13 R. 1042; 23 S.L.R. 768.

(164)

Composition payable by railway company
—Mode of ascertaining annual value of part of line.

Opinion that an equitable mode of ascertaining the annual value of a part of a line of railway, for the purpose of calculating the composition payable to the superior, would be to take 4 per cent. on the price paid for the land (excluding severance damages and the price paid in respect of compulsory sale) and in the amount expended on the land in the construction of that part of the line, and to deduct from the percentage so obtained feu-duty and public burdens, and such an amount for maintenance and repair as would naturally fall on the landlord if the subjects were let.

Hill v Caledonian Railway Co., 1877, 5 R. 386.

(165)

Composition payable in respect of land compulsorily acquired for waterworks—Method of computing annual value.

Held that in calculating the amount of composition payable in respect of lands which had been taken compulsorily as a site for waterworks the annual value should be ascertained by taking 4 per cent. on the price paid for the land (excluding severance damages and the extra price paid in respect of compulsory sale) and the amount expended on construction, and deducting from the percentage so obtained feu-duty and public burdens, and the cost of maintenance and repair so far as it would fall on the landlord if the subjects were let.

Campbell v Northern District Committee of Ayrshire County Council, (O.H.) 1904, 12 S.L.T. 160.

(166)

Mid-superiority—Part redemption of sub-feu-duty—Measure of composition due on entry to mid-superiority.

In 1817 a vassal sub-feued his lands for a feu-duty of £20, which was an adequate return on the value of the lands as at that date. The feu-duty was subsequently redeemed to the extent of £19 15s., in virtue of a proviso in the feu disposition, by payment at the rate of twenty years' purchase. On the entry of a singular successor to the mid-superiority in 1908 the superior, on the ground that the existing sub-feu-duty of 5s. was illusory, demanded payment of a composition of one year's rent of the lands, amounting to £936. The singular successor tendered £20, either as representing the original sub-feu-duty, or as representing the existing sub-feu-duty of 5s., plus 5 per cent. on the redemption price paid. **Held** (by a Court of seven judges) that the superior was not entitled to a composition of a year's rent, but was bound to accept the £20 tendered.

Governors of George Heriot's Trust v Paton's Trustees, 1912 S.C. 1123; 49 S.L.R. 852; 1912, 2 S.L.T. 116.

(167)

Nominal feu-duty—Measure of composition due on entry to mid-superiority.

In 1847 lands of the annual value of between £85 and £102 were subfeued for a feu-duty of £1. No grassum was taken. In 1915, when the annual value of the lands was £192 7s., the over-superiors, in terms of the Feudal Casualties (Scotland) Act, 1914, required their vassals, the mid-superiors, to redeem the casualties exigible in respect of their interest in the lands. In an action of declarator at the instance of the over-superiors against the mid-superiors the pursuers maintained that the measure of the composition payable to them was the annual value of the lands in 1915. The defenders maintained that the measure of the composition was the subfeu-duty. Neither party maintained that the composition should be measured by the annual value of the lands at the date of the subfeu. **Held**, by a majority of the whole Court, that in the special circumstances of the case the superiors were only entitled to the sum of £1, the amount of the subfeu-duty, in name of composition.

Mason v Ritchie's Trustees, 1918 S.C. 466; 55 S.L.R. 454; 1918, 1 S.L.T. 351.

(168)

Elusory feu-duty and grassum—Grassum representing value of two combined estates—Measure of composition due on entry to mid-superiority—Rate of interest on grassum.

A vassal, who held adjacent lands from different superiors, subfeued the lands (on which there was a quantity of mature growing timber) as one estate for an unapportioned grassum of £54,000 and an elusory feu-duty of 1s. per annum. An action was brought at the instance of one of the

superiors against the vassal, under the Feudal Casualties (Scotland) Act, 1914, for redemption of the casualties affecting the portion of the estate of which the pursuer was the superior. The defender, who averred that, by combining the two portions of the estate, he had been able to obtain a grassum very much larger in amount than the cumulo grassum or price which could have been got by disposing of them separately, and that part of the grassum represented the value of the timber, maintained that the grassum which he had obtained fell to be ignored, and that the measure of the composition payable to the pursuer was the annual rental of the lands of which he was superior, considered as a separate subject. **Held** (1) that the composition fell to be calculated on the basis of a year's interest on so much of the grassum paid for the whole estate as effeired to the portion of which the pursuer was superior; (2) that, as the growing timber was part of the land for which the grassum had been paid, its value was not deductible for the purposes of the calculation; and (3) that, in the absence of any relevant averments that a different rate should be applied, the rate of interest to be taken was 5 per cent., in accordance with the rule in *Campbell v Westera*, 1832, 10 S. 734, although that rate brought out, in the result, a sum larger than the rental at the date of the subfeu.

Smith-Shand's Trustees v Forbes, 1922 S.C. 351; 59 S.L.R. 322; 1922 S.L.T. 369.

(169)

Casualty stipulated in long lease—"One year's real rent."

Where under a lease for 999 years the landlord was entitled to a casualty of "one year's real rent" at the entry of an heir "in the same way as is used in feu-holdings," **held** that "one year's real rent" meant only a duplicand of the tack-duty.

Buchanan's Trustees v Pagan, 1868, 7 M. 1; 41 J. 4; 6 S.L.R. 1.

(170)

Crown vassal—Redemption of casualties—Feudal Casualties (Scotland) Act, 1914, sec. 5.

Held that the Crown, on entering a singular successor of the last entered vassal in a Crown holding, is not entitled to a composition of a year's rent of the lands, whether such successor takes the lands by legal diligence or by voluntary transfer. **Held** accordingly that, in calculating the compensation payable upon redemption of the casualties of a Crown holding in terms of the Feudal Casualties (Scotland) Act, 1914, where the "highest casualty," in the sense of sec. 5 (1) (a) was a composition, the composition did not fall to be taken as a year's rent of the lands, but was limited to one-sixth of the valued rent.

Lord Advocate v Marquess of Zetland, 1920 S.C. (H.L.) 1; 57 S.L.R. 26; 1919, 2 S.L.T. 269.

(171)

Non-entry—Practice of Barons of Exchequer to remit duties.

Held that it was not a relevant objection to a claim by the Crown for arrears of non-entry duties, that the Barons of Exchequer were in the practice of remitting the duties in similar cases.

Earl of Aberdeen v Lord Advocate, 1874, 18 S.L.R. 726.

5. TAXED ENTRY.

(172)

Entry untaxed in original charter—Entry taxed in charter by progress—Prescriptive possession on later charter.

In a charter of resignation granted in 1843, the entry of singular successors was taxed at double the feu-duty. In the original charter the entry of singular successors was untaxed. The vassal infeft and entered in 1843 having died, his trustees, who were singular successors, were called upon in 1890 to pay a year's rent as composition. They pleaded possession for the prescriptive period upon the charter of 1843. Held that there being disconformity between the original charter and the charter by progress, the former must rule, and that prescription did not apply, there having been no possession inconsistent with the superior's claim.

Rankine v Rollo's Trustees, (O.H.) 1890, 28 S.L.R. 594.

(173)

Stipulation for duplicand of feu-duty every twenty-five years—Whether in full of all casualties.

A feu-contract, dated before the Conveyancing (Scotland) Act, 1874, contained in the dispositive clause a stipulation in the following terms—"Besides making payment of the said yearly feu-duty at the terms after mentioned, the said . . . shall be bound to pay a duplication of the said feu-duty at the expiry of every twenty-fifth year, commencing, &c." The reddendo clause contained a stipulation for the annual feu-duty only. Held that the duplication of the feu-duty was to be regarded as in full of all casualties payable ex lege, although there were no express words to that effect.

Magistrates of Dundee v Duncan, &c., 1883, 11 R. 145; 21 S.L.R. 107.

(174)

Whether taxation of entry of "assignees" applicable to disponees or only to assignees before infeftment.

A vassal who held lands under old charters in favour of disponees, "their heirs and assignees," and by which the duties payable at entry of "heirs and assignees" were taxed at double the feu-duty, obtained in 1858 a charter of confirmation and novodamus. The clauses of confirmation and novodamus were in favour of the vassal, "his heirs and assignees whomsoever, excluding assignees before infeftment." The duties payable at the entry of "heirs and

assignees" were taxed at double the feu-duty. In an action of declarator of non-entry brought by the superior, held (1) that the taxing clause in the earlier charters must be read as applicable only to assignees before infeftment, and not as applicable to disponees; and (2) that the taxing clause must receive the same construction in the charter of novodamus, in respect that it did not appear that the terms of the entry were intended to be altered. Question, whether in the construction of a charter it is competent to refer to the previous negotiations of the parties when a reference to these negotiations is made in the charter.

Magistrates of Inverkeithing v Ross, 1874, 2 R. 48; 12 S.L.R. 21.

(175)

By a feu-contract dated in 1631, a superior feued a certain parcel of lands to three of his kindly tenants and their "aires whatsoever (or assignayes, wha shall not exceed three chalders victuall in yeirlie standant rent)." The superior bound himself to receive the vassals and their heirs in and to the said lands, and also, "ony tenant that shall happen to buy the same frae the saids persons, or ony of them or yr forsd (the buyers yrof not exceeding the rank above wryttine) . . . for payment of tenn pounds money for yr entrie to ilk five shilling land forsaid, and accepting ane new conqueiser yrintill." In 1886, after the feu-right had been more than once sold, the superior demanded a year's rent of the subjects as composition from a singular successor in the feu, entered by implied entry under the Conveyancing Act, 1874. The vassal tendered £10 Scots, and maintained that he was entitled to the benefit of the taxed entry. The only other heritable property belonging to him was a subject in Glasgow, the agricultural value of which was trifling, although it was valuable in other ways. Held (1) that although the superior had no longer an interest to exclude vassals above the rank of three chalders men, a vassal of that rank was yet entitled to claim the benefit of the taxation; and (2) that the defender was entitled to the benefit of the taxed entry, (a) because "assignayes" was intended to include any disponees of the real right after infeftment, and (b) because the agricultural value of their property was the only measure by which the "three chalders victual in annual rent" could be determined.

Duke of Montrose v Provan's Trustees, 1887, 14 R. 378; 24 S.L.R. 276.

(176)

Taxation at different amounts for entries of heirs and singular successors—Lands acquired by corporation—Act 1874, sec. 5.

A municipal corporation was infeft in a feu under a feu disposition in its favour in terms of which the superior had an effectual claim to a casualty on the occasion of each sale or transfer of the feu as well as on the occasion of the death of a vassal. The casual-

ties were taxed, double the feu-duty being payable at the entry of an heir and treble the feu-duty at the entry of a singular successor. **Held** that sec. 5 of the Conveyancing (Scotland) Act, 1874, applied, and that the corporation was liable to pay composition at the end of every fifteen years from the date of the acquisition by it of the feu.

Sec. 5 of the Conveyancing (Scotland) Act, 1874, interpreted.

Milroy's Trustees v Magistrates of Leith, (O.H.) 1911, 2 S.L.T. 514.

(177)

Taxed composition for "successors in office"—School board succeeding to body of school trustees—Singular successors.

In 1810 a feu of a piece of ground in Leith, with a school erected thereon, was granted to nineteen persons nominatim, "and to their successors in office, as trustees, managers, and patrons of the said school," the feu charter providing that so long as the subjects were held for the purpose of a school by the grantees "and their successors in office" the only composition payable should be a composition "of one pound sterling, and that at the end of every twenty-five years." Circumstances in which **held** on a composition becoming due in 1910, that the School Board of Leith were the "successors in office" of the original vassals within the meaning and intent of the charter, and that accordingly, whether they were or were not "singular successors," they were liable only in the taxed composition of £1.

Magistrates of Edinburgh v School Board of Leith, 1915 S.C. 137; 52 S.L.R. 98; 1914, 2 S.L.T. 342.

(178)

Blench holding—"Successors."

The tenendas clause of a disposition of lands bore that the lands were to be held "in free blench farm for yearly payment of one penny Scots money . . . if the same be asked allenarly, in lieu of the entry of heirs and successors and other casualties of superiority." **Held**, on a construction of the whole deed, that the term "successors" in the above clause was to be read as including singular successors, and the term "other casualties of superiority" as including composition, and accordingly that singular successors were relieved from payment of composition.

Hill's Trustees v Kay's Tutor, 1902, 4 F. 572; 39 S.L.R. 392; 9 S.L.T. 492.

(179)

Meaning of "duplicand"—"And further to pay" a duplicand every twenty years.

A feu-contract, by which certain areas of building ground were feued, took the vassals bound to pay a feu-duty of stated amount by equal portions at Whitsunday and Martinmas in each year, "And further to pay . . . a duplicand of the said . . . feu-duty at the termination of every period of twenty years." **Held** (1) that the term "duplicand" meant a sum of double the yearly feu-duty; (2) (per Lord Buck-

master, L.C., and Lord Dunedin, diss. Viscount Finlay and Lord Atkinson) that, on a construction of the feu-contract, the vassal was bound every twentieth year to pay the duplicand in addition to the feu-duty for the year.

Commercial Union Assurance Co. v Waddell, 1919 S.C. (H.L.) 38; 56 S.L.R. 320; 1919, 1 S.L.T. 266.

(180)

—A few charter, besides providing for annual feu-duties of stated amount payable in equal portions at Whitsunday and Martinmas in each year, imposed this obligation on the vassal, "and paying a duplicand of the said feu-duties" at the term of Whitsunday in every nineteenth year "in lieu of casualties, with interest and penalties in case of failure if incurred all as provided with regard to said feu-duties." **Held** (by a majority of a Court of seven judges) that the sum payable by the vassal every nineteenth year as duplicand was a sum equal to twice the amount of the annual feu-duties in addition to the feu-duties for the year.

Adam v Finlay, 1917 S.C. 464; 54 S.L.R. 388; 1917, 1 S.L.T. 235.

(181)

"As also to pay the double of the yearly feu-duty every nineteenth year"—Whether twice or three times the feu-duty due—Discharge—Singular successor.

By a feu-disposition to certain lands with entry at Whitsunday, 1805, the vassal was taken bound to pay a feu-duty of £248 18s. 2d. "yearly at the said term of Whitsunday . . . As also to pay to me," the superior, "and my foresaids, at the term of Whitsunday, 1824, the sum of £497 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the said whole subjects, and also to pay to me," the superior, "and my foresaids, every nineteenth year (counting from the said term of Whitsunday, 1824) the said sum of £497 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the whole subjects above mentioned, and so forth, doubling the said yearly feu-duty every nineteenth year, counting from Whitsunday, 1824, but that only for each nineteenth year as the same comes round." The feu-disposition further bound the superior to enter as vassals the heirs, disponees, or singular successors of the vassal without demanding or being entitled to exact any composition whatever, "in regard that the foresaid feu-duty, together with the double thereof in every nineteenth year, . . . are the agreed and fixed consideration hereby accepted of in lieu of all compositions for the entries of heirs, disponees, and singular successors in the foresaid lands and others." **Held** that the sum of £497 16s. 4d. due every nineteenth year was not in addition to the yearly feu-duty for the year, but included that feu-duty.

In each of the first four nineteenth years,

viz., 1824, 1843, 1862, 1881, the vassals paid £497 16s. 4d., being two feu-duties in all to the superiors. For 1881 the superiors granted a receipt which bore (1) that £248 18s. 2d. had been paid by the vassals as "money feu," and (2) that £248 18s. 2d. had been paid as "double feu." In 1900 the vassal (a singular successor of the vassals of 1881) paid £497 16s. 4d. in addition to the feu-duty of £248 18s. 2d. for the year. The receipt bore that the £497 16s. 4d. was in payment of "casualty" due at Whitsunday, 1900. **Held** (per Lord Stormonth-Darling, Ordinary) (on the assumption that three times the annual feu-duty was due every nineteenth year) that the receipts did not imply a discharge of arrears, and that the arrears might be exacted from a singular successor. **Opinion** (per Lord Moncreiff) that the receipt for 1881 imported a complete settlement of all sums then due to the superior.

Alexander's Trustees v Muir, 1903, 5 F. 406; 40 S.L.R. 316; 10 S.L.T. 563.

(182)

"Double" of feu-duty.

A feu-contract, by which certain building lots were conveyed, provided for an annual feu-duty of stated amount in respect of each lot, payable by equal portions at Whitsunday and Martinmas in each year. The feu-contract imposed this further obligation on the vassals—"as also paying to" the superior "a double of the said respective feu-duties before mentioned in name of composition at the expiry of every twenty-two years from the" term of Whitsunday from which the feu-duty in each case commenced to run. **Held** that the sum payable in name of composition was, in each case, a sum equivalent to double of the annual feu-duty, over and above the half-year's feu-duty due at the term at which the composition fell to be paid.

Governors of George Heriot's Trust v Lawrie's Trustees, 1912 S.C. 875; 49 S.L.R. 561; 1912, 1 S.L.T. 379.

(183)

Meaning of "duplication" — Ground annual.

A contract of ground annual, after stipulating for a ground rent or ground annual payable at two terms in each year by equal portions, proceeded thus—"And also under the real lien and burden of the payment of a duplication of the said ground rent or ground annual in respect of the said subjects in name of grassum therefor at the expiry of every nineteenth year from and after the term of Martinmas, 1877, over and above the ground rent or ground annual payable for the said subjects thereby disposed, and that for the year then current, but for that year only. . . ." **Held** that the sum payable every nineteenth year as grassum was a sum equal to one year's ground annual in addition to the ground annual for the year.

Murray v Bruce, 1917 S.C. 623; 54 S.L.R. 525; 1917, 2 S.L.T. 34.

(184)

Duplicands of Feu-Duties (Scotland) Act, 1920, secs. 4 and 5—Duplicand falling due before passing of Act.

A duplicand became due at Whitsunday, 1920, before the passing of the Duplicands of Feu-Duties (Scotland) Act, 1920. That Act provides that in a case where the superior shall have accepted payment of one year's feu-duty only over and above the feu-duty for the year, the amount of the casualty shall be deemed to be the amount of one year's feu-duty only. The superior had accepted one year's feu-duty as the casualty payable in 1899. **Held** that the superior was only entitled to demand as casualty one year's feu-duty over and above the feu-duty of the year.

Warrender's Trustees v Lauder's Trustees, (O.H.) 1921, 2 S.L.T. 136.

6. REDEMPTION OF CASUALTIES.

(1) CONVEYANCING ACT, 1874, sec. 15.

[For Redemption Price see V. 4 (2), supra.]

(185)

Disposnee of unentered vassal—Entered vassal still alive—Right of disposnee to redeem casualties.

An original feu-disposition granted in 1833, which did not stipulate for payment of any casualty on a sale or transfer of the property, contained a clause excluding subinfeudation, fenced by an irritancy. The vassal was duly infeft. After various conveyances of the feu-right to disponees who did not enter with the superior, a disponee, infeft on a disposition which did not express the manner of holding, raised an action against the superior concluding for declarator that the feu was not in non-entry, the original vassal being still alive, and that the pursuer was entitled to redeem the casualties on payment of a year's rent of the subjects and 50 per cent. additional, under sec. 15 of the Conveyancing Act of 1874. **Held** (1) that the pursuer had a title to sue, the Act of 1874 expressly operating as a confirmation of his infeftment, and giving an implied entry; and (2) that as the superior could not compel an entry except on the death of a vassal, the pursuer was entitled to redeem at the price stated by him.

Morris v Brisbane, 1877, 4 R. 515; 14 S.L.R. 369.

(186)

Disposnee impliedly entered in part of a feu—Right to redeem casualty applicable to his own part.

Held that a proprietor of part of a feu, who was entered with the superior by the operation of sec. 4 of the Conveyancing Act, 1874, was entitled, under sec. 15 of the Act, to redeem the casualty of composition in so far as applicable to his part of the feu, negating the superior's plea that he could only redeem the casualty applicable

to the entire feu, as set forth in the last charter.

Magistrates of Edinburgh v Edinburgh Hoperie and Sailcloth Co., 1878, 6 R. (H.L.) 1; 4 App.Cas. 87; 16 S.L.R. 127.

(187)

Offer to redeem part of lands held of superior—Tender of specific sum or "such other sum as shall be found to be the true amount"—Competency of decree for amount due on all lands held of superior.

The vassals in part of an estate brought an action against the superiors for declarator that they were entitled to redeem the casualties on payment of a certain sum, "or in the event of the defenders establishing any valid objection to the said amount, then of such other sum as shall be found in the process to follow hereon to be the true amount." The superiors stated in defence that the pursuers were their vassals in other parts of the estate, and, accordingly, that the action was incompetent, a vassal not being entitled to redeem the casualties of a part only of the lands held by him of his superior. **Held** that in view of the conclusions of the summons it was competent to grant decree of redemption in respect of all the portions of the estate which the pursuers held of the defenders as superiors.

Aberdeen Land Association v Magistrates of Aberdeen, 1904, 6 F. 1067; 41 S.L.R. 647; 11 S.L.T. 640.

(188)

Two estates held together of one superior—Action by vassal to redeem casualties applicable to one estate.

By feu charter, dated 1730, a superior feued out to a vassal two subjects, consisting of the lands of Colsayseat, and a piece of muir ground, described as adjoining the said lands. The two subjects were separately described in the feu charter, but the muir ground was declared in the tenendas and other clauses of the charter as well as in the precept of sasine, to be part and pertinent of the said lands of Colsayseat. In the reddendo clause the vassal was taken bound to pay to the superiors "for the said lands of Colsayseat and pertinent thereof, and the said piece of muir ground now annexed thereto as part and pertinent thereof, the sum of £14 Scots money (viz., £6 for the said lands of Colsayseat and £8 for the said piece of muir ground annexed thereto) . . . doubling the said feu-duty at the entry of every heir to the said lands with the pertinents."

In an action raised for the redemption of casualties effeiring to the muir ground alone, by the successor to the original vassal in both subjects, **held** (1) that the two subjects did not form separate holdings; and (2) that the vassal was not entitled to redeem the casualties incident to one part of his feu only.

Leslie's Trustees v Magistrates of Aberdeen, 1898, 35 S.L.R. 855; 6 S.L.T. 107.

(189)

Payment of outstanding casualties.

The Conveyancing (Scotland) Act, 1874, sec. 15, which deals with the redemption of casualties by vassals, contains this proviso—"And provided always that before any such redemption, otherwise than by agreement, shall be allowed, any casualty which has become due shall be paid." **Held** (per Lord Dundas, Ordinary) that where agreement has failed and the vassal has brought an action against the superior for redemption of the casualties, the fact that a casualty is due and outstanding at the raising of the action does not make the action incompetent or premature, and that the casualty may be paid at any time before decree.

Pollokshaws Co-operative Society v Stirling-Maxwell, 1906, 8 F. 638; 43 S.L.R. 375; 13 S.L.T. 781.

(190)

Date of redemption.

Held (per Lord Dundas, Ordinary) that the "date of redemption" is the date of signeting the summons in an action for redemption of the casualties.

Pollokshaws Co-operative Society v Stirling-Maxwell, 1906, 8 F. 638; 43 S.L.R. 375; 13 S.L.T. 781.

See also *M'Elroy v Duke of Argyll*, 1902, 4 F. 885; 39 S.L.R. 666; 10 S.L.T. 156, No. 222, *infra*.

(191)

Lands sold—Sale not intimated to the superior.

In an action for redemption of casualties held by Lord Low, Ordinary, and acquiesced in, that a vassal was not bound to redeem the casualties applicable to portions of his feu which he had sold and in which he was no longer vassal, although he had not given notice of change of ownership in terms of sec. 4 (2) of the Conveyancing (Scotland) Act, 1874.

Aberdeen Land Association v Magistrates of Aberdeen, 1904, 6 F. 1067; 41 S.L.R. 647; 11 S.L.T. 640.

(192)

Measure of amount—Progressive feu-duty—Feu-duty not yet exigible—Repayment of expenditure from sub-vassals.

A vassal brought an action for redemption of the casualty of non-entry which was untaxed. A portion of his feu had been sub-feued for a blench duty and a grassum. **Held** that the measure of the casualty applicable to this portion was the actual rent of the land at the date of the raising of the action.

The vassal had sub-feued another portion of the feu for a progressive feu-duty of £26 in the first year, £52 in the second year, £78 in the third year, and £104 a year thereafter. The action was raised in the first year. **Held** that £26 was the measure of the casualty applicable to this portion of the feu.

The vassal had sub-feued another portion of the feu for £50, but no feu-duty was to

be exigible for two years after the date of the feu-disposition. The action was raised in the second year. **Held** that £50 was the measure of the casualty applicable to this portion of the feu.

In certain of his sub-feus the vassal had taken the sub-vassals bound to repay him a proportion of the expenses incurred by him in forming streets. **Held** that this payment did not fall to be taken into account in calculating the amount of the casualty.

Aberdeen Land Association v Magistrates of Aberdeen, 1904, 6 F. 1067; 41 S.L.R. 647; 11 S.L.T. 640.

(2) **FEUDAL CASUALTIES (SCOTLAND) ACT, 1914.**

(193)

Mid-superiority — Nominal feu-duty — Measure of composition due on entry to mid-superiority.

Mason v Ritchie's Trustees, 1918 S.C. 466; 55 S.L.R. 454; 1918, 1 S.L.T. 351, No. 167, *supra*.

Smith-Shand's Trustees v Forbes, 1922 S.C. 351; 59 S.L.R. 322; 1922 S.L.T. 369, No. 168, *supra*.

(194)

Crown vassal—Measure of composition.

Lord Advocate v Marquess of Zetland, 1920 S.C. (H.L.) 1; 57 S.L.R. 26; 1919, 2 S.L.T. 269, No. 170, *supra*.

(195)

Joint action by superiors—Vassal holding adjacent lands from different superiors—Lands subfeued as one estate—Plurality of pursuers—Community of interest—Competency of action—Amendment.

A vassal, who had acquired adjacent lands in feu from different superiors, subfeued the lands as one estate for a single unapportioned grassum with an elusory and unallocated feu-duty. The superiors of the two portions brought a joint action against the vassal for redemption of the casualties affecting each portion. The boundaries between the two portions of the estate were not easily ascertainable, but had been adjusted by the superiors for the purposes of the action. **Held** (1) that a joint action was incompetent, in respect that the pursuers had not a common interest in the redemption of each other's casualties; (2) that the action might be amended by striking out one set of pursuers.

Smith-Shand's Trustees v Forbes, 1921 S.C. 820; 58 S.L.R. 554; 1921, 2 S.L.T. 151.

VI. STIPULATIONS IN FEU RIGHTS.

1. GENERALLY.

(196)

Stipulations introduced in charter by progress—Minerals.

Bain v Duke of Hamilton, 1867, 6 M. 1; 40 J. 4; 5 S.L.R. 2. **MINES AND MINERALS**, No. 59.

(197)

Minerals.

A was infeft upon a feu contract by which certain lands were conveyed to him without reservation of mines and minerals. Upon A's death his son B was infeft in the lands upon a precept of clare constat, which contained an express exception and reservation of the mines and minerals to the superior. Upon B's death his son C, having been infeft in the said lands, sold them. Subsequently D, having served heir in special in the mines and minerals to A, brought an action of declarator of his right to them against the superior and the proprietors of the dominium utile of the lands, on the ground that they still remained in hæreditate jacente of A. **Held** that the exception and reservation of mines and minerals in the precept of clare constat was inept, and did not limit the precept as a warrant for infeftment in the fee of the lands, and therefore that there was nothing in hæreditate jacente of A which D by service to him could take up.

Boyd v Bruce, &c., 1872, 11 M. 243; 45 J. 153; 10 S.L.R. 157.

(198)

Novodamus—Terms of entry.

A vassal who held lands under old charters in favour of dispoones, "their heirs and assignees," and by which the duties payable at entry of "heirs and assignees" were taxed at double the feu-duty, obtained a charter of confirmation and novodamus in favour of "his heirs and assignees whomsoever, excluding assignees before infeftment," in which the duties payable at the entry of "heirs and assignees" were taxed at double the feu-duty. **Held** that the taxing clause must receive the same construction in the charter of novodamus as in the old charter, in respect that it did not appear that the terms of entry were intended to be altered.

Magistrates of Inverkeithing v Ross, 1874, 2 R. 48; 12 S.L.R. 21.

(199)

Obligation to accept feu charter containing clauses usual on the estate—Reservation of minerals to superior.

A person agreed to accept a feu contract containing "the usual clauses inserted in feu contracts in connection with the estates of X." **Held** that the person was bound to accept a feu contract containing a clause reserving to the proprietor the right to work minerals and exempting him from any liability for damage occasioned by sits or draw, or for injuries of any kind caused by working of the minerals to houses, buildings, walls, steam engines, plant or machinery.

Alexander v Ormiston, 1895, (O.H.) 3 S.L.T. 139.

(200)

Obligation to make road—Counter obligations—Superior disabling himself from fulfilling counter obligations—Discharge of obligation—Assignment of obligation.

B's trustees, the proprietors of the estate

of B, laid it out for feuing according to a plan which showed continuous streets and sewers. In 1871 they feued part of the estate to Messrs. Hannay by a feu contract which embodied the plan and contained an obligation by the vassals to make, inter alia, a street and sewer to their eastern boundary, and to allow the superiors and the feuars on their remaining lands to use them; and on the other hand, B's trustees bound themselves to allow the Hannays and their successors to use the streets and sewers formed or to be formed on the remaining parts of the estate, and to insert clauses to secure this in any future conveyance of any parts of their remaining lands. In 1877 B's trustees conveyed to Stevenson the plenum dominium of part of the estate adjoining Hannays' feu on the east, by a disposition unqualified by any obligation or restriction in favour of Hannays' feu. In an action brought by Stevenson against Hannays' successors to compel them to form the street, held that the obligation in favour of B's trustees had been extinguished by their granting the unqualified disposition of 1877. **Opinions**, that if the right which B's trustees acquired as Hannays' superiors for the benefit of their remaining lands had not been lost, the conveyance to Stevenson would have carried with the lands conveyed to him a right to demand implement of the obligation from Hannays' successors.

Stevenson v Steel Co. of Scotland, 1899, 1 F. (H.L.) 91; 36 S.L.R. 946.

(201)

Obligation by superior to take subsequent feuars bound to relieve vassals of certain expenditure — Unfeued ground acquired by railway company under statutory powers—Disposition to railway company containing no clause of relief of vassals.

A superior feued part of his lands to a school board by feu charter, wherein he took them bound to form a road. After stipulating that the vassals should maintain this road until the ground on the opposite side was feued, the feu charter proceeded thus:—"Whereupon the feuars there shall be bound, and I shall take them bound, to pay . . . one-half of the cost of constructing said proposed new road . . . and I shall also take them bound to relieve my said disponees of one-half of the future maintenance thereof." The land on the opposite side of the road was not feued by the superior, but was acquired by a railway company under compulsory powers, and conveyed to them by a disposition in statutory form, in which no clause of relief in favour of the school board was inserted. Certain portions of this ground, having become superfluous, were afterwards sold by the railway company, and feued by their disponees, the feu charters containing no clauses of relief with regard to the road. The school board having brought an action against the superior for damages, held that the superior had

committed a breach of contract and was liable in damages.

Leith School Board v Rattray's Trustees, 1918 S.C. 94; 55 S.L.R. 133; 1917, 2 S.L.T. 247.

(202)

Right of pre-emption—Condition fenced with irritancy—Enforcement against singular successor.

A feu disposition provided that it should not be lawful for the disponee or his heirs and assignees to set or dispose of the subjects until they had first offered to sell them at the same price to the disponer or his heirs and successors under the penalty of incurring an irritancy.

In an action by the superior against a singular successor of the disponee for declarator of the pursuer's right of pre-emption, held that though the irritancy was not valid against singular successors, the right had been validly created a real burden; and decree granted.

Christie v Jackson, (O.H.) 1898, 6 S.L.T. 245.

(203)

Use of plan to interpret obligations.

Opinion reserved as to whether a plan annexed to a feu contract might be used for the elucidation of obligations as well as for the identification of the feu.

Gibson Maitland v Kennedy, 1901, 9 S.L.T. 120.

2. TRANSMISSION OF OBLIGATION.

(204)

Obligation on vassal, his heirs, executors, and successors, conjunctly and severally.

A feu contract bore that the vassal "binds and obliges himself, his heirs, executors, and successors whomsoever, conjunctly and severally," to pay feu-duties and implement certain other obligations.

Held that the personal obligation remained effectual on him and his representatives in perpetuity, notwithstanding that he had disposed the feu to a singular successor, who was duly infeft and entered with superior.

Dundee Police Commissioners v Straton, 1884, 11 R. 586; 21 S.L.R. 410.

(205)

Obligation to build within a certain period—Liability of singular successor.

A, a vassal under a feu contract, conveyed part of his feu by contract of ground annual to B, with and under the burdens and conditions contained in the feu contract, and further under an obligation to erect certain buildings on the ground within one year from the term of entry, in order to secure payment of the ground annual and of the share of the feu-duty, &c., which had been allocated upon the ground disposed, and to maintain the buildings in good order and repair in all time. B bound himself and "his heirs, executors, and representatives whomsoever, and his assignees," to perform these conditions, and they were declared to be real burdens upon the sub-

jects disposed, and appointed to be recorded in the Register of Sasines. B subsequently disposed the subjects to C, and six years after the date of the contract of ground-annual C disposed them to D, the disposition being in each case "with and under the real liens and burdens, conditions, provisions, and others specified and contained in said contract of ground-annual." The trustee upon A's sequestrated estate having raised an action against D, to have it found that he was bound to implement the obligations in the feu contract, and the obligation in the contract of ground-annual, as to the erection and subsequent maintenance of buildings, held (1) that as the pursuer was not a party to the feu-contract he had no title to sue upon it; and (2) that in so far as the contract of ground-annual was concerned, it imposed no personal obligation to erect buildings which was enforceable against a singular successor in the lands, and defender therefore assolvied.

Question, whether the obligation to erect buildings contained in the contract of ground-annual could be made effectual as a real burden.

Marshall's Trustee v Macneill & Co., 1889, 15 R. 762; 25 S.L.R. 581.

(206)

—Liability of personal representatives—Real burden.

A proprietor by feu contract feued certain ground to three partners of a company, "and the survivors or survivor, and the heir of the last survivor," as trustees for behoof of the company, "with and under the burden of the whole conditions, reservations, burdens . . . which are declared to be real burdens affecting the lands conveyed," viz., that dwelling-houses of a certain value should be erected by the above-named vassals within two years upon the lands, and be upheld by them in good order, and insured and rebuilt if burnt down, "and failing such houses being erected . . . then and in that event these presents . . . shall, in the option of the superior, become null and void." After the lapse of the two years the last surviving partner of the company died in possession of the subjects without having implemented the obligation to build, and his widow, who had been appointed sole trustee under her husband's settlement, did not take up the feu. The superior raised an action against her as her husband's sole trustee, concluding to have her ordained to implement the obligation, and failing implement to pay damages. The Court assolvied her from the conclusions of the action, holding (1) that as the obligation was by the express terms of the feu contract imposed solely upon the vassals holding the lands under the contract it did not transmit against the last vassal's personal representative; and (2) that as the conclusion of the summons was for implement of a personal obligation attaching to the defender herself, and no such obligation was prestable, she was not liable in damages.

Opinions that under the terms of the feu contract there was a personal obligation to build imposed upon the vassal in possession of the subjects, and that it might have been enforced by the superior by the ordinary remedies available to him at common law, notwithstanding the option expressly given him by the deed to irritate the feu in the event of the vassal's failure to build.

Opinions that the obligation to build would transmit and be enforceable against any one taking up the feu.

Macrae v Mackenzie's Trustee, 1891, 19 R. 138; 29 S.L.R. 127.

(207)

Obligation to erect building destroyed by fire—Disposition of feu after obligation has become prestable—Liability of old and of new vassal.

An obligation by a vassal under a feu contract, which has once become prestable, cannot be discharged without the superior's consent, even although a new vassal has subjected himself to the same liability by entering with the superior while the obligation is still unperformed.

A proprietor by feu contract disposed certain subjects to a company "and its successors and assignees whomsoever," and under the provision, *inter alia*, "that the company and its foresaids" should be bound to erect buildings of not less value than £15,000, and to uphold buildings of that value in all time coming, and to keep the same insured against fire to the extent of not less than that sum, and in case the said buildings should be destroyed by fire, or part thereof, to rebuild the same or the part destroyed so as to maintain the total value of £15,000. Buildings were erected of the stipulated value, and insured. On 7th November, 1893, they were destroyed by fire, and on the 27th November the superior raised an action against the company for performance of the obligation to rebuild. Before defences were lodged the company, by a duly recorded disposition, conveyed the subjects to a third person, who was thereafter made a party to the action. The company then pleaded that, as they were no longer vassals in the feu, they were not liable in performance of the obligation. Held (1) that the obligation, having become prestable during the company's tenure, continued to be binding on them; and (2) that the company's disponee was also liable, in respect that the obligation was a condition of the grant remaining unfulfilled during his possession of the subjects.

Marshall v Callander and Trossachs Hydropathic Co., 1895, 22 R. 954; 32 S.L.R. 693; 3 S.L.T. 94. Affirmed, 1896, 23 R. (H.L.) 55; [1896] A.C. 223.

(208)

Obligation to erect buildings—Disposition in security by vassal—Disposition qualified by back-letter—Recording of disposition but not of back-letter—Liability of security-holder to implement obligation.

A feu charter contained an obligation upon

the vassal to erect certain buildings within a specified time. Before the obligation was implemented the vassal granted a disposition in security for a loan, the disposition being qualified by a back-letter. The disposition was recorded, but not the back-letter.

In an action by the superior against the security-holder to enforce the obligation, **held** that the defender's right, being in security only, did not render him liable to implement the obligation imposed upon the vassal; and defender *assolizied*.

Patterson v Robertson, (O.H.) 1912, 2 S.L.T. 494.

(209)

Personal liability for damages for non-implementation—Plurality of defenders.

In 1874 a proprietor granted a feu disposition of a piece of ground, subject to the condition that the donee, his heirs and assignees, should be bound within eighteen months to erect buildings of a certain value. It was declared that the condition should be a real burden and be personally binding upon those afterwards deriving or acquiring right to the subjects. **Held** that so long as the condition was not implemented, the disposition imposed a personal obligation on each successive vassal to erect the buildings and liability to pay damages to the superior for non-implementation, and (2) that this liability for damages for non-implementation continued to attach to the person in default and his executors after the property had passed to a new vassal.

Held further, that an action brought by the superior in 1900, when no buildings had been erected, against (1) the vassal in possession, and (2) the executrix of a prior vassal, concluding against the vassal in possession for a decree ordaining him to erect the buildings within a certain time, and failing his doing so, for decree against both defenders, conjunctly and severally, or severally, for the damage sustained by the pursuer through non-implementation, was competent; and (2) that the pursuer was not barred from insisting in the conclusion for damages against the second defender by taking a decree against the first defender *ad factum præstandum*.

Rankine v Logie Den Ltd Co., 1902, 4 F. 1074; 40 S.L.R. 4; 10 S.L.T. 278.

(210)

Obligation to make road.

A stipulation in a feu charter that the feuar should be bound on the superior completing a roadway to pay a proportion of the expense, **held** not enforceable against a singular successor acquiring the feu after the roadway had been completed.

Magistrates of Edinburgh v Begg, 1883, 11 R. 352; 21 S.L.R. 243.

(211)

Transmission in favour of donee of dominion plenum—Obligation to make road.

Stevenson v Steel Co. of Scotland, 1899, 1 F. (H.L.) 91; 36 S.L.R. 946; No. 200, *supra*.

3. BUILDING RESTRICTIONS.

[See BUILDING RESTRICTIONS.]

4. ROADS AND SEWERS.

(212)

Feuar bound to make road in front of feu whenever road made through adjoining ground belonging to different superior—Whether obligation prestable on feuar himself becoming proprietor of a necessary portion of the adjoining ground.

In 1863 a proprietor feued a piece of ground (part of the estate of D), bounded on the north by a proposed road, and on the east by the adjoining estate of K, belonging to a different proprietor, subject to the condition that, in the event (which was then improbable) of a street being formed through K in connection with the proposed road, the feuar should be bound to form and maintain one-half of the said road in front of his feu. In 1864 the feuar, to take advantage of a wall which had been built by the proprietor of K four and a half feet within his boundary, bought from him the strip of ground lying between his feu and the wall, extending northwards from the south-east corner of the feu the whole length of the feu and twice that distance beyond. In 1872 the proprietor of D bought a part of the estate of K, which would have enabled him to form a street through K in connection with the proposed road, had it not been for the intervening strip acquired by the feuar. In an action brought by the proprietor of D against the feuar, concluding, *inter alia*, for declarator that the defender was bound to form a road forty feet wide over the strip, upon payment of such compensation as the Court should fix, **held** (by seven judges) that the defender was under no obligation, express or implied, to make, or allow to be made, a road over the part of K acquired by him.

Paterson v McEwan's Trustees, 1881, 8 R. 646; 18 S.L.R. 475.

(213)

Obligation to form street through ground not part of feu and not belonging to superior.

A vassal was taken bound to form part of a street opposite his feu and continue it through a narrow strip of ground belonging to a third party. The obligation was practically inexecutable, owing to refusal of consent except at an exorbitant price by a third party, owner of the strip of ground. In an action by assignees of the right, in which it was held that the pursuers had no title to sue, *opinions* (per Lord President Inglis and Lord Shand) that if the pursuers had had a title, their claim would have been for damages and not for specific implement.

Moore, &c. v Paterson, &c., 1881, 9 R. 337; 19 S.L.R. 236.

(214)

Obligation to pay share of cost of making road—Personal or real.

A feu charter contained a stipulation

that the feuar should be bound, on the superior completing a roadway, to pay a proportion of the expense. The roadway was completed on 1st October, 1878. In a petitory action brought by the superior in 1883 against a singular successor of the feuar who had acquired the property in 1881, **held** that the claim could not be enforced against the defender.

Magistrates of Edinburgh v Begg, 1883,
11 R. 352; 21 S.L.R. 243.

(215)

Road in fact made by adjoining proprietor—Vassal's obligation limited to repayment and indemnity.

A superior feued certain steadings of ground under an obligation to pay to the superior one-half of the expense of forming and constructing such common sewers or drains as the superior might have already formed, or which he might thereafter form, in a street ex adverso of his feu; and to repay to the superior one-half of the price of the formation of said street so far as already formed. The sewer had been constructed and the street formed many years before by an adjoining proprietor at his own expense, in consideration of a right of access thereby secured to him. The vassal was sued by the superior under the obligation in the feu-contract for one-half of the expense of forming the sewer and street. **Held** that the clauses in the feu contract were clauses of repayment and indemnity, and did not entitle the superior to receive a sum which he had not expended.

McClelland v Robertson, 1876, 13 S.L.R. 570.

(216)

Obligation to maintain roads converted into a money-payment.

By indentures entered into in 1859 a vassal was bound, as the condition of his right to certain lands, to maintain and repair certain causeways. The obligation was repeated in the titles, and was implemented till a period shortly anterior to 1865. The roads were materially changed in their character and in their line, especially by changes effected by the construction of railways, and the amount of traffic upon them had enormously increased. In 1865 the successor of the vassal in the said lands refused any longer to maintain the causeways, and the superior brought an action of declarator and for implement against him. **Held** that the obligation was not extinguished, but that in consequence of the change of circumstances it could no longer be specifically enforced, but must be converted into a money payment.

Magistrates of Perth v Earl of Kinnoull, 1872, 10 M. 874; 44 J. 491; 9 S.L.R. 555.

(217)

Obligation to form pavement—Existence and extent of obligation quoad ground unoccupied by stipulated buildings.

A feu charter provided that the vassal

should within three years from the term of entry "erect and constantly maintain on the said piece of ground buildings of the value of £12,000 at least, which buildings shall consist of a range of four-storey tenements similar to those already built" in the street. The vassal was further taken bound to form and constantly maintain a foot-pavement "in front of the houses to be built on the said piece of ground . . . the foot-pavement being formed within the area of the said piece of ground to the extent of eight feet." After he had erected houses of the character and value specified, the vassal proposed to erect on a part of the ground as yet unbuild on stables of one storey in height. He also proposed that these stables should come to the edge of his ground, without leaving eight feet for a foot-pavement. **Held** that he was within his right in both respects, the Court being of opinion (1) that the feu charter could not be construed to import any restriction on building on the ground feued (except in regard to those buildings the erection of which was stipulated for), and (2) that the buildings which the vassal proposed to erect were not of a character to require him to form a foot-pavement in terms of the second of the clauses above quoted, although if he came to erect buildings of another class his obligation to form the foot-pavement might come into operation.

Cowan v Magistrates of Edinburgh, 1887,
14 R. 682; 24 S.L.R. 474.

(218)

Whether feuar, taken bound to maintain existing sewer, was liable for cost of original construction.

A bank holding a title to a piece of building-ground, ex facie absolutely, but really only in security, feued a portion thereof, taking the vassal bound to pay half the cost of maintaining the portion of the street sewer opposite his feu, which had been constructed by the bank at the real owner's expense. **Held** that the owner, to whom the lands so far as not feued were afterwards reconveyed, had no claim against the feuar for any part of the cost of the original construction of the sewer.

Stewart v Meikle, 1874, 1 R. 408; 11 S.L.R. 211.

5. RIGHT OF ACCESS.

[See SERVITUDE II. 2.]

6. MISCELLANEOUS.

(219)

Reservation of right to all deer found on subjects—Whether it imported right of stalking.

A proprietor in 1737 granted a feu charter of certain lands, shealings, and grassings, inserting in the obligation to infest a reservation to himself and his heirs and successors

of "all the deer that may be found at any time hereafter within the bounds of the said shealings." The precept of sasine in the charter bore that the lands were "to be holden of us for yearly payment, &c., and under the reservation of the deer, mines, and minerals as above mentioned." This reservation was embodied in the titles of all subsequent vassals. In 1882 a singular successor of the original vassal raised an action of declarator that the superior was not entitled "to go on the lands in pursuit or for the purpose of hunting or stalking deer," and for interdict against him, or others having authority from him, so going on the lands. There had been no usage of hunting or stalking deer upon the lands on the part of the superior since the feu right was granted. The Court granted the declarator and interdict, **holding** that, while the reservation might confer a right to deer captured or killed on the lands, it could not be construed as conferring a right of hunting or stalking deer on them.

Hemming v Duke of Atholl, 1883, 11 R. 93; 21 S.L.R. 87.

(220)

Feu to railway company for station—Obligation to stop all passenger trains—Trains subsidised by Government departments—Excursion trains.

The proprietor of land through which a railway had been formed feued to the railway company two acres of ground at C for a feu-duty of 5s., the feu charter containing a declaration that the railway company "shall be bound within twelve months to erect at their own expense on the said piece of ground . . . a station for passengers and goods, at which all passenger trains shall regularly stop, to be called the C station." There followed a clause of irritancy, to take effect in the event of the company discontinuing the use of the station "as a regular goods or passenger station."

A station was erected at C in terms of this contract, at which at first all the trains on the line stopped regularly, but some years after the date of the contract certain new trains were established and subsidised in the public service, under agreements with the Home Office and the Post Office, and these trains stopped at C station only if required. There was also established a summer excursion train on Saturdays at low fares, open to the public at the terminal station only, and stopping at certain places of interest on the line. This train was not advertised in the regular time-tables, and it never stopped at C station. In an action by the proprietor of C as superior, to have it declared that the company were bound to stop both classes of trains at C station regularly, and for implement, **held** (1) that the feu contract imposed a valid obligation on the railway company to stop all passenger trains at C station; (2) that the trains subsidised by the Home Office and the Post Office were passenger trains, which the railway company were bound to stop at the C station; and (3) that special excursion trains not adver-

tised in the time-tables as running regularly were not passenger trains within the meaning of the feu contract.

Burnett v Great North of Scotland Railway Co., 1885, 12 R. (H.L.) 25; 10 App. Cas. 147; 22 S.L.R. 456.

(221)

Privilege conferred on vassal to use vacant ground adjoining feu—Reservation of right to curtail vacant ground by building thereon—Extent of reserved right.

A feued a building stance to B, with the privilege of using a piece of vacant ground behind it, which was bounded on one side by certain brick buildings facing C street belonging to A. The feu contract contained a declaration that, "as the brick buildings are more narrow from back to front than the permanent buildings in C street to be built upon the site of the said brick houses will be when C street is feued, the said back ground will thus be curtailed," and that B should have no claim against A for this restriction. A subsequently feued the back ground and the ground on which the brick buildings stood to C, who applied to the Dean of Guild for warrant to pull down the existing buildings and erect in their place permanent buildings of considerably greater depth than the original buildings. The plans shewed that the proposed new buildings would materially injure the lights and ventilation of the buildings on B's feu. B opposed the application on the plea that the proposed buildings would be an unreasonable encroachment on his rights in the back ground. The Court repelled the plea, on the ground that B's title imposed no limitation on the depth of the permanent buildings, the erection of which it contemplated.

King v Barnetson, 1896, 24 R. 81; 34 S.L.R. 54; 4 S.L.T. 127.

(222)

Feu for special purpose—Superior's right of pre-emption—Clause prohibiting alienation—Tenures Abolition Act, 1746, sec. 10—Redemption at fixed sum.

In 1850 a proprietor feued a piece of ground on the shore of Loch Long for the purpose of the disponent erecting a pier at a cost of £650, and for no other purpose, with power to the disponent to levy tolls at certain specified rates. It was provided that the disponent should not make any other erections than those specified in a relative plan. The feu contract contained a provision that the disponent should be entitled "to repurchase and reacquire" the ground and pier at the term of Martinmas, 1851, or at any term of Whitsunday or Martinmas thereafter, at a price to be fixed by arbiters, but not to exceed £650. In 1897, by which time large extensions had been made to the pier by the vassals which greatly increased its value, the superior gave notice that at Whitsunday, 1902, he was to reacquire the ground in terms of the clause in the feu contract. The vassals, who were singular successors of the original vassals, thereupon raised an action to have it declared that the clause in ques-

tion was not binding on them, or at least not binding in so far as it restricted the price to be paid, and that the superior was not entitled to enforce it, in respect that indirectly it was a clause prohibiting alienation, and so struck at by sec. 10 of the Tenures Abolition Act, 1746, or otherwise that it was illegal, in that it did not stipulate for redemption at the price which the subjects would fetch in open market at the date of redemption. **Held** (1) that the clause was legal, and (2) that as it was a condition of the feu it must receive effect against singular successors according to its terms.

M'Elroy v Duke of Argyll, 1902, 4 F. 885; 39 S.L.R. 666; 10 S.L.T. 156.

(223)

Prohibition of subinfeudation—Disposition a me vel de me not a contravention.

A feu contract dated in 1862 prohibited the vassals from subfeuing the ground or disposing the same "so as in any case to be holden of themselves but allenarly to be holden of" the superior, and declared that all deeds in contravention of the prohibition should be null. It was stipulated that each successor of the vassals should be bound to enter with the superior and complete his title within three months of his acquiring right to the subjects, under pain of nullity of all deeds not recorded within three months; and that in case of failure so to enter, a duplicand should be payable for each year during which there was delay to enter. The original vassal in 1862 (with the view of giving security for a loan) disposed the subjects to a company by an *ex facie* absolute disposition a me vel de me. The disposition was at once recorded by the company, and the company was in possession when the Conveyancing (Scotland) Act, 1874, creating implied entries came into force. The original vassal died in 1882, and the loan having been repaid, his heir obtained a reconveyance of the subjects by a disposition from the company, which he duly recorded. In 1908 the superior brought an action against the heir for payment of duplicands from 1882 onwards, on the ground that the disposition to the company was null, as falling within the prohibition in the feu contract, that consequently his entry following on a conveyance from the company was of no effect, and that the lands, therefore, had been in non-entry since the original vassal's death. **Held** (1) that the a me vel de me disposition of 1862 to the company did not fall within the prohibition in the feu charter against subinfeudation, and, therefore, that the defender had acquired a valid title in 1882 by the disposition from the company, and having recorded it was duly entered with the superior, and was not liable in duplicands for the period subsequent to that date.

Observed that the prohibition and irritancy had the effect, not of rendering any deed or infetment in contravention null ab initio, but merely of enabling the

superior to set aside the deed and infetment if he so chose.

Inglis v Wilson, 1909 S.C. 1393; 46 S.L.R. 979; 1909, 2 S.L.T. 363.

(224)

Feu for a distillery—Right of superior to complain of it polluting a river—Bar.

In 1886 a proprietor entered into a feu contract, whereby she disposed in feu farm to the vassal "All and whole the distillery of M., with the right to take water for the use thereof from the burn of R. by pipes." It was also declared "that it shall not be lawful to nor in the power of the said" vassal "to erect or carry on upon the piece of ground hereby disposed any manufactures or operations which may legally be deemed a nuisance or be dangerous or injurious to the amenity of the neighbourhood, but which declaration shall not apply to the carrying on of the said distillery." In an action raised in 1897 by the superior along with other riparian proprietors to have it declared that the vassal had no right to pollute the burn and a river into which it flowed, by discharges from the distillery, **held**, after a proof, by which the pollution was established, (1) that although the first clause above quoted conferred upon the vassal every right to use the water which the superior had, as the latter was not entitled in a question with lower riparian proprietors to pollute the water, the clause could not be read as meaning that the vassal was to be entitled to do so; (2) that the second clause did no more than disable the superior from objecting to the distillery, as such, as a nuisance; and (3) that the superior was not barred by the terms of either clause of the feu contract from complaining of the pollution of the burn unless the vassal was able to show that it was impossible in the ordinary course of business to carry on the distillery without polluting the burn, and that he had failed to do so.

Question, whether the construction of a feu contract may be affected by the circumstances in which it is granted.

Countess Dowager of Seafield v Kemp, 1889, 1 F. 402; 36 S.L.R. 363; 6 S.L.T. 289.

(225)

Feuar's obligation not to alter weir.

Terms of a feu contract which were held to bar the feuar in an attempt to alter a weir to convey an increased supply of water therefrom to his distillery.

Allan v Campbell, 1881, 18 S.L.R. 707.

VII. RESERVATION OF MINERALS.

(226)

Ambiguity of reservation—Onus of identifying lands.

Superior held bound to prove to which of several parcels of lands a reservation of minerals applied; and also held to have discharged the onus.

Duke of Hamilton v Graham, 1872, 10 S.L.R. 61.

(227)

Reservation first inserted in precept of clare constat.

Boyd v Bruce, 1872, 11 M. 243; 45 J. 153; 10 S.L.R. 157, No. 197, *supra*.

Bain v Duke of Hamilton, 1867, 6 M. 1; 40 J. 4; 5 S.L.R. 2. MINES AND MINERALS, No. 59.

(228)

Construction of titles.

In 1530 a proprietor granted in feu farm part of his estate, "*necnon tantos carbones in carbonariis*" in the remaining portion of the estate as were necessary for the domestic use of the vassal, his heirs and assignees. A charter of confirmation, resignation, and novodamus in 1605 showed that the vassal's right to coal had been extended, the superior granting and confirming to the vassal the lands feued, "*necnon tantos carbones*" in the superior's other lands as should satisfy the vassal, his heirs and assignees, for necessary uses, and to sell or give away at their pleasure. In 1622 the superior feued another part of his estate, reserving to the feuar of 1530 and his successors their right to the coal "*secundum formam ac tenorem eorum originalis infeofamenti*." With the exception of the lands feued in 1622, the dominium utile of the whole estate, including the original feu of 1530, was acquired by an appriser, whose successor in 1708 executed a procuratory of resignation *ad remanentiam*, reserving, however, the lands feued in 1530, but without any mention of the right of taking coal contained in the original feu right, and he was infeft on a charter of novodamus granted in these terms. One of his successors in 1866 obtained from the vassal in possession of the lands feued in 1622 a disposition of the coal therein, and commenced to work the same, when the superior applied for interdict as superior, and as being in right of the vassal to whom the right of taking coal was conveyed by the feu charter of 1530, and in whose favour it was reserved in that of 1622. It appeared that in 1794 the superior had granted a charter of confirmation of the feu of 1622, containing a clause reserving to the superior, as in right of the feuar of 1530, the coal of the lands feued in 1622 and in 1530, "as mentioned in the original infeftments of the same," and that in an action by one of the vassals of 1622 against the superior to set aside this charter it was decided by the Court in 1810 that the vassal was not entitled to object to the insertion of this clause. There had been no active possession of the coal by either party. In a suspension and interdict brought by the superior, **held** (1) that the decision of the Court in 1810 was not *res judicata* so as to preclude the vassal in the feu of 1622 from maintaining that the superior had no right to the coal therein; (2) that the reservation in the charters by progress subsequent to 1794 being in favour of the superior as in right of a third party, it was competent to refer to the original titles in order to interpret the nature and extent of the right; and (3)

that the superior was not entitled to interdict, in respect either that he had failed to establish by the titles that he was in right of the feuar to whom the right to coal was originally granted in 1530, or that the right conferred was not a right of property in the coal entitling him to interdict as in a question with the proprietor of the lands feued in 1622.

Harvie v Stewart, &c., 1870, 9 M. 129; 43 J. 73; 8 S.L.R. 118.

(229)

Reservation of coal and limestone strata—Right to use reserved strata for conveyance of minerals from other mines.

A superior feued certain lands reserving "the coal and limestone within the bounds of the lands, so as it shall be lawful to [him] to set down coal pits, shanks and sinks, and win coal and limestone within the bounds of the lands or any part thereof."

Held (1) that the strata of coal and limestone were excepted from the conveyance to the vassal, and therefore (2) as there were no averments that the coal and limestone were worked out, the superior, as absolute owner of these strata, was entitled to form in them roads for the underground carriage of minerals from other properties.

Duke of Hamilton v Graham, 1871, 9 M. (H.L.) 98; L.R., 2 Sc.App. 166; 43 J. 491.

(230)

Right to convey minerals through strata other than those expressly reserved.

A proprietor granted a feu in the middle of a coalfield reserving right to the minerals, and thereafter leased the whole coalfield, including the coal under the feu, to a coal company, who drove underground levels through the feu for the purpose of conveying coal from the proprietor's lands beyond.

Held that in terms of the reservation of minerals the proprietor and his tenants had right only to the strata of coal and other reserved minerals, and were not entitled to mine in other strata of the feu, and that they were not entitled to use these strata for the purpose of conveying coal from other lands.

Ramsay v Blair, 1876, 3 R. (H.L.) 41; 1 App.Cas. 701; 13 S.L.R. 751.

(231)

Charter of novodamus—Glebe—Foreshore.

In exchange for an old glebe, a new glebe bounded by the sea was acquired by exchange in 1817. The new glebe had originally formed part of a portion of the barony of Grange, known as the 24 acres. In 1613 the 24 acres bounded by the sea had been feued by the proprietor of Grange to Bruce, the coal being reserved by the granter. In 1643 the granter obtained a Crown charter of resignation which contained a grant of the coal in the foreshore as a separate estate. In 1673 the proprietor of Grange, in consideration of a money payment, granted a charter of novodamus conveying the 24 acres (without reservation of

the coal) to Bruce's successor, who in the same year took infeftment upon a precept contained in the charter. In 1904 the right of the minister to the coal in the foreshore ex adverso of the glebe was challenged by the proprietor of Grange in a process of interdict brought by him against the minister's mineral tenants. The complainer founded on the Crown charter of resignation of 1643, which contained a grant of the minerals in the 24 acres as a separate tenement, and contended that the charter of novodamus of 1673 merely gave of new what was given in the feu contract of 1613. The mineral tenants in answer founded on the novodamus of 1673 as conveying the coal in the 24 acres from the proprietor of Grange to Bruce's successor. **Held** that the charter of novodamus of 1673 included the coal, and contained a valid grant by the proprietor of Grange of the 24 acres, without reservation, and that therefore the proprietor of Grange had no title to challenge the minister's right to the coal in the foreshore ex adverso of the glebe.

Cadell v Allan, 1905, 7 F. 606; 42 S.L.R. 514; 13 S.L.T. 10.

(232)

Charter of novodamus reserving coal—Vassal's claim to work coal founded on earlier titles.

By charter of novodamus, in 1708, the superior reserved the coal in certain lands; and in all the titles following upon that charter the coal was in like manner reserved. The coal was not worked until 1875 when the vassal attempted to do so, and the superior brought a note of suspension and interdict against him. **Held** that the vassal could not plead in defence titles prior to 1708, as he was not able to connect himself with these titles.

Lord Belhaven and Stenton's Trustee v Harvie, (H.L.) 1876, 14 S.L.R. 198.

(233)

Effect of sale of superiority to vassal where minerals had been reserved in the feu-charter.

In 1753 the trustees of an entail granted a feu-charter reserving to the entailor and his heirs the mines and minerals, &c. The heir in possession in 1811 appointed commissioners, and gave them authority to sell the superiorities of his lands under the Sales to the Crown Act, 1746. They accordingly sold the superiority of the feu to the vassal by a disposition which narrated their authority to sell the superiorities and disposed the lands themselves, with all right, title, and interest competent to them or the heir in possession. **Held** that this deed did not convey the minerals, which had been created a separate tenement. **Opinions** that if the disposition had conveyed the minerals, the heir of entail's right to challenge would not have been cut off by the negative prescription, and that the vassal would not have acquired right to the minerals by the positive prescription, the nullity of the conveyance as a conveyance of anything but the

bare superiority appearing ex facie of the deed.

Fleeming v Howden, 1868, 6 M. 782; 40 J. 401; 5 S.L.R. 511.

(234)

Construction of disposition—Whether dispositive proprietor of coals on the feu.

In 1796 the Duke of Argyll, who held the plenum dominium of the lands of Campbell of the Crown, disposed in feu the lands of Hillfoot, part of Campbell, to Drysdale, but reserved the coals and coalheughs. Tait acquired the Campbell estate remaining in the Duke. In 1837 Tait's trustee in bankruptcy—on the narrative that he had exposed to sale "the superiority and feu-duty of the lands" of Hillfoot, and that Moir, Drysdale's successor in the feu, had been preferred to the purchase—conveyed to Moir "all and whole the town and lands of Hillfoot . . . all as at present possessed" by Moir and his tenants. No coal had at this time been worked in Hillfoot. The feu-rights and infeftments granted by the disposer's predecessors to feuars were excepted from the warrandice clause. The disposition contained an assignation to an unexecuted precept of sasine in a Crown charter of resignation and confirmation, which Tait had obtained, "in so far as applicable to the lands of Hillfoot thereby disposed, to the end that" Moir "may be more readily infeft and seased in the premises, and also in and to the whole feuduties and other services and casualties payable from the said lands and others above disposed," "surrogating hereby" Moir "in my full right and place of the premises for ever." On the precept assigned Moir was infeft. In 1890 Orr, who had acquired from Tait's trustee in 1860 the lands of Campbell, with a description which included the lands of Hillfoot, and the "coals and coalheughs," raised an action against Moir's testamentary trustees to have it declared that the pursuer was proprietor of the coal in Hillfoot (which still remained unworked), in virtue of the conveyance of 1860. The defenders pleaded the conveyance of 1837. **Held** that the dispositive clause in the deed of 1837 might be read either as a conveyance of the whole lands of Hillfoot or as a conveyance of the superiority merely, and that the narrative on which it proceeded showed that the superiority of the estate feued to the vassal was alone conveyed. (Per Lord Watson)—"When a disposition in implement of sale has been delivered to and accepted by the purchaser it becomes the sole measure of the contracting parties' rights, and supersedes all previous communings and contracts however formal."

Orr v Mitchell, 1893, 20 R. (H.L.) 27; [1893] A.C. 238; 30 S.L.R. 591.

(235)

Whether feu-charter gave full right of property including minerals, or right of servitude only.

The feuars in a burgh of barony acquired their respective steadings of twenty falls of

land under feu-charters, which also disposed in feu farm "ane proportional pairt of our lands of Barrwood, with the rest of the inhabitants of the sd. burgh, as sd. is, gress, moss, meadow, and arable land yrof, effeirand to ane burgess-steading, of the sd. burgh and toune of Kilsyth, presentlie possessed be the inhabitants yrof." There was a separate reddendo applicable to the twenty falls, and to the proportional part of Barrwood. There was a precept for giving sasine in "the forsd. twentie falls of land or yrbys, tenements of land, houses, yards, priviledge of burgesshipe, pairt of Barrwood, with all uyr liberties, and priviledges, pairts, pendicles, and pertinents yrof qtsomever in mainer abune mentioned." The feuars had possessed the lands of Barrwood for more than 100 years. **Held** that the charters gave the feuars the full right of common property in Barrwood, including the minerals.

Baird & Co. v Feuars of Kilsyth, 1878, 6 R. 116; 16 S.L.R. 53.

(236)

Power to "search for and work out" coal—"Shank or open the ground"—"Close or garden."

A feu-charter, dated in 1728, contained a reservation in the granter's favour of the coal under the subjects feued, with power "to search for, work out, and dispose of the said coal, . . . and provided that, in searching for or working said coal, we doe not shank or open the ground within the house, office-houses, closs, or gardens to be built or made upon the said lands." In 1895 a successor of the granter commenced boring operations at a spot which was within thirteen yards of one of the main entrances of the mansion-house built upon the feu, and which was situated in an artificially made and enclosed piece of ground laid out partly in grass and partly in flower beds. The bore was sunk in the part laid out in grass. In a note of suspension and interdict presented by the feuar to have the boring operations interdicted, **held** (1) that "boring" was covered by the expression "opening the ground"; and (2) that the place where the operations were being carried on was a "closs or garden" in the sense of the charter, and was therefore within the prohibited area.

Macdonald v Welsh, 1896, 23 R. 995; 33 S.L.R. 719; 4 S.L.T. 78.

(237)

Reservation of freestone with right to feuar to dig freestone for building on feu—Whether railway bridges and other works within right.

A feu-charter, which reserved the freestone to the superior, gave power to the feuar, notwithstanding the reservation, to dig or work the freestone for erecting "houses and offices, or walls or other buildings" upon the feu, or for making or repairing the roads thereon. A railway company having taken over the feu by compulsory purchase, **held** that it was within the powers of the feuar to dig freestone for

the construction of bridges and other railway works on the feu.

Davidson's Trustees v Caledonian Railway Co., 1895, 23 R. 45; 33 S.L.R. 25; 3 S.L.T. 122.

(238)

Vassal's right to use ground as burying ground—Superior's right to have bodies removed.

Where a feu disposition reserved the coal, **held** that the vassal was entitled to use part of the surface of his feu as a private burying ground, but the owners of the coal would be entitled to have bodies removed if necessary to enable them to use the surface for the purpose of boring.

Welsh v Macdonald, (O.H.) 1896, 3 S.L.T. 304.

(239)

Damage caused to feu by working of minerals—Action by feuar against granter—"All parties not called."

A granted a feu of certain subjects, reserving the minerals, and afterwards leased the minerals. Injury having subsequently been occasioned to the surface of the feu by the workings of the mineral tenants, the feuar raised an action of damages against A. The defender, averring that the injury was due solely to the fault of the mineral tenants, pleaded, "all parties not called." **Held** that the pursuer was entitled to proceed with his action without calling the mineral tenants.

Highgate & Co. v Magistrates of Paisley, 1896, 23 R. 992; 33 S.L.R. 722; 4 S.L.T. 78.

VIII. CLAUSES OF RELIEF.

1. OF PUBLIC BURDENS.

[See also HERITABLE PROPERTY II. 10 (1).]

(240)

Nature of obligation—Construction.

A feu-contract conveyed certain lands to be holden of the superior in feu farm fee and heritage for ever for payment of a feu-duty "in full of all casualties upon the entry of heirs and singular successors, cess, minister's stipend, school salary, and all other burdens whatsoever affecting or which may affect said lands." **Held** that the clause could not be construed as imposing any obligation on the superior to relieve the vassal, but only as limiting the superior's claims against the vassal.

Magistrates of Lanark v Honyman, 1890, 17 R. 1226; 27 S.L.R. 993.

(241)

Right of vassal to relief—Rates levied on subfeuars—Poor rates.

In a feu-charter granted in 1752 the superior came under the following obligation, to "warrant, acquit, and defend this present charter, and infeftment to follow hereon, together with the lands feued . . . and

particularly to free and relieve the said" vassal and his heirs and assignees "of all feu, teind, and blench duties, ministers' and schoolmasters' stipends and salaries . . . and for all cesses, taxations, highway money, and other public burdens whatever, due and payable furth of, or that may anyways be imposed upon the lands and others above mentioned in all time coming, at all hands, and against all deadly, as law will." The vassal subfeued the lands, but did not assign the obligation of relief, and did not bind himself to relieve the subvassals of public burdens. In an action brought by the vassal against his superior for payment of the poor rates paid by the subvassals, **held** that the obligation of relief in the feu-charter was not a warranty, but a contract of indemnity, forming a term of the feudal contract, which could not be separated from the title of the subaltern estate, and that as the vassal had not been and could not be assessed for poor rate on the land subfeued he had no claim against the superior under the obligation of relief.

Latto v Magistrates of Aberdeen, 1903, 5 F. 740; 40 S.L.R. 488; 10 S.L.T. 277.

(242)

———**Contract to grant feu-charter with clause of relief in favour of vassal — No original feu-charter ever granted—Charters by progress without clause of relief.**

In 1764 C and D entered into a contract and agreement whereby C undertook to grant a feu-right to the said D, his heirs and successors, of sixty acres of land, "for yearly payment of £3 sterling . . . and to assign the rents from and after Martinmas 1765, and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, except the said feu-duty, and to make the said public a real burden upon his other lands . . . for the which causes and on the other part the said D, on the said C performing his part of the premises—that is, granting the said feu-contract in the terms above narrated, binds and obliges him, his heirs and successors, to content and pay to the said C, his heirs, executors, and successors whatsoever, the sum of £600 sterling at Martinmas 1765 . . . and to pay £3 of feu at Martinmas, beginning the first year's payment at Martinmas 1765." The deed contained a precept of sasine, on which D took infeftment in May 1776. In 1888 a singular successor of D, who was duly entered with the superior under a charter of confirmation, which did not set forth an obligation by the superior to relieve the vassal of public burdens, raised an action against the superior, who was a singular successor of C, concluding for declarator that the defender as superior was bound to relieve the pursuer of public burdens. The pursuer founded on the deed of 1764 as showing that the obligation to relieve of public burdens was a condition of the feu. It did not appear that a feu-contract was ever granted, or that the £600 was ever paid. **Held** that the contract of 1764 was not a feu-contract, but

merely a personal obligation to grant a feu-contract, and that the obligation to relieve of public burdens was merely a personal obligation, which could not be enforced against a singular successor in the superiority.

Durie's Trustees v Earl of Elgin, 1889, 16 R. 1104; 26 S.L.R. 664.

(243)

Obligation in favour of Crown—Whether right personal to Crown or transmissible.

A Crown vassal conveyed certain lands to His Majesty King George III., "ad perpetuam remanentiam to the effect that the property . . . may be consolidated with the superiority of the same in the person of His Majesty and his royal successors." The disposition contained an obligation on the granter to relieve "His Majesty, and his royal heirs and successors" of certain specified burdens, and of "every other parish or public burden which may be demanded of or from them for or in respect of the lands disposed," and a disposition of lands in warrandice of this obligation. The Officers of Ordnance, who had by statute become vested in the lands, disposed part of them in feu to a subject, providing that the disponee should be similarly relieved of public burdens by the granter of the original disposition, his heirs and successors, and disposed the warrandice lands as in the original obligation. **Held** that the obligation was in favour of the Crown alone, and was not assignable to a vassal.

Orr Ewing v Earl Cawdor, 1884, 12 R. (H.L.) 12; 22 S.L.R. 105.

(244)

Creation of mid-superiority for voting purposes—Liability of mid-superior.

In 1752 the Magistrates of Aberdeen, who held of the Crown, granted a feu-charter of certain subjects to Dingwall, with a clause of relief from public burdens. In 1900 Dingwall's successor in the subjects raised an action against the magistrates founded on the obligation of relief. The magistrates pleaded that the superiority was no longer vested in them, and that accordingly they were not liable in the obligation. It appeared that in 1806 the magistrates had disposed the superiority to Brebner with procuratory of resignation, and that Brebner, having obtained a charter of resignation from the Crown, had then granted to the magistrates a feu-charter whereby he disposed the subjects to the magistrates, to be holden of him for a feu-duty of £1 5s. The feu-duty payable by Dingwall's successor had been redeemed in 1804. Under this charter the magistrates took over all the superior's obligations to feuars. It further appeared that in 1863 the magistrates had granted to Dingwall's then successor in the subjects a writ of confirmation "as his lawful superiors." **Held** that the magistrates alone had the substantial interest in the superiority, and that the action was properly laid against them.

Latto v Magistrates of Aberdeen, 1903, 5 F. 740; 40 S.L.R. 488; 10 S.L.T. 277.

(245)

Liability of successor in superiority — Stipend.

In a feu-contract the superior conveyed certain lands and the teinds thereof to the vassal, and bound himself, his heirs and successors, to warrant the teinds to be free to the vassal from augmentations of stipend. After the dominium utile of the estate had passed through the hands of several successive owners, the successor and personal representative of the original superior refused to relieve the vassal of augmentations, on the ground that no right to enforce the obligation had been transmitted to the latter. The vassal afterwards sold his estate under articles of roup, which provided that £1500 of the price should be consigned and disposed of as follows: — (1) The exposor to take all necessary proceedings for effectuating the claims of relief under the original feu-disposition; (2) in the event of the exposor obtaining total or partial relief, the consigned money to be payable to him wholly or in proportion. The exposor raised an action against the superior, concluding for relief, and obtained a judgment of the House of Lords affirming his liability "as superior." In an action of declarator subsequently brought by the exposor, held that the exposor was entitled to demand payment of the £1500 consigned. **Opinions** that an obligation in a feu-charter by the superior binding himself, his heirs and successors, to relieve the vassal of future augmentations of stipend, is binding only on the superior's successors in the superiority, and not on his general representative.

McCallum v Stewart, 1870, 8 M. (H.L.) 1; 42 J. 266; 7 S.L.R. 308.

(246)

———**Teind duties and minister's stipend — Whether augmentations of stipend included in obligation of relief — Lands feued with the teinds — Lands feued without the teinds — Teinds — "Teind duties."**

By a feu-contract entered into in 1737 the proprietor of a heritable estate disposed part of the lands, together with the teinds thereof, and bound himself to relieve the vassal of "all feu and teind duties minister stipend schoolmaster fees payable forth of the said lands in time coming." In 1738, by another feu-contract, containing an obligation of relief in similar terms, he disposed a further portion of the lands, but without the teinds, to a second vassal. Down to 1864 the superior was localised upon direct for the whole stipend; and the whole stipend, including several augmentations granted at different dates from 1753 onwards, was paid by him. In 1864, in the course of proceedings for a further augmentation, the vassals were, for the first time, localised upon direct for the share of stipend exigible from their lands. Thereupon a dispute arose between the superior and the vassals as to whether the superior's obligation of relief included augmentations of stipend. In a special case presented by the superior and the vassals in 1920 for the determination of the dispute,

held that the obligations of relief contained in each of the feu-contracts imposed on the superior the duty of relieving the vassals, not only of the stipends payable at the date of the feu-contracts, but also of all subsequent augmentations. **Opinion** (per Lord President Clyde) that "teind duties," as used in the feu-contracts, was synonymous with "teinds."

Welwood's Trustees v Mungall, 1921 S.C. 911; 58 S.L.R. 613; 1921, 2 S.L.T. 220.

(247)

———**Poor rates on buildings subsequently erected on feu.**

A feu-contract, dated in 1805, provided that the feu-duty should be "in full of cess, minister's stipend, and all other public burdens whatsoever, payable or which may be claimed or demanded furth of the said forty-seven falls of land hereby feued." From the terms of the contract and the amount of the feu-duty it was evidently within the contemplation of the parties that buildings should be erected on the feu. **Held** that the superior was bound to relieve the vassal of the poor rates imposed on him as the owner of the building as well as of the ground. **Observed** that the liability might be limited to the amount of the feu-duty.

Nisbet v Lees, 1869, 7 M. 881; 41 J. 502; 6 S.L.R. 569.

(248)

———**What burdens embraced — Supervenient legislation.**

In 1857 the Magistrates of Edinburgh feued a piece of ground in the vicinity of the city to be holden of them as superiors, "with the houses and planting built and planted or to be built or planted thereupon," and undertook to free and relieve the vassals and their successors "of all teinds, minister's stipend, king's cess, supply, and other public burdens which do or may affect the same now and in all time coming." **Held** that the obligation of relief embraced (1) augmented stipend localised upon the lands; (2) poor rates payable in respect of houses recently erected thereon; and (3) cess, land-tax, and other public burdens, but not burgh cess, to which the lands were for the first time subjected by statute subsequent to the date of the feu-charter. **Question**, whether the superior's liability was limited to the amount of the feu-duty.

Preston v Magistrates of Edinburgh, 1870, 8 M. 502; 42 J. 232; 7 S.L.R. 291.

(249)

———**Supervenient legislation — Poor rates — Property and occupancy.**

A feu-contract in 1765 contained a provision that the feu-duty should be in full of all public burdens payable or which might be claimed furth of the lands, and an obligation by the superiors to relieve the vassals thereof "now and in all time coming." **Held** (1) that the clause imported relief only from burdens payable by virtue of laws then in existence; (2) that it imported

relief from poor rates imposed on the vassal in respect of property, but not in respect of occupancy.

Wilson v Magistrates of Musselburgh, 1868, 6 M. 483; 40 J. 250; 5 S.L.R. 312.

(250)

—Supervenant legislation—" . . . and other public burdens " due and to become due—Poor rates—Road assessments—Burdens coming to exceed feu-duty.

Lands were feued in 1823 for the erection of a harbour, &c., the superior binding himself by the feu-contract to free and relieve the vassals "of the whole cess or land-tax, . . . ministers' stipends, schoolmasters' salaries, and other public burdens due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming." Upon the lands feued the vassals built extensive harbour works and a large village. Held (1) that the superior was bound to relieve the vassals of the whole poor rates imposed on them under the Poor Law Amendment Act, 1845, as owners of the lands and buildings thereon; (2) that this obligation of relief was not limited to the amount of the feu-duty; but (3) that the clause of relief did not cover road assessments imposed by subsequent local Acts, as being a burden imposed by supervenant legislation, although at the date of the feu-contract a Statute Labour Commutation Act was in force in the county.

Dunbar's Trustees v British Fisheries Society, 1878, 5 R. (H.L.) 221; 3 App.Cas. 1298; 15 S.L.R. 772.

(251)

—Supervenant legislation—Property-tax—39 Geo. III. c. 13—Property and Income-tax Act, 1842—Income-tax Act, 1853, Schedule A.

In 1803 a proprietor feued out lands, binding himself and his successors in the superiority "to pay the teind duties, ministers' stipends, schoolmasters' salaries, cess or land-tax, and all other burthens, duties, services, and casualties whatsoever, public and parochial, as well as all others of every description now due and payable, and that shall hereafter become due and payable or be imposed by any authority whatever for or furth of the said portion of land or teinds thereof for ever, it having been pactioned betwixt us that he was to pay no more than the said feu-duty and duplication when it shall occur." In a question raised in 1898, held (1) that the clause covered and gave the vassal relief from those burdens and assessments that affected the land in 1803, including assessments which merely took the place of and were the same in incidence and object as assessments which had ceased to be imposed, but did not cover assessments imposed by supervenant legislation; and (2) that the clause did not bind the superior to relieve the vassal of property-tax, that being a personal tax on income derived from the

land, and not a tax payable "for or furth" of the lands.

Lindsay v Bett, 1898, 25 R. 1155; 35 S.L.R. 881.

(252)

—Supervenant legislation—Usage following on feu-charter—Rates and assessments—Rates levied on tenants.

Where a superior binds himself in a feu-charter to relieve his vassal of all public burdens imposed or thereafter to be imposed on the subjects feued, the subsequent actings of the parties may be founded upon to show that the superior's obligation is not limited to burdens imposed under laws in existence at the date of the charter, but extends to burdens imposed by supervenant legislation. Terms of feu-charters granted by the Magistrates of Edinburgh in 1769 and 1770 which, as explained by the actings of the parties, were held to bind the magistrates to relieve their vassals of public burdens imposed on the subjects by supervenant legislation, including not only the rates and assessments levied on the vassals as owners but also those levied on the occupiers of the subjects feued, although the leases on which these subjects were let did not bind the vassals to relieve their tenants of rates and assessments payable by occupiers.

North British Railway Co. v Magistrates of Edinburgh, 1920 S.C. 409; 57 S.L.R. 344; 1920, 1 S.L.T. 246.

(253)

—Agricultural lands built upon.

In 1752 the Magistrates of Aberdeen granted a feu of ten acres adjoining the burgh. The lands were wholly agricultural, yielding a rent of £1 per acre. The feu-duty payable was at the rate of £1 18s per acre. The feu-charter contained an obligation by the superior to relieve the vassal of public burdens. From about 1860 onwards the vassal granted subfeus, on which buildings were erected. In 1900, when the subjects had come to be covered with buildings and the municipal boundaries of Aberdeen had been extended so as to include them, the assessed rental being about £3750, the vassal raised an action against the Magistrates of Aberdeen, the superiors, for payment of £1361, being the amount of the sums imposed as poor-rates upon, and paid by, the subfeuars to the rating authority. The magistrates maintained, *inter alia*, that the obligation of relief was granted in the view of the lands being used as agricultural subjects, and was not to be extended to buildings. After a proof as to the circumstances existent at the date of the feu-charter, held that it was not proved that the only use of the ground feued which the parties had in view in 1752 was for agricultural purposes, and therefore that the superiors' obligation of relief was not limited to such a sum as would have been assessed on the subjects if they had continued to be agricultural. Held further that as the clause of relief was expressed as an independent obligation and not as part of the

reddendo clause, the extent of the obligation was not limited to the amount of the feu-duty.

Latto v Magistrates of Aberdeen, 1903, 5 F. 740; 40 S.L.R. 488; 10 S.L.T. 277.

(254)

Stipulation that burdens should be paid as by landlord and tenant—Construction in light of prior documents.

A feu-charter dated in 1814 contained the following clause:—"During the existence of the present feu-right all public and parochial burdens or taxes imposed or to be imposed shall be paid by the superior and vassal as if the former was proprietor and landlord and as if the latter was tenant under him."

Held, in an action by the vassal for relief of all poor-rates payable in respect of property, that the superior was only bound to relieve the vassal of poor-rates on the annual value of the feu-duty. **Observations** (per Lord President Inglis and Lord Deas) as to the competency of looking behind a feu-charter at other and prior documents with a view to construing the charter.

Smith, Laing & Co. v Maitland, 1876, 3 R. 281; 13 S.L.R. 177.

(255)

Construction—Evidence of actings of parties—Long lease.

Where the parties to a long lease had for a long period of years acted on a particular construction of a clause of relief from public burdens, **held** that such construction must be regarded as the true meaning of the clause and receive effect accordingly.

Jopp's Trustees v Edmond, 1888, 15 R. 271; 25 S.L.R. 211.

(256)

Retention of poor-rates from arrears of feu-duty.

Held, in the construction of a feu-charter in which the vassal was taken bound in the first instance to pay the public burdens, "he always having allowance thereof in the first end of the foresaid feu-duties yearly at clearing," that the vassal was entitled to retain from arrears of feu-duties the poor-rates not only for the same years but also for previous years the feu-duties of which had been

paid, but was not entitled to interest on these poor-rates, in respect that he had not sooner made his right effectual. **Observed** that the clause quoted was to be read as an ordinary clause of relief in favour of the vassal, but with an additional privilege enabling him to operate his own relief.

Hope v Lumsdaine, 1871, 9 M. 865; 43 J. 466; 8 S.L.R. 574.

(257)

Provision for redemption of obligation of relief—Whether option in superior or in vassal only—Prescription.

Certain lands and teinds were disposed in feu farm in 1673, the superior undertaking to relieve the vassal of bypast burdens, "and yearly and tearmly in all time coming, of all teynd-duty, minister's stipends, and annuity of teynd's allenarly." The superior further bound himself "that in case the teind sheaves of the said lands, with the crofts and pertinents thereof, or any part or portion of the said teinds, should be evicted from them, or that the same lands and teinds be burdened and affected with any minister's stipend in time coming, whether present or supervenient, then and in that case, and immediately after the said eviction or burdening of the said lands and teind, as said is, to content and pay to the said Andrew Ross and his foresaids, in liferent and fee respective, the sum of £1200 Scots money for each chaldre that should be so evicted, whether of stock or teind, with the annual rent of the said sums, yearly and termly during the not-payment thereof after the said eviction." **Held** that by the terms of these clauses the option of fixing the mode of relief by redemption or by an annual payment was conferred on the vassal and not on the superior.

Observed that a right of redemption is *res mere facultatis*, which no prescription can take away.

Reid's Trustees v Duchess of Sutherland, 1881, 8 R. 509; 18 S.L.R. 326.

2. OF FEUDAL BURDENS.

[See HERITABLE PROPERTY II. 10 (2).]

SUPERVENIENT LEGISLATION. See CONTRACT; RES JUDICATA; SUPERIOR AND VASSAL.

SUPERVISION, BOARD OF. See LOCAL GOVERNMENT; POOR; PUBLIC HEALTH.

SUPPLY, COMMISSIONERS OF. See LOCAL GOVERNMENT.

SUPPORT. See MINES AND MINERALS; SERVITUDE.

SURFACE DAMAGE. See MINES AND MINERALS.

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SUSPENSION AND INTERDICT. See ARBITRATION; INTERDICT; POINDING; POINDING OF THE GROUND; SHERIFF.

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TEINDS.

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I. TITULARS.

(1)

Right of titular to exact cumulo teind-duty where lands divided without allocation—Interest on arrears.

Subsequent to a decree of valuation of teinds the lands were divided and sold to different persons. No process of division or allocation of the valued teind was brought. Payment of the valued teind to the titular was not made for several years. **Held** that until the valuation was apportioned by regular process the titular was entitled, under the decree of valuation, to recover the valued teind from any parties intromitters with the fruits of the lands, to the amount of their intromissions. Circumstances in which interest was not allowed on a claim by a titular for arrears of teind-duty.

Glasgow University v Pollok, 1868, 6 M. 878; 40 J. 428; 5 S.L.R. 531.

(2)

Claim by Crown to teinds, founded on (1) decree proceeding on concealment of a material fact by the Crown officers, (2) decree in subsequent locality not directly determining property of teinds—Res judicata—Prescription—Jus coronæ as a prescriptive title to teinds.

In a declarator of the right to the teinds of certain lands brought by the proprietor of the lands against the Crown, the pursuer founded on a progress of titles dating from a disposition of the teinds by the Lord of Erection in 1629, while the defender pleaded (1) *res judicata*, founding on a decree against the then proprietor of the lands in an action in 1776 by the Solicitor of Tithes, in which the disposition of 1629, though known to the Crown, was not produced, and the Court held that the teinds were bishops' teinds in the hands of the Crown; and founding also on a decree of locality in 1794, in which they were also treated as bishops' teinds, and (2) *prescrip-*

tion, founding on a tack granted by the Crown to the proprietor of the lands in 1798, on which tack-duty had been paid for more than forty years. **Held** (1) that neither the decree in that action, which proceeded on an erroneous assumption in point of fact, nor the decree in the subsequent locality, which did not directly determine any question as to the property of the teinds, could be effectually founded on by the Crown as supporting a plea of *res judicata*; and (2) that the Crown, having produced no title to the teinds in question, could not plead the positive prescription under the tack of 1798; and that the pursuer was entitled to decree in terms of the conclusions of the summons. **Observed** that even if the teinds in question had fallen to the Crown *jure coronæ* as bishops' teinds, the Crown's right to teinds, being derived from the Church, was "limited, circumscribed, and qualified" by the title of its author, and that the *jus coronæ* could not constitute a title to teinds on which prescription could run in favour of the Crown.

Cheape v Lord Advocate, 1871, 9 M. 377; 43 J. 182; 8 S.L.R. 286.

(3)

Claim to surplus teinds—Teinds paid to Crown in error—Claim by true titular for repetition—Interest.

For many years surplus teinds were paid to the Crown, all parties interested being in the belief that the Crown was titular. It was eventually discovered that the teinds belonged not to the Crown but to a private person as patron of the parish. In an action brought by the heritor for repetition, decree for the principal sum was granted of consent, but **held** that the Crown was not liable for interest prior to a formal demand for repetition, the error being attributable to the negligence of the patron in not having ascertained the true state of the title.

Countess of Cromartie, &c. v Lord Advocate, 1871, 9 M. 988; 43 J. 547; 8 S.L.R. 640.

(4)

Teinds paid to Crown in error—Bona fide perception and consumption by Crown.

A titular raised an action for surplus teind against certain heritors, who pleaded that they had paid to the Crown upon a demand made to that effect by Crown officials. The titular having raised a supplementary action in which he called the Crown, and concluded for repayment to him of the sums of surplus teind so received, the Court held that he was entitled to decree against the Crown, repelling a plea of bona fide perception and consumption. **Question**, whether the plea of bona fide perception and consumption is available to the Crown.

Earl Cawdor v Lord Advocate, 1878, 5 R. 710; 15 S.L.R. 407.

(5)

Claim by Crown for arrears of surplus teinds—Bona fide perception.

The Crown granted a lease of the teinds and feu-duties of the lordship of Dunfermline to certain vassals, for themselves and in trust for the other vassals, which expired on 23rd March, 1799. The lease was continued by tacit relocation till 1838. In that year the Crown executed an inhibition of teinds, and brought an action of removing from the subjects other than teinds, in which decree of removing was obtained as from 23rd March, 1839. Thereafter the vassals paid feu-duties to the Crown, but no teinds were paid or claimed till 1868. In an action brought by the Crown against one of the vassals not named in the lease for arrears of teinds, the defender pleaded bona fide perception. It was admitted that the defender had consumed the teinds in ignorance of any claim by the Crown, and that the inhibition was inept. **Held** that the plea must be sustained.

Lord Advocate v Drysdale, 1874, 1 R. (H.L.) 27; L.R., 2 Sc.App. 368; 11 S.L.R. 492.

(6)

Claim against heritor—Bona fide perception.

Opinion that a plea of bona fide perception and consumption would be relevant if stated by a heritor against a titular.

Haldane v Ogilvy, 1871, 10 M. 62; 44 J. 32; 9 S.L.R. 44.

(7)

Bona fide perception and consumption—Belief that teinds exhausted.

In an action at the instance of a proprietor of teinds against the proprietor of the lands for arrears of surplus teinds, the defender pleaded bona fide consumption, averring that he had regularly paid his proportion of the minister's stipend in the belief that the teind was thereby exhausted. **Held** that the defender's statements were not relevant to support the plea of bona fide consumption.

Macrae v Assets Co., 1894, 21 R. 1080; 31 S.L.R. 870; 2 S.L.T. 185.

(8)

Arrears — Tack — Tacit relocation—Inhibition—Error in terms and execution.

The proprietor of the two estates of Pitdornie and Dalcroy, lying in the same parish but not contiguous, in 1791 obtained from the Crown, the titular, a tack of the teinds thereof for nineteen years from the Lammas term, at a cumulo tack-duty of 5s. 3d. After the expiry of the tack, the tacksman continued to possess the teinds on tacit relocation. In September, 1839, the titular executed inhibition against the tacksman removing "this instant crop" in respect it was liable in payment of teinds. Following on this inhibition, arrears of surplus teinds of the lands of Pitdornie were demanded in 1859 by the titular, and payment was then made for the crops of the years 1841 to 1859. No surplus teinds were ever demanded from the lands of Dalcroy. In 1882 the titular demanded payment of arrears of surplus teinds from the lands of Pitdornie for the crops from 1861-1881, and from the lands of Dalcroy for the crops from 1844-1881. In an action at his instance to enforce these payments, **held** (1) that the inhibition was inoperative in respect (a) it was executed after the term of Lammas, 1839, at which time tacit relocation had taken place for that year, (b) that from its terms it applied only to the "instant crop," and not to the crop of succeeding years; (2) that as regarded the arrears of surplus teinds of the lands of Pitdornie the effect of the payment made in 1859 was to negative the theory of the tacit relocation subsequent to 1839, and that, therefore, the titular was entitled to the arrears claimed in respect of those lands; but (3) that quoad the teinds of Dalcroy, as the inhibition was inoperative, and as the tacksman had been allowed to continue in possession of the surplus teinds without objection, tacit relocation must be held to have continued, and that, therefore, the titular was not entitled to the arrears claimed.

Lord Advocate v Duke of Atholl, 1885, 12 R. 882; 22 S.L.R. 573.

(9)

Lands unvalued—Principle of valuation.

Held (per Lord McLaren) in a claim by a titular against a tacksman for arrears of surplus teinds where the teinds were unvalued, that the value of the teind fell to be estimated at one-fifth of the rental of the estate from year to year. **Opinions** on this question in the Inner House reserved.

Lord Advocate v Duke of Atholl, 1885, 12 R. 882; 22 S.L.R. 573.

(10)

Cumulo valuation—Disjunction quoad omnia of part of lands.

The teinds of the lands of K, in the parish of X, comprehending the lands of A, B, C, D, and E, with the pertinents, were valued in cumulo. D and E were afterwards disjoined, and erected into the parish of Y.

quoad omnia. In the locality of Y the teinds of D and E, as ascertained for the purposes of the locality, from data contained in the extract of the old decree of valuation, without process of division of the cumulo valuation, were exhausted. In consequence of the stipend having been modified in a year when the fiars prices were abnormally low, the heritor's subsequent payments from these teinds to the minister of Y considerably exceeded the valued teind on which the locality proceeded. He continued, however, to pay without surrendering to the minister of Y. In the parish of X, on the assumption that the teinds of the lands of A, B, and C were severally ascertained on the same basis, there was surplus teind. **Held** that the valuation of the teinds of the lands of K being a cumulo valuation, and no formal process of division having been brought, the titular was only entitled to claim surplus teind from the whole lands of K, after deducting the stipend paid in both the parishes of X and Y, and was not entitled to claim the surplus teind of the lands of A, B, and C (parts of the lands of K remaining in the parish of X), after deducting only the stipend paid to the minister of the parish of X.

Lord Advocate v Stirling, 1888, 15 R. 424; 25 S.L.R. 254.

(11)

Whether over-paying heritor has a claim against titular to whom under-paying heritors have paid surplus teinds.

Cheape's Factor v Lord Advocate, 1872, 44 J. 532; 9 S.L.R. 602, No. 158, *infra*.

(12)

Under-paying heritor's surplus paid to titular—Subsequent claim by over-paying heritor—Relief against titular.

Opinion that a heritor who, under an interim scheme of locality, has paid too little stipend, and has paid the whole of his surplus teind to the titular, and afterwards is made to reimburse an over-paying heritor, has a claim of relief against the titular.

Mackenzie v Lord Advocate, 1878, 5 R. 589; 15 S.L.R. 321.

(13)

Two titulars in same parish—Adjustment of liabilities for stipend.

When in the same parish there are two distinct titularities, **held** (1) that augmentations fall to be allotted on both in the proportion to the teindable rentals; but (2) that where heritors had for a long time paid stipend in terms of interim decrees of locality proceeding on an erroneous principle, the titular has no claim for repetition of the sums so paid, the new locality having, in so far as he is concerned, only a prospective effect.

Lord Advocate v Landale, (O.H.) 1867, 40 J. 363.

(14)

Locality—Titularity not recognised in interim locality—Title of recognised titular to object.

Baird v Earl of Wemyss, 1906, 8 F. 669; 43 S.L.R. 614; 14 S.L.T. 2, No. 108, *infra*.

II. HERITABLE RIGHTS TO TEINDS.

(15)

Prescriptive title claimed in respect of a conveyance dated 1766 a non domino.

A proprietor of lands, who had no title to the teinds, conveyed in 1766 several parcels of land to trustees for family purposes, "with the several manor-places, milns, teinds, &c., belonging to and on the said respective lands above disposed, and contained in the particular characters and indentments thereof." The trustees, as directed by the truster, executed a conveyance in 1772 to a beneficiary in the same terms. The subsequent titles contained no mention of teinds. The proprietors did not pay teind to any titular, but they submitted to localities in 1837 and 1862 made on the footing that they had no heritable right to the teinds. In an action raised by the heritor in 1875, for reduction of the decrees of locality, and declarator of his heritable right to the teinds, **held** (1) that it was competent to ascertain by examination of the previous titles, though beyond the prescriptive period, whether the truster had a right to his teinds in 1766; (2) that as he had no such right, the trust deed conveyed none. **Observations** on the possession necessary to establish a heritable right to teinds.

Mackintosh v Lord Abinger, 1877, 4 R. 1069; 14 S.L.R. 632.

(16)

Cum decimis inclusis.

Progress of titles which were held not to constitute a valid decimæ inclusæ right.

Dundas v Waddell, 1878, 6 R. 345; 16 S.L.R. 340; reversed (on another point), 1880, 7 R. (H.L.) 19; 5 App.Cas. 249; 17 S.L.R. 433, No. 116, *infra*.

(17)

Patron's right to teinds under Acts 1690, c. 53, and 1693, c. 41—Fendalisation of teinds.

Lochore and Capledrae Cannel Coal Co. v Common Agent for Ballingry, 1878, 5 R. 763; 15 S.L.R. 440, No. 99, *infra*.

(18)

Valuation as title to prescribe.

Held that a decree of valuation of teinds was not a title under which a proprietor could by prescriptive possession acquire a right to teinds of lands not originally included in the valuation.

Macleod v Heritors of Morvern, 1873, 11 M. (H.L.) 62; 45 J. 461; 10 S.L.R. 657.

(19)

Res judicata—Judgment in former action with Crown that teinds were bishops' teinds—Concealment of material fact by Crown.

In an action by a heritor against the Crown to establish his right to the teinds of his lands, **held** that neither a judgment in favour of the Crown in a former litigation with the heritor by which the latter was decreed to pay to the Crown a certain sum as the annual value of his teinds, nor a decree in a subsequent locality, in which the whole teinds of the parish were dealt with as bishops' teinds belonging to the Crown, constituted *res judicata* in favour of the Crown, the first decree having proceeded on concealment of a material fact by the Crown officers, and the second not having directly determined any question as to the property in the teinds.

Cheape v The Lord Advocate, 1871, 9 M. 377; 43 J. 182; 8 S.L.R. 286.

(20)

Locality—Common agent—Common agent acquiescing in interlocutor as representing whole heritors.

Duke of Buccleuch v Common Agent for Inveresk, 1868, 7 M. 95; 41 J. 55; 6 S.L.R. 88, No. 117, *infra*.

(21)

Locality — Reduction — Prescription — Bona fide perception.

Elder v Fotheringham, 1869, 7 M. 341; 41 J. 199; 6 S.L.R. 220, No. 118, *infra*.

(22)

Valuation — Presumption of validity — Negative prescription.

Dundas v Waddell, 1880, 7 R. (H.L.) 19; 5 App.Cas. 249; 17 S.L.R. 433, No. 116, *infra*.

III. VALUATIONS AND SUB-VALUATIONS.

1. RULES FOR FIXING "CONSTANT RENT."

(23)

Lands permanently diverted from agriculture.

Held (by a majority of the whole Court) that by the operation of the Teinds Valuation Statutes of 1633, as construed by decisions, all lands not enjoying special immunity were made liable in payment of teinds, whether producing teindable fruits or not, and that until a valuation was led the teinds were to be taken as one-fifth part of the rent which the lands might be expected to produce as an agricultural subject.

In accordance with the above, **held** that lands included in the city of Glasgow, and for the most part densely covered with buildings, the teinds of which had never been valued, and which, so far as it appeared, had never paid stipend, though they were included in old tacks of teinds, were liable to be localised on for stipend, and the teind-

able rental fixed at £4 per acre, being an estimate of the probable agricultural rent which would be obtained if the buildings were swept away.

Burt v Common Agent for Calton, 1878, 5 R. 445; 15 S.L.R. 472.

(24)

Land forming part of park and policies.

Held in valuing the teinds of lands which formed part of the park and policies attached to a mansion-house, and which were kept in permanent pasture interspersed with plantations, that the teinds should be valued as at a fifth of the rent which would be got for the subjects in their actual condition.

Baird v Earl of Wemyss, 1906, 8 F. 669; 43 S.L.R. 614; 14 S.L.T. 2.

(25)

Grass parks of which grazing let for season—Deductions from grazing rent in respect of charges borne by proprietor—Grass parks forming part of policies of mansion—Diminished grazing value—C.A.S., 1913, H. iii. 1.

In valuing the teinds of grass parks, the grazing of which was let year by year for the season, **held** (1) that the constant rent at which the grass parks might be presumed to be lettable as pasture lands was the rent paid for the seasonal grazing under deduction of such charges presently borne by the proprietor as, under an ordinary pastoral lease, would have fallen on the tenant. **Held**, accordingly (2) that deductions must be made for (a) upkeep of fences, (b) cost of shepherding and cutting weeds, (c) occupier's rates, and (d) occupier's income tax, which the Court, in the circumstances, fixed at 2s. in the £; but that the auctioneer's commission, paid by the lessor on letting the grazings, did not fall to be deducted. **Held**, further, as regarded certain of the parks forming part of policies of suitable extent for the mansion-house, that no addition to the rent actually obtained for the grazing fell to be made in respect of diminished grazing value caused by overhanging trees, intersecting roads, and restrictions imposed to secure amenity and for the convenience of the proprietor.

M'Ewen v Watt, 1922 S.C. 203; 59 S.L.R. 175; 1922 S.L.T. 125.

(26)

Farms let on lease—Consideration other than the rent—Tenant taken bound to insure farm buildings.

Held that, in valuing the teinds of farm lands let on lease where the tenant was taken bound to keep the buildings insured against fire, the premiums of insurance fell to be added to the rent payable under the lease in order to arrive at the constant rent.

M'Ewen v Watt, 1922 S.C. 203; 59 S.L.R. 175; 1922 S.L.T. 125.

(27)

Where rent reduced during currency of lease.

Lands unvalued for teind were let on a nineteen years' lease at a rent of £370 per

annum, which, being found to be too high, was afterwards reduced to £300, by an agreement declaring that in other respects the lease should remain effectual. While the lease was still current the landlord raised an action of valuation of the stock and teind. **Held** that the reduced rent formed the criterion for valuation under the Act 1633, c. 17, the effect of the agreement being the same as if the tenant had renounced his lease and obtained another at a lower rent.

Observed that the rule by which in practice lands under lease are valued according to the current rent may admit of exception where the rent payable under the current lease does not truly represent the constant yearly value.

Fotheringham v Elder, 1870, 9 M. 172; 43 J. 90; 8 S.L.R. 138.

(28)

Alleged diminution of rental since former locality.

In a process of locality a heritor whose teinds were not valued was localled upon an admitted rental of £409. In a subsequent locality he alleged that the rental was now less, and that the teinds were exhausted. The Court **held** that the heritor was entitled to lead a valuation of his teinds.

Magistrates of Edinburgh v Montgomery, 1872, 11 M. 14; 45 J. 10; 10 S.L.R. 4.

2. CUMULO OR SEVERAL VALUATION.

(29)

Subsequent division of lands.

In a decree of valuation of, inter alia, the teinds of the lands and barony of K, comprehending the lands of A, B, C, D, and E, with the pertinents, the rent, stock, and teind of these lands was declared to be £157 6s. 0³/₄d. sterling, the fifth part whereof, being £31 9s. 2¹/₂d., was declared to be teind, and the usual decerniture followed. In the extract of the decree, which was in the old form, it was set forth that the decerniture proceeded upon a report by the Lord Ordinary, and conform to a particular scheme showing the rental, stock, and teind of each separate parcel of land making up the barony. In a question arising as to the surplus teinds of D and E—two of these several parcels—which had been disjoined and erected into a new parish quoad omnia, **held** that, as regarded the lands and barony of K, the valuation was a cumulo valuation, and that it was not competent to look beyond the decerniture for the purpose of ascertaining the several valuations of the teinds of D and E.

Lord Advocate v Stirling, 1888, 15 R. 424; 25 S.L.R. 254.

3. OBJECTIONS TO VALUATION.

(1) AS TO NATURE OF DECREE.

(30)

Whether document was truly a valuation.
Terms of a document which, after proof,

was **held** (by a majority of seven judges) to be a valid extract of valuation.

Lord Advocate v Viscount Arbuthnott, &c., 1868, 6 M. 999; 40 J. 571; 5 S.L.R. 641.

(31)

An extract valuation, recorded under the authority of the Court in terms of 1707, c. 9, in the following terms:—"At Edinburgh, the third day of Februar Jajvjc and threttie sixt. The landis of W pertaining to J D are worth and may pay in stock and teynd, personage and viccarage, aucht chalders victuall. This is the just extract of the valuation of the fords. landis, as is contained in the principall register yrof. Extracted by me, T M, clerk-deput to Sir Archibald Johnston of Wariestone, Knight, Clerk Register and Keiper of the saids registers"—**held** to be a valid decree of valuation.

Lord Advocate v Governors of Donaldson's Hospital, 1870, 8 M. (H.L.) 136; 42 J. 435; 7 S.L.R. 676.

(32)

Terms of a decree of the commissioners which was **held** to be a valuation by the commissioners, and not a mere approval of a private arrangement of parties.

Observed that the commissioners in valuations of teinds were entitled to consider the consent of parties along with other evidence of value.

Heritors of Old Machar v The Ministers, 1870, 8 M. (H.L.) 168; 42 J. 604; L.R. 2 Sc.App. 89; 7 S.L.R. 726.

(33)

Decree of valuation combined with decree of augmentation and locality — Acts Rescissory, 1662, c. 1, 1662, c. 9, 1663, c. 28.

After the abolition of Episcopacy in Scotland, King Charles I., in 1641, made a gift under the Privy Seal of a tack of the titularity of the teinds of the parish of Cargill, which had formerly belonged to the Bishop of Dunkeld, in favour of James Livingstone. The tack was originally for nineteen years, but was afterwards extended to Livingstone's lifetime and three nineteen years thereafter. Power was given to the tenant to sub-let and to sell the teinds to the heritors. The teinds had never been drawn by the bishop, or enjoyed in the form of rental bolls, but had been let by the bishop for a tack-duty to the heritors as kindly tenants. Livingstone conveyed his right to the Earl of Crawford. In an action subsequently raised by the minister of the parish before the High Commission for augmentation, modification, and locality, and also for valuation of the teinds, in which the Earl of Crawford was called and appeared as titular along with the heritors, a decree of augmentation and valuation was pronounced in 1647. In a process of locality of the parish depending in 1884, the Lord Advocate, on the part of the Crown, objected to the decree of 1647 receiving effect as a valuation of teinds, on the grounds (1) that it was a mere decree of locality, and that the valuation was merely

for the purpose of the locality; (2) that in the process of 1647 there was no proper titular; (3) that the decree was cut down by the Rescissory Acts. **Held** (1) that it was no valid objection to the decree of valuation that it was combined with a decree of locality; (2) that the titularity was well represented in the process; (3) that the Act 1662, c. 1, did not strike at valuations; (4) that the Act of 1662, c. 9, distinguished between bishops' teinds which had been drawn or enjoyed in the form of rental bolls and those teinds which had been set in tack, making valuations of the former since 1637 invalid, but not affecting valuations of the latter; (5) that the Act 1663, c. 28, expressly saved from the operation of the Rescissory Acts valuations of teinds, except decreets of valuation, modifications of stipends, or augmentations, whereby the bishops were deprived of any part of the rents which they had in 1637; and that while the decree of 1647 fell under this exception in so far as it granted an augmentation of stipend, it did not do so in so far as it was a decree of valuation.

Lord Advocate v Lady Willoughby de Eresby, 1885, 12 R. 1330; 22 S.L.R. 891.

(34)

Valuation in absence of titular—Subsequent Order by High Commissioners to desist from valuation of titular's teinds—Dereliction of sub-valuation.

Objection was taken to an interim scheme of locality which gave effect to a valuation by sub-commissioners of teinds made in 1630, and to the approving of that valuation, on the grounds (1) that the valuation was obtained by the tacksman of the teinds in the absence of the titular, Lord Maitland; (2) that an order of the High Commissioners had been obtained by the Earl of Lauderdale, Lord Maitland's father, on 28th January, 1629, which was produced to the sub-commissioners in 1632, ordering the sub-commissioners to desist from valuing the teinds of any men's lands of which the titular had the teinds; and (3) that the valuation of the sub-commissioners must be held to have been dereliquished, in respect that there was evidence that certain persons had, in a valuation proceeding in 1714, produced a decret of valuation by the High Commission, dated 1633, of lands which *prima facie* included the lands valued by the sub-commissioners in 1630. **Held** (1) that the absence of the titular did not in itself render the sub-valuation invalid; (2) that the order of the High Commission intimated to the sub-commissioners in 1632 could have no effect upon the report of the sub-commissioners valuing specified teinds, completed in 1630; and (3) that the onus of showing dereliction lay on the objector and that he had not discharged that onus; and accordingly (4) that the objection fell to be repelled. **Observed** (per Lord President Dunedin) that the Court must affirm the valuation of the sub-commissioners, provided that no intrinsic objection can be shown to their report, that

it can be shown that the identity of the lands is made out, and that dereliction of the sub-report cannot be proved against the party seeking approbation.

Baird v Earl of Wemyss, 1906, 8 F. 669; 43 S.L.R. 614; 14 S.L.T. 2.

(35)

Disconformity to sub-commissioners' report—Reduction of decree of approbation in absence by party who obtained it.

Held that a heritor who had obtained decree in absence in a process of approbation of a sub-valuation of the teinds of his lands could competently bring a reduction of the same, on the ground that owing to his mistake in framing the summons the decree was disconform to the sub-commissioners' report, on which it bore to proceed.

M'Neill's Trustees v Campbell, 1872, 11 M. 211; 45 J. 131; 10 S.L.R. 138.

(36)

Cumulo rent of lands in different parishes.

Held that it is not a valid objection to a decree of valuation that lands in different parishes are therein valued in cumulo.

Hay v Minister of Peebles, (O.H.) 1886, 13 R. 585.

(2) ALL PARTIES NOT REPRESENTED.

(37)

Titular not cited.

Held that it is not a good objection to a valuation at the instance of A B, "parson and minister," to allege that the titular was not called, without any averment that A B was not parson, and that some other person was titular—the presumption being that A B was (as designed) parson, and in that capacity titular.

Elder v Fotheringham, 1869, 7 M. 341; 41 J. 199; 6 S.L.R. 220.

(38)

In a process of valuation of teinds, at the instance of a heritor against the minister and B, the High Commission in 1647 pronounced a decree interponing "their decret and authority" to an agreement therein narrated, whereby B, "as tacksman and titular, and having right to the teinds," and the heritor, agreed that the teinds "shall be in all time coming £210 Scots." This valuation was given effect to in subsequent processes of modification and locality, and in a process of disjunction and erection. The teinds were held by B's representatives under successive tacks down to 1848. In 1859 the arrears of surplus teind from 1848 to 1858 were paid to and accepted by the donatories of the titular, on the basis of the decree of valuation. In an action raised in 1863 by the Crown, as titular, and by its donatories, concluding for reduction of the decree, in so far as bearing to be a permanent valuation of the teinds, on the ground, *inter alia*, that the titular had not been called, and for declarator that the valuation was merely of the tacksman's interest, **held**

that the decret was ex facie a permanent valuation of the teinds to which B appeared to have been a party in the capacity of titular; and (2) that the decree must be presumed to have been valid, nothing having been relevantly averred inconsistent with its validity.

Deans of the Chapel Royal v Johnstone, 1869, 7 M. (H.L.) 19; 41 J. 348; L.R., 1 H.L. Sc. 426.

[See also *Baird v Earl of Wemyss*, 1906, 8 F. 669; 43 S.L.R. 614; 14 S.L.T. 2, No. 34, supra.]

(39)

Question whether titularity well represented—Decree of valuation combined with decree of augmentation and locality—Acts Rescissory, 1662, c. 1; 1662, c. 9; 1663, c. 28.

Lord Advocate v Lady Willoughby de Eresby, 1885, 12 R. 1330; 22 S.L.R. 891, No. 33, supra.

(40)

Minister not cited.

Held that certain decrees of valuation pronounced by the High Commission prior to the year 1707 were not invalid in consequence of the stipendiary minister of the parish having not been cited as a party to the processes in which these decrees had been pronounced.

Heritors of Old Machar v The Ministers, 1870, 8 M. (H.L.) 168; 42 J. 604; L.R. 2 Sc.App. 89; 7 S.L.R. 726.

(41)

Held that a decree of valuation pronounced by the Teind Court in 1719 was not invalid though the minister of the parish was not cited as a party to the process in which the decree was pronounced.

Hay v Minister of Peebles, (O.H.) 1886, 13 R. 585.

(42)

Valuation on wrong principle—Prescription.

In a minute of condescendence and surrender of teinds proceeding on a valuation dated in 1805 the parish minister objected to the valuation as (a) proceeding on a wrong principle; and (b) pronounced in absence of the minister of the time. It was admitted that the right to object was excluded by prescription unless the valuation was ex facie invalid, and **held** as to (a) that the valuation was not ex facie invalid because omnia presumuntur rite acta; and as to (b) that this was an objection excluded by prescription.

Sharp v Ewan, (O.H.) 1909, 2 S.L.T. 287.

(43)

Bishops' teinds.

Held that the decree in an action brought by a bishop in 1636 for valuation of the teinds of his mensal or patrimonial kirks was not reducible on the ground that the ministers serving the cures had not been cited,

because they had no interest in the teinds in respect (1) they were dependent on the bishop for the amount of their stipends; and (2) the bishop was personally liable for their stipends, which were payable, not from the teinds of the parish, but from a third of the whole revenues of the benefice.

Ministers of Islay v The Heritors, 1863, 6 M., 1074; 40 J. 602; 5 S.L.R. 714.

4. SUB-VALUATIONS.

(1) EFFECT OF REPORT.

(44)

Sub-valuation — Approbation — Effect of decree.

A report of sub-commissioners of teinds has no effect as a valuation until it has been approved by the High Commissioners or by the Court of Teinds.

Lord Elibank's Trustees v Hope, 1891, 18 R. 445; 28 S.L.R. 295.

(2) OBJECTIONS.

(a) Objections to Sub-Commissioners' Report.

(45)

No direct finding as to value.

In an action brought in the Teind Court in 1874 for approbation of a report of sub-commissioners dated in 1629, valuing the teinds of certain lands, which merely reported that all parties being summoned and called there compeared the heritor, "and is cōtent that the auld rental of the said lands of . . . stand in tyme cūming as it is and hes bein, to wit, xij bolls meill, baith for p'sonage and viccarage teyndis in cais the titular be yrw't cōtentit." Objection to the report, to the effect that the sub-commissioners had not pronounced any direct finding as to the value of the teinds of the lands, repelled, and decree of approbation pronounced.

Observed (per Lord President Inglis) that where an old rental was produced either by the titular against the heritor, or by the heritor against the titular, the party entitled to object in either case being duly summoned, and not appearing, the sub-commissioners might report the rental as the true value of the teinds.

Duke of Montrose v Earl of Camperdown, &c., 1875, 2 R. 772.

(46)

A report by sub-commissioners on valuation of teinds in 1629, after narrating with reference to a parcel of lands held at that date by the provost, bailies, and community of a burgh, that there appeared a bishop as titular, as well as two bailies and the clerk of the burgh, bore that they "condescendit yat ye rental of ye teind scheiffis" of the parcel of lands "suld be valued to ye auld rental, viz. . . ." In an action brought in 1906 for approbation of the report of the sub-commissioners the defenders pleaded that decree of approbation should

be refused, in respect that the report contained no valuation by the sub-commissioners. The Court repelled the plea.

Elgin Guildry Fund Society v Macpherson, 1906, 8 F. 550; 43 S.L.R. 399; 13 S.L.T. 860.

(47)

Valuation of consent without proof—Part of teinds in hands of heritors—Payment of teinds by rental bolls—No evidence on which vicarage teinds valued.

In an action brought in the Teind Court in 1870 for approbation of a report of the sub-commissioners in 1629 valuing the teinds of certain lands, the defenders maintained the following objections to the report:—(1) that, as it bore to proceed upon the mere consent of the titular and heritors without proof, it was not a report in terms of the commission of 2nd February, 1629, and so could not be approved of without the consent of the titular; (2) that as the teinds were paid in rental bolls, and it did not appear that they were "near-hand the just avail" for forty years, the valuation should have been of the stock and teind together, and not of the teinds separately; (3) that at its date the teinds of some of the lands belonged to the heritor himself, who could not therefore by his consent effectually fix their value; and (4) that it did not set forth the evidence on which the vicarage teinds were valued. Objections repelled, and decree of approbation pronounced.

Richmond v Officers of State, &c., 1871, 9 M. 1020; 43 J. 562; 8 S.L.R. 696.

(48)

Valuation of "stock and vicarage teinds" where no parsonage teinds.

A sub-valuation in 1632 declared the "stock and vicarage teinds conjunctim" of certain lands "haveing no parsonage teinds yrin, in regard the samen nevir was teillit or laboured, was, is, and may be worth only in all tyme comeing 20 mkis. money." Held that this valuation was in conformity with the instructions issued to the sub-commissioners in 1629, that it valued the entire rent of the subjects, and that the rule of valuation where the teind was not severally drawn was that all lands, whether grass lands or corn lands, should have their teinds, parsonage and vicarage, commuted to one-fifth of the constant rent.

Houston v Common Agent for Haddington, 1868, 6 M. 235; 40 J. 139; 5 S.L.R. 179.

(49)

Stock and teind valued together—Teinds in possession of heritors—Title to bring process of approbation.

A process of approbation and valuation was brought in the Teind Court in 1878 for approval of a report and valuation by the sub-commissioners in 1629-35, affecting certain lands in the united parishes of Little Dunkeld and Logieallochie. The report narrated that the minister "hes ane local stipend payit to him be the heretors and in-

trometters with the teyndis at comand and direction of the Bishop of Dunkeld, titular," and it contained a series of findings applicable to the different lands, valuing stock and teind together, but in certain cases there was added to the finding a separate statement of the teinds as "led," "rentallit," and "payit of auld." The Bishop of Dunkeld as titular had appealed to the High Commission, and the report was never approved by the High Commission, but it was acted upon for two centuries in a series of localities. Held that the Crown as titular was entitled notwithstanding the lapse of time to insist in the bishop's appeal, but that the report and valuation should be approved in respect that, the heritors having been in possession of the teinds, the sub-commissioners had proceeded properly in valuing the lands, stock and teind, together, and that the teinds should be valued at one-fifth of the reported rent of stock and teind together.

Duke of Atholl v Lord Advocate, 1880, 7 R. 583; 17 S.L.R. 409.

(b) All Parties not Represented.

(50)

Absence of titular.

Lord Advocate v Lady Willoughby de Eresby, 1885, 12 R. 1330; 22 S.L.R. 891, No. 33, *supra*.

Baird v Earl of Wemyss, 1906, 8 F. 669; 43 S.L.R. 614; 14 S.L.T. 2, No. 34, *supra*.

(51)

Titularity only partly represented.

A parson who was titular of three-fourths of the whole teinds of his parish, and tacksman of the other fourth, called the bishop's fourth, appeared and consented to a sub-valuation according to the whole rental bolls. Held that the titularity had been sufficiently represented, and that it was not a valid objection to the valuation that the bishop had not been called.

M'Neill's Trustees v Campbell, 1872, 11 M. 211; 45 J. 131; 10 S.L.R. 138.

(52)

Valuation by rental bolls of consent—Absence of consent by one heritor—Titular only partly represented.

A sub-commission for the valuation of the teinds in a parish authorised the sub-commissioners to give effect to the practice of payments by rental bolls when the parties consented thereto. In 1629 a report by the sub-commissioners set forth that the parson, who was titular of three-fourths of the teinds of the parish, and tacksman of the remaining fourth, and all the heritors, had consented to the valuation by rental bolls, except the proprietor of the lands of A. The bishop, who was titular of the said remaining fourth, was not directly represented. In an approbation, brought after the lapse of two hundred years, by the proprietor of A, the titular objected to the valuation as having proceeded without the consent of all the

titulars and heritors. **Held** (1) that the titularity had been sufficiently represented by the parson, as titular and tacksman; (2) that the silence of the proprietor of A was not a valid objection to the valuation.

Ainslie & Co. v The Officers of State, 1869, 11 M. 260; 6 S.L.R. 551.

5. IDENTIFICATION OF LANDS.

(53)

Prima facie evidence that whole lands in parish valued, rebutted.

Circumstances in which **held** that terms of a report of sub-commissioners of teinds in 1629, decree of approbation thereof in 1785 and 1786, and relative scheme of division, and the proceedings in a process of augmentation in 1800, raised the presumption that the whole lands in a parish had been valued in 1629, but that this presumption had been overcome by proof that certain lands were not included in the valuation.

Macleod v Heritors of Morvern, 1873, 11 M. (H.L.) 62; 45 J. 461; 10 S.L.R. 657.

(54)

Presumption that pertinents are included.

Opinion (per Lord Barcaple, Ordinary) that a valuation nominatim of the lands appearing in a person's titles affords "a clear and strong legal presumption" that it includes separate possessions not appearing in the decree or in the titles but held as part of the estate.

Elder v Fotheringham, 1869, 7 M. 341; 41 J. 199; 6 S.L.R. 220.

(55)

Onus of proof.

In a parish in which the teinds had been for a long period dealt with as valued and exhausted, the minister obtained an augmentation on the condition that free teinds should be found to exist. In the course of the process the Court **held** that certain lands in the parish were not included in an old decree of valuation founded on by the heritors, and allowed the minister a proof of his averment that certain other lands were not included in the decree of valuation. **Held** that under the interlocutor the onus of proving that the lands were not included in the valuation lay upon the minister. There is no presumption that a decree of valuation professing to value the whole lands of a heritor does not include lands which were moss lands at the date of the decree.

Minister of Banchory-Devenick v Heritors, 1871, 9 M. (H.L.) 121; 43 J. 428; 8 S.L.R. 716.

(56)

—A decree of valuation dated in 1634 bore to value the teinds of the lands of A, with the exception of a certain ten shilling land, which through lapse of time it had become impossible to identify. In a locality in 1874 the proprietor of a portion of the lands of A founded upon the valuation as embracing his lands. **Held**, in the absence of evidence as to the situation of the ten shilling land,

that in the first instance the onus lay upon the minister to show that the heritor's lands fell within the exception, but that in the circumstances that onus had been discharged.

Stevenson v Magistrates of Rutherglen, 1874, 2 R. 174; 12 S.L.R. 149.

(57)

Ambiguity in sub-commissioners' report.

Held competent in a process of approbation of a sub-valuation to inquire what lands were valued by the sub-commissioners under a particular name.

Earl of Mansfield v Hamilton, 1870, 8 M. 1072; 42 J. 618; 7 S.L.R. 685.

(58)

—In a locality certain heritors objected to the lands of Nether Obney and Over Obney being localled on as valued. The proprietor, in answer, founded on a report and valuation of the lands of "Obney," by the sub-commissioners (of date 1629-35, approved by the High Commission on 3rd February, 1796), which, in localities from 1770 downwards, had been held to apply to them. **Held** that the terms of the findings in the report showed that the lands of Nether Obney and Over Obney were not included in the valuation, and that the title deeds supported this construction.

Earl of Mansfield v Stewart, 1880, 7 R. 552; 17 S.L.R. 359.

(59)

Lands included under general name in accordance with general understanding — Identification.

In a process of locality in 1862 the proprietor of two adjoining parcels of land described in his titles as M and B, for each of which he paid a separate feu-duty, founded on a decree of valuation in 1636 of the teinds of M, alleging that it included a valuation of the teinds of B. **Held** that he had proved this allegation by proving that at the date of the valuation B was understood to be included in the general description of M.

Plummer v Common Agent for Selkirk, 1867, 6 M. 124; 40 J. 70; 5 S.L.R. 100.

(60)

Ambiguity in decret of approbation—Prescription of extrinsic objections to decret.

In a report in 1629 of a valuation by sub-commissioners of lands and teinds in a parish, the lands of P were reported to be of the value of forty bolls victual. In a note appended to the report, the lands of D were declared to be "nocht valued becaus yai ar sett decimis inclusis." In 1797 an action of approbation and valuation was brought by A as proprietor of the lands of P, and by B as "infert" in part of the lands of D, "which lands of D were formerly part of the said lands of P"; and decree of approbation of the report was pro-

nounced, and the funds of P were valued at forty bolls victual "conform to conclusions of the libel." More than forty years after the date of the decree the proprietor of the part of D which belonged to B objected to be localled on for augmentation of stipend, maintaining that his part of D had been valued under the above decree. Another heritor lodged answers in which he maintained (1) that the decree of approbation, when fairly construed along with the report, which it expressly approved, did not value the lands of D; or otherwise (2) that there was a latent ambiguity in the decree, which fell to be explained by documentary evidence. **Held** (1) that the decree valued the part of the lands of D which belonged to B as having formed part of the lands of P at the date of the sub-valuation; and (2) that the objections stated to it were extrinsic objections which could not be maintained after the lapse of forty years.

Spir v Lord Willoughby de Eresby, 1891, 18 R. 407; 28 S.L.R. 277.

(61)

Lands not mentioned nominatim in valuation of proprietors' lands—Subsequently not localled on—Presumption.

An action was brought in 1884 by the minister of the parish of X for declarator that the lands of D were not valued. The defenders' title to the lands was founded on a feu contract, dated in 1764, by which the proprietor of A feued to the defenders' predecessor the two merk land of D, with the teinds, parsonage and vicarage, for a feu-duty of eighteen merks for the lands, and ten merks for the teinds, the vassal and his successors being appointed heritable sub-foresters and sub-keepers of the forest of D. The defender founded on a valuation in 1629 by sub-commissioners appointed to value the teinds of the whole presbytery, in which the lands belonging to the proprietor of A were separately valued thus—the lands of A—the lands of B—the lands of C—but no mention was made of the lands of D. The defender also founded on a decree of approbation obtained by the proprietor of A in 1777 (after he had parted with the lands of D). The pursuer in that action did not conclude to have the valuation of the teinds of A divided, so as to throw part of the stipend on the lands of D, as he did in the case of other subjects belonging to him, where a portion had been alienated since the sub-valuation. It was proved that the two merk land of D was fifteen miles distant from the lands of A. It appeared that in a process of locality in 1806 the lands of D were entered in the proven rental at £300, but that they were omitted from the scheme of locality. The same course was followed in the last locality in 1817. The pursuer suggested that the lands of D had been excluded from the locality as being part of a royal forest. **Held** that it had not been proved that the lands of D were valued.

MacLachlan v Stuart, &c., 1885, 12 R. 1107; 22 S.L.R. 721.

(62)

Portion of lands feued out prior to valuation—Whether included—Usage.

In 1616 the proprietor of the estate of L feued part thereof under the name of the mill and mill lands of L. In 1630 the teinds of L were valued under that general name. In a question raised by the minister of a parish to which the lands of L had, under that name alone, been annexed in 1648, the minister maintained that, although the whole lands had been annexed to his parish under the name of the lands of L, the valuation did not include the teinds of the mill and mill lands of L. All subsequent usage had proceeded on the footing that the teinds of the whole had been included in the valuation. **Held** that the valuation must be taken to have included the whole lands of L, in respect that no clear case to the contrary had been established by the minister, and that if they did not form part of L in 1648, they had not been annexed.

Simpson v Ewing, 1882, 10 R. 313; 20 S.L.R. 228.

(63)

Whether share of common, subsequently allocated, included.

In 1636 the teinds of the lands of S were valued. In 1676, on a division of an adjoining common, a portion of land was allocated to the proprietor of S. Circumstances in which **held** that the valuation included the right of the proprietor in the common. **Observed** that to found the presumption that a valuation of principal lands includes a valuation of accessories so as to embrace land which afterwards comes to the heritor as a surrogatum for such accessories, it is necessary (1) that the valuation precede the acquisition of the separate subject as a surrogatum; and (2) that the principal lands named in the valuation be identified as the principal lands to which in the division the surrogatum is appropriated. **Observed** that the fact of a considerable part of teind valued being vicarage teind, is favourable to the conclusion that rights in a commonity are included in a valuation.

Plummer v Common Agent for Selkirk, 1867, 6 M. 124; 40 J. 70; 5 S.L.R. 100.

(64)

—A report of sub-commissioners in 1630 found that the lands of L were worth "of yearly rent in stock and teynd one chaldier victual, half bear half meal." The earliest extant title to the lands was dated in 1755, and expressly included a right of pasturage in an adjoining common. The common was divided in 1792, when a portion was allocated to the lands of L. **Held** that the proprietor of L having failed to prove that at the date of the sub-valuation the lands of L had any share in a right of commonity, the portion of the common subsequently allocated must be held to be unvalued.

Kerr v Common Agent for Kinross, 1869, 7 M. 748; 41 J. 390; 6 S.L.R. 467.

(65)

Whether teinds of burgh green included in valuation by rental bolls.

A decree of valuation in 1634 bore to value the teinds of certain lands belonging to a burgh, which had hitherto been paid in rental bolls. **Held** that there was no presumption that the teinds of the burgh green, which formed part of the lands, and which, though capable of cultivation, was presumably in pasture at the date of the valuation, had not been included in the conversion into rental bolls, and were not therefore included in the valuation.

Stevenson v Magistrates of Rutherglen, 1874, 2 R. 174; 12 S.L.R. 149.

(66)

Falsa demonstratio.

It was decided in a process of locality that the lands of K, "part of the Barony of Naughton," were valued. **Held** that this finding was *res judicata* to the effect that these lands were valued, whether they were "part of the Barony of Naughton" or not—these words being only descriptive, not taxative.

Stuart v Morison, 1871, 8 S.L.R. 372.

(67)

Lands erroneously described as in another parish.

A heritor raised in 1757 a process of valuation of his lands lying in the two adjoining parishes of A and R, and called the ministers of the two parishes, who appeared. In the summons one of his lands was erroneously described (though conform to his titles) as lying in the parish of A, but in the proof and in the decree the lands were named without any parochial description. In localities subsequent to the valuation the lands were localised on in the parish of A. In the locality of the parish of R, in 1868, the minister succeeded in proving that the lands lay in his parish. **Held** that the lands were effectually valued, repelling an objection by the minister of R that the misdescription in the summons of valuation was fatal. Remarks on the unreported case of the locality of Kilmalie (*Macintyre v Duke of Gordon*, 23rd Dec., 1826).

Minister of Rescobie v Carnegie, 1869, 7 M. 514; 41 J. 273; 6 S.L.R. 322.

(68)

The proprietor of an estate raised a process of valuation of lands lying in several parishes, and called the ministers, patrons, and titulars of all the parishes as defenders. **Held** that the valuation of part of the lands was not invalidated by the lands being erroneously described in the summons and decree as in one instead of another of the parishes, the lands having been otherwise well described, and there being no doubt of their identity.

Cameron v Lord Lovat, 1869, 7 M. 896; 41 J. 510; 6 S.L.R. 582.

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6. PROVING THE TENOR.

(69)

Sub-valuation.

Circumstances in which the tenor of a report of sub-commissioners of teinds in 1629 was **held**, so far as regarded certain lands, to be instructed by a copy in the handwriting of the period found in the family repositories of a heritor of other lands in the same parish, although it appeared that the copy was not in all respects a precise transcript of the original.

Richmond v Officers of State, &c., 1869, 7 M. 956; 41 J. 539; 6 S.L.R. 614.

(70)

A report of the sub-commissioners appointed for the valuation of the stock and teind of the lands within the presbytery of Argyll, dated in 1629, had been repeatedly given effect to in approbations and localities. Part of the original document had become illegible, apparently from damp, and part appeared to have been worn away. A copy of the entire document, supposed to be made about 1720, was preserved in the Teind Office, but the writer was not known. From this copy, which was not in all respects a faithful transcript, the deficiencies in the original could be supplied. In an action of proving the tenor of a portion of that part of the report which had been destroyed, **held** that the tenor had been sufficiently instructed by the evidence produced.

Duke of Argyll v Campbell, 1873, 11 M. 611; 45 J. 383; 10 S.L.R. 407.

(71)

Of one word or figure only.

Held that a proprietor was entitled to bring a proving of the tenor of an old valuation of the teinds of the lands in his presbytery in so far as it related to his own lands, the only defect in the valuation being the want of a figure or letter said to represent the number "ten" before the word "bolls."

Duke of Atholl, 1880, 7 R. 1195; 17 S.L.R. 804.

(72)

Casus amissionis—Destruction of teind records.

In an action of proving the tenor of two decrees of valuation, pronounced in 1634, where the *casus amissionis* condescended on was the loss of teind records either in the shipwreck in 1660 or in the fire which took place in the Parliament Close in 1700, and the adminicles were certain documents preserved in the Teind Office and in the Lord Clerk Register's department, the Court, after a report from the teind-clerk, sustained the adminicles, and found the *casus amissionis* and the tenor proved.

Earl of Wemyss v Duke of Buccleuch, &c., 1883, 10 R. 1084.

(73)

Report of Teind-Clerk.

Circumstances in which the Court gave decree in a proving of the tenor of a report of sub-commissioners for the valuation of

teinds without an oral proof, the adminicles being satisfactory, and the Teind-Clerk having reported favourably on these adminicles.

Duke of Atholl, 1880, 7 R. 1195; 17 S.L.R. 804.

(74)

Expenses.

In an action of proving the tenor of a sub-valuation, held that the pursuer was not entitled to expenses against a defender whose opposition had not been unreasonable.

Richmond v Officers of State, &c., 1869, 7 M. 956; 41 J. 539; 6 S.L.R. 614.

7. DERELICTION.

(75)

Sub-valuation—Payments in excess.

A sub-valuation of the teinds of lands originally in one parish, but afterwards annexed to another, held to have been derelinqushed, the heritors having constantly made payments of stipend to the ministers of both parishes, which together exceeded the amount of the sub-valuation, though the payments for each parish were within it.

Fogo v Colquhoun, 1867, 6 M. 105; 40 J. 67; 5 S.L.R. 92.

(76)

—Circumstances in which held that dereliction of a sub-valuation could not be inferred from over-payments of stipend.

Cowan v Cook, &c., 1866, 6 M. 110 (note).

(77)

—Held that although a heritor had made payments of stipend in excess of the teind of his lands as valued by a report of the sub-commissioners in 1629, dereliction of the valuation was not to be inferred, the over-payments being either of small amount or made under protest, and in presumed ignorance of the existence of the report, while there was nothing to show that he had deliberately elected to hold the teinds of his lands as unvalued.

Richmond v Officers of State, &c., 1871, 9 M. 1020; 43 J. 562; 8 S.L.R. 696.

(78)

Lapse of time as bar to approval.

Held (1) that mere lapse of time is no bar to a sub-valuation of teinds being approved, the right to obtain approbation being *res meræ facultatis*; (2) that a sub-valuation of teinds will not be held to be derelinqushed unless there is evidence of an intention to abandon it; (3) that over-payments of stipend will not be evidence of the abandonment of a sub-valuation if it appear that at the time of the over-payments the heritor making them was ignorant of the existence of the sub-valuation.

Lord Elibank's Trustees v Hart, 1888, 15 R. 927; 25 S.L.R. 659.

(79)

Sub-valuation in standard measure—Payment in local measure for prescriptive period.

In an action brought in the Teind Court

in 1884 for approbation of a report of the sub-commissioners in 1630 valuing the teinds of certain lands, the minister showed that while the pursuer and his predecessors had been localled on for a bere stipend of 11 bolls, the amount fixed by the valuation stated in standard measure, they had for upwards of forty years paid the ministers a bere stipend of 11 bolls according to a local measure, which exceeded the standard measure, and pleaded accordingly that the heritor so paying in excess of the valuation must be held to have derelinqushed it. Held that there was no evidence of an intention on the part of the heritor to abandon the sub-valuation, and defences therefore repelled.

Smollett v Simpson, 1885, 12 R. 1150; 22 S.L.R. 768.

8. SURRENDER OF TEINDS.

(80)

Form of surrender—Letter.

One of the heritors of a parish, whose teinds had been valued, wrote a letter to the minister containing merely a statement that he "surrendered the teinds" of certain lands of which he was the proprietor.

Opinions that the letter was not a satisfactory form of surrender, in respect that it was not a specific surrender of the stated amount of the valued teinds.

Davidson v Stuart, 1919 S.C. 20; 56 S.L.R. 27; 1918, 2 S.L.T. 241.

(81)

—Surrender not unconditional.

A minute of surrender of teinds was objected to by the minister as not being unconditional in its terms, in respect that there was a dispute as to the extent of the lands embraced in the valuation on which it proceeded. As the dispute did not appear *ex facie* of the minute but only in the objections thereto stated by the minister, the Lord Ordinary sustained the minute but observed that this would neither determine nor affect the dispute as to boundaries.

Earl of Dalhousie v Minister of Barry, (O.H.) 1915, 1 S.L.T. 392.

(82)

Tender—Localled stipend exceeding total teinds—Right of heritor to tender teinds without surrendering them—Tender of valued teinds where teinds valued—Tender of fifth of rent where teinds unvalued.

Where a heritor has not surrendered his teinds to the minister in perpetuity, he is bound each year to pay to the minister the full amount of stipend localled upon him. Accordingly, where the teinds have been valued and the amount of stipend localled in victual exceeds in value the money value of the teinds, a heritor cannot tender, instead of the localled stipend, the full money value of his teinds; where the teinds are unvalued and the amount of stipend localled in victual exceeds in value one-fifth of the rent of the lands, he cannot tender, instead of the localled stipend, one-fifth of the rent.

So held per Lord Sands, Ordinary, and his judgment as regarded the valued teinds affirmed by the Court of Teinds and, on appeal, by the House of Lords. In view, however, of an admission by the heritor that failure on his part as regarded the valued teinds would necessarily involve failure as regarded those which were unvalued, the Court of Teinds and the House of Lords found it unnecessary to deal specifically with the question of unvalued teinds, but expressed approval of the Lord Ordinary's judgment with regard to them. **Observations** (per Lord Dunedin) upon the surrender of teinds (1) where the surrenderer has not a heritable right to the teinds; (2) where the teinds cannot be sold.

Galloway v Earl of Minto, 1922 S.C. (H.L.) 24; 59 S.L.R. 46; 1922 S.L.T. 9.

(83)

Surrender where final decree of locality in force—Necessity for reduction of decree of locality—No free teind.

In 1905 the Court of Teinds pronounced a final decree of modification and locality in a process of augmentation relating to a certain parish. The total value of the teinds of the parish was £353, of which £80 was localised upon lands belonging to D, whose teinds were unvalued. After the augmentation there remained £44 of free teind, of which £15 applied to D's lands. For the year 1916, owing to the increase in the value of the chalders, the stipend amounted to £621, of which £191 applied to D's lands. In 1916 D brought an action for the valuation of his teinds, and obtained a decree valuing them at £96. Thereafter he surrendered the teinds to the minister and his successors in office. The minister, however, demanded payment of £191 as the teind for 1916, contending that D's surrender was invalid, in respect that he had not reduced the existing decree of locality and obtained a rectified scheme giving effect to the proposed surrender.

Held that the reduction of an existing decree of locality and the obtaining of a rectified scheme were not conditions necessarily precedent to a surrender of teinds, and that there was no necessity in this case for such reduction and rectification, as that procedure would not, in the state of the teinds, be of any benefit to the minister; and, accordingly, that the surrender was valid, and that D's liability was limited to £96.

Davidson v Stuart, 1919 S.C. 20; 56 S.L.R. 27; 1918, 2 S.L.T. 241.

(84)

Lands localised on for forty years in excess of valuation subsequently obtained.

By a final decree of locality in 1817 the lands of a heritor were localised on for stipend to the extent of £40, being the full amount of the teinds taken at one-fifth of the proven rental. In 1863 the heritor obtained a decree of valuation of his teinds which fixed them at £32, and subsequently obtained a decree of reduction of the decree

of locality, qualified by the condition that it should subsist as the interim rule of payment of stipend until a new decree of locality was obtained. In a subsequent locality, **held**, in a question between the heritor and the minister, that the former was not precluded by the forty years' payments of £40 from surrendering his teind at the sum fixed by the decree of valuation.

Question, whether the reduction of the former decree of locality was necessary.

Chisholm-Batten v Cameron, 1873, 11 M. 292; 45 J. 207; 10 S.L.R. 195.

(85)

Effect of forty years' over-payments.

When for more than forty years payments of stipend in excess of sub-valuations of teinds had been made under final decrees of locality, pronounced prior to decree of approbation, **held** that the minister had acquired right to have these payments continued.

When under a decree of locality payments of stipend in excess of the value of teinds fixed by previous sub-valuation and decree of approbation had been made for more than forty years, **held** that the minister had not acquired right to have these payments continued.

Where payments of stipend in excess of a sub-valuation of teinds had been made for more than forty years under a final decree of locality, and the sub-valuation had been abandoned, and a decree of valuation of the Court of Teinds obtained, **held** that the decree of the Court fixed the amount of the teind, and that the minister had no right to have the overpayments continued.

Colquhoun v Fogo, 1873, 11 M. 919; 45 J. 567; 10 S.L.R. 637.

(86)

Forty years' over-payments after valuation of consent approved by Court of Teinds.

In a locality the minister objected to a surrender of teinds by a heritor who held a valuation approved of by the Court of Teinds, on the ground that thereafter, under a final decree of locality, over-payment of stipend had been made for forty years, and that the heritor's right to reduce the locality and his right to surrender the teinds were both cut down by the negative prescription. Objection repelled, in respect (1) that it was not necessary for the heritor to reduce the decree of locality; and (2) that the right to surrender, being *res mere facultatis*, could not be affected by the negative prescription.

Earl of Minto v Pennell, 1873, 1 R. 156; 11 S.L.R. 66.

(87)

Prescriptive right to over-payments.

Where a minister has acquired a prescriptive right to over-payments of teind in excess of decrees of approbation of sub-valuation, **held** that the heritor could not surrender his teinds.

Colquhoun v Fogo, 1873, 11 M. 919; 45 J. 567; 10 S.L.R. 637.

(88)

Decree of approbation disconform to sub-valuation—Over-payments by heritor for prescriptive period—Surrender at value stated in decree.

A decree of approbation and valuation dated 1792 was disconform to the sub-valuation on which it proceeded. The decree had not been challenged within the prescriptive period of forty years, and was ex facie consistent and unambiguous, although the payment made since 1792 had been in excess of the valuation contained in the decree. **Held** that a heritor was entitled to surrender teinds at the value stated in the decree.

Duke of Fife v Lord Advocate, (O.H.) 1895, 2 S.L.T. 518.

(89)

Surrender sustained without objection by former minister—Res judicata.

Held that the fact of a surrender of valued teinds having been sustained in one locality without objection on the part of the minister to the decree of valuation, did not bar his successor in the benefice from stating objections to the validity of the decree in a subsequent locality, and pleas of res judicata and "competent and omitted," stated by a heritor, repelled.

Thomson v Earl of Zetland, 1868, 7 M. 99; 41 J. 57; 6 S.L.R. 86.

(90)

Failure to produce original decree of valuation—Valuation referred to in subsequent decree.

In a process of augmentation, modification, and locality an owner of teinds proposed a minute of surrender. He failed to produce the original decree of valuation, but produced a decree pronounced in a subsequent action of valuation finding that there could be no new valuation of the teinds in question as they had already been valued in cumulo with other teinds, and finding and declaring the proportion of that valuation effeiring to the teinds in question. **Held** that the production of this decree entitled the owner to surrender.

Earl of Dalhousie v Minister of Barry, (O.H.) 1915, 1 S.L.T. 392.

(91)

Effect of surrender—Vesting of stipend.

A heritor obtained a decree of valuation of his teinds on 23rd November, 1916. In March, 1917, he surrendered the teinds to the minister. The minister maintained that the surrender did not affect the stipend for 1916 in respect that that stipend had vested in him at Michaelmas, 1916, prior to the decree of valuation.

Held that, while the stipend had vested, it had vested only quantum valeret at the time when it fell to be paid, and that, as by that time the valuation and surrender had taken effect, the stipend of 1916 fell to be paid as modified by the valuation and surrender.

Davidson v Stuart, 1919 S.C. 20; 56 S.L.R. 27; 1918, 2 S.L.T. 241.

9. ACTIONS OF APPROBATION AND REDUCTION OF VALUATIONS.

(92)

Action of approbation—Title to sue.

No one except a heritor can pursue a summons of approbation of the sub-valuation.

Lord Elibank's Trustees v Hope, 1891, 18 R. 445; 28 S.L.R. 295.

(93)

Title to sue—Action at instance of proprietor of a portion only of the lands valued—Competency.

Held that the proprietor of a portion of the lands of G, the teinds of which were the subject of a valuation by sub-commissioners in 1629, could competently bring an action for the approbation of the valuation of the lands of G, with a view to have the cumulo valuation divided and apportioned, though the other persons who, at the date of the action, were proprietors of the other portions of these lands were not joined with him as pursuers in the action, these persons having been called as defenders.

Elgin Guildry Fund Society v Macpherson, 1906, 8 F. 550; 43 S.L.R. 399; 13 S.L.T. 860.

(94)

Petition for authority to record decree of valuation of teinds—Act 1707, c. 9.

In a petition for authority to record a decree of valuation of teinds, which had recently been upheld as valid by the Court of Session in a question between the Lord Advocate and the petitioner, the Court, in respect of the said judgment, dispensed with the usual remit to the Lord Ordinary on Teinds, and granted the prayer of the petition de plano.

Lady Willoughby de Eresby, 1885, 13 R. 74; 23 S.L.R. 50.

(95)

Reduction of valuation — Ministers of parishes valued in one decree suing jointly.

The teinds of several parishes had been valued by one decree. The ministers of these parishes raised an action of reduction of the decree against the heritors. **Held** that though each pursuer had an interest only to set aside the decree so far as it affected the teinds in his own parish, it was not incompetent for them all to sue in the same action.

Ministers of Islay v The Heritors, 1868, 6 M. 1074; 40 J. 602; 5 S.L.R. 714.

IV. STIPEND.

1. MINISTER'S RIGHT TO STIPEND.

[See CHURCH VI. 3.]

2. SUBJECTS NOT LIABLE FOR STIPEND.

(96)

Royal forest.

Evidence on which **held** (1) that the forest of Glenfinlas had not been from time im-

memorial a royal forest; and (2) that it had not been exempted from being localised on for stipend. **Question** (per Lord Neaves) whether lands which have been a royal forest from time immemorial are in every case free from stipend.

Earl of Moray v M'Diarmid, 1869, 8 M. 142; 42 J. 274; 7 S.L.R. 300.

(97)

Roads and streets in a city.

Held that streets in a city are not liable for stipend, the police board not being heritors, and the presumption being that the streets have been taken into consideration in valuing the adjoining lands to which they give access.

Glasgow Police Board v Common Agent for Springburn, 1878, 5 R. 718; 15 S.L.R. 510.

(98)

Bare superiority—Security right.

Held that a person who has a bare superiority over lands, or one who has a security right over lands on which no possession has followed, and who has not intromitted with the fruits, is not liable for minister's stipend.

Jackson v Cochrane, 1873, 11 M. 475; 45 J. 314; 10 S.L.R. 290.

3. ORDER OF ALLOCATION OF STIPEND.

(1) TEINDS TO WHICH HERITOR HAS HERITABLE RIGHT.

(99)

Patron's title to teinds under Acts 1690, c. 53, and 1693, c. 41—Postponed liability of teinds of patron's own lands, though no heritable right—Feudalisation of teinds.

By the Statutes 1690, c. 53, and 1693, c. 41, the teinds of all parsonages, which had not prior to the Reformation been appropriated to a prelate or religious house, were transferred from the minister to the patrons, under burden of the minister's stipend. The earlier titles of the patron of the parish of B bore to convey the patronage without mention of teinds. From 1698 to 1734 the teinds were expressly included in the titles, but from 1734 onward they were again omitted, and the titles prior to 1698 bore to transmit merely the patronage. In a locality the patron claimed, in virtue of his statutory right qua patron to the teinds of the parish so far as not conveyed to the heritors, and particularly to the teinds of his own lands, to have the teinds of his own lands postponed along with the teinds of such heritors as held heritable right to their teinds. **Held** (1) that the attempt to feudalise the teinds between 1698 and 1734 was inept; but (2) that even if it had had any effect, neither the temporary feudalisation of the teinds, nor the falling again into abeyance of the feudal title which had been so created, sopited the statutory title or derogated from the patron's right qua patron

to the teinds, and that the patron was therefore entitled to the postponement which he claimed.

Lochore and Capledrae Cannel Coal Co. v Common Agent for Ballingry, 1878, 5 R. 763; 15 S.L.R. 440.

(100)

Prescriptive right to teinds claimed in respect of a conveyance dated 1766 a non domino—Observations on possession necessary to establish a heritable right to teinds.

Mackintosh v Lord Abinger, 1877, 4 R. 1069; 14 S.L.R. 632, No. 15, supra.

(101)

Progress of titles held not to constitute a valid decimæ inclusæ right.

Dundas v Waddell, 1878, 6 R. 345; 16 S.L.R. 340.

Reversed (on another point), 1880, 7 R. (H.L.) 19; 5 App.Cas. 249; 17 S.L.R. 433, No. 116, infra.

(2) BISHOPS' AND COLLEGE TEINDS.

(102)

Teinds alleged to be bishops' teinds—Contrary usage.

In all the localities of the parish of M, from 1579 down to 1860, teinds held by the Crown as titular were localised on primo loco, teinds held by heritors on heritable rights having been exempted from allocation. In a locality in 1860 the Crown objected to this mode of allocation, on the ground that the teinds belonging to it were bishops' teinds. **Held** that the onus lay upon the Crown of showing that the existence of the heritable rights, and the usage which had followed upon them, were consistent with its claim.

Lord Advocate v Gordon's Trustees, 1871, 9 M. (H.L.) 73; 43 J. 391.

(103)

Res judicata.

Bonar v Lord Advocate, 1870, 9 M. 58; 43 J. 28; 8 S.L.R. 69, No. 119, infra.

Thomson v Lord Advocate, 1872, 10 M. 849; 44 J. 551; 9 S.L.R. 542, No. 120, infra.

Cheape v Lord Advocate, 1871, 9 M. 377; 43 J. 182; 8 S.L.R. 286, No. 2, supra.

(104)

Teinds united to a bishopric for the first time in 1612.

Teinds had belonged to a priory before the Reformation, had never been erected into a temporal lordship, but after the Reformation were held in commendam by laymen until 1612, when they were regularly united to a bishopric. They were inalienable in the hands of the bishop before the submissions to King Charles I. in 1627 and 1628, and fell to the Crown on the abolition of episcopacy in 1689. **Held**, in a locality, that these were bishops' teinds in the hands of the Crown, and entitled to be postponed to teinds held on heritable right.

Lord Advocate v Earl of Galloway, 1873, 11 M. 896; 45 J. 547; 10 S.L.R. 629.

4. PERSONS LIABLE TO PAY STIPEND.

(105)

Liability on change of ownership of land.

Opinion (per Lord Justice-Clerk Moncreiff) that it is not necessary to enable a minister to use his decree of locality against a possessor of lands localised on that the possessor's name should appear in the locality. **Opinion** that a proprietor whose name appears in the decree of locality ceases to be liable for stipend when he ceases to be proprietor.

Jackson v Cochrane, 1873, 11 M. 475; 45 J. 314; 10 S.L.R. 290.

(106)

Pending application for decree of approbation of sub-commissioners' report—Clause of reservation in decree of augmentation.

In a process of augmentation certain heritors stated that they had discovered a report of the sub-commissioners of teinds and were about to take steps to obtain a decree of approbation of that report, and maintained that either the process of augmentation should be sisted or a clause reserving the rights of the heritors should be inserted in the decree of augmentation. The Court granted decree of augmentation and refused either to sist the process or to insert an express reservation of the rights of the heritors in the decree, in respect that an express clause of reservation was unnecessary, because the de plano decree of augmentation would not affect the rights of the heritors.

Clark v Grant, 1902, 39 S.L.R. 431.

(107)

Alterations on interim scheme—Final scheme—A.S., 12th November, 1825.

In a process of locality, after an interim scheme had been approved of, a number of alterations became necessary in the preparation of a final scheme, owing to deaths of heritors and changes of proprietors. The common agent accordingly prepared a rectified scheme of teinds, and, an opportunity having been given to the heritors to see this state, he asked a remit in the usual terms to the clerk to prepare a rectified scheme. The motion was opposed on the ground that it was contrary to the provisions of the Act of Sederunt of 12th November, 1825. **Held** that the course followed by the common agent was competent and expedient, although not in strict conformity with the provisions of the Act of Sederunt.

Duke of Hamilton v Common Agent for Linlithgow, 1874, 12 S.L.R. 99.

5. PROCESS OF AUGMENTATION AND LOCALITY.

(1) PARTIES ENTITLED TO APPEAR.

(108)

Titularity not recognised in interim locality—Title of recognised titular to object.

In a process of locality a titular objected

to an interim scheme of locality, as drawn up by the common agent, that it recognised the existence of only two titularities in the parish, and omitted to recognise a third titularity existing in a person who had not claimed a right of titularity. It was admitted that the objector had no interest to state the objection in the process of locality. **Held** (per Lord Pearson, Ordinary, and acquiesced in) that the objection fell to be disallowed in the process of locality on the ground of want of interest, the right to raise the objection in any other competent process being reserved.

Baird v Earl of Wemyss, 1906, 8 F. 669; 43 S.L.R. 614; 14 S.L.T. 2.

(109)

Augmentation and modification—Decree in absence of heritor—Reponing—Act of Sederunt, 12th Nov., 1825, sec. 24.

Interlocutors finding a minister entitled to an augmentation, modifying the same, and appointing the only heritor having an interest to lodge a scheme of locality, were pronounced in absence of that heritor, upon whom the summons had not been served, but who did not dispute that the procedure otherwise, by advertisement and announcement in the parish church, had been regular. The Court reponed the heritor on payment of the previous expenses.

Buchanan v Gilmour, 1883, 11 R. 59; 21 S.L.R. 51.

(110)

Value fixed in previous locality—No evidence that question fairly raised and truly sub judice.

In an action brought by the minister of a parish for declarator that certain lands therein were not valued, the proprietor pleaded res judicata, founding on the proceedings in a locality in which the lands in question had been entered in the proven rental at £300, but had been omitted from the decree of locality. **Held** that there being no evidence that the question of liability had ever been fairly raised between the minister and heritor and a judgment pronounced, the plea of res judicata could not be sustained.

MacLachlan v Stuart, &c., 1885, 12 R. 1107; 22 S.L.R. 721.

(111)

—Falsa demonstratio.

Stuart v Morison, 1871, 8 S.L.R. 372, No. 66, supra.

(112)

—No objection by minister at the time.

Thomson v Earl of Zetland, 1868, 7 M. 99; 41 J. 57; 6 S.L.R. 86, No. 89, supra.

(113)

Question between two heritors—Subsequent question between heritor and common agent.

Held that when a question between two heritors as to whether the lands of one of them were teindable was decided and given effect to by a final locality, it was res judicata in a subsequent locality in a question

between the common agent and one of these heritors.

Magistrates of Edinburgh v Montgomery, 1872, 11 M. 14; 45 J. 10; 10 S.L.R. 4.

(114)

Admission by Crown—Whether judgment founded thereon res judicata against heritor.

The Lord Advocate appeared in a locality on behalf of the Crown, and admitted that certain lands were included in a sub-valuation. The admission affected the patrimonial interest of a heritor, which interested the Lord Advocate did not in any way represent. **Held** that the judgment founded on the admission was not *res judicata* against that heritor.

Earl of Mansfield, &c. v Stewart, 1880, 7 R. 552; 17 S.L.R. 359.

(115)

Rectified scheme of locality not declared final.

An augmentation of stipend having been granted and modified, a process of locality followed in which in 1850 an interim scheme was approved. To this scheme the Lord Advocate, as having right on behalf of the Crown to the bishops' teinds, lodged objections, in which he stated that the teinds of the lands of D and certain other lands in the parish, the teinds of which were held on heritable rights, were unvalued. He objected to the scheme in so far as it laid no portion of the augmentation upon the teinds of these lands. The common agent lodged a note, in which he admitted that the teinds of certain of the lands in question, including the lands of D, were unvalued, and stated what he believed to be their rental. In 1858 the Lord Advocate lodged a note stating that he was satisfied with the extent to which the common agent had given effect to his objections as regarded the rents stated for the lands which were let unvalued, including the lands of D, and he craved the Lord Ordinary to sustain the objections, and to remit to the clerk to rectify the locality, and to allocate the augmentation *primo loco* on the teinds of these lands. By interlocutor of 9th July, 1858, the Lord Ordinary remitted to the clerk to rectify the locality and to report. This interlocutor was not reclaimed against. The clerk reported a rectified scheme, but it was never approved final, and no further proceedings took place in the locality until after a new augmentation was granted in 1873. In 1890 the question was raised whether the teinds of the lands of D were valued or unvalued. The party alleging that the teinds were not valued pleaded *res judicata* in respect of the Lord Ordinary's interlocutor of 9th July, 1858. **Held** that the interlocutor did not support the plea.

Speir v Lord Willoughby de Eresby, 1891, 18 R. 407; 28 S.L.R. 277.

(116)

Finding in previous locality that lands held cum decimis inclusis—Whether interlocutors founded on pronounced *causa cognita*.

In a process of augmentation raised in 1875

the heritor of certain lands objected to their inclusion in the scheme of locality on the ground that in a previous process of augmentation raised in 1795, to which the minister of the time and all the heritors had been parties, the Court had ordered these lands to be struck off the rental as being held *cum decimis inclusis*. He further averred that in a subsequent process of augmentation raised in 1807 no question as to these lands was raised, and a final decree of locality was pronounced in 1809. He pleaded that the decree of 1795 was *res judicata*. **Held** that the plea of *res judicata*, founded on the interlocutor of 2nd December, 1795, fell to be sustained, the question whether the lands were held *cum decimis inclusis* having been distinctly presented to the Court and adjudicated upon in the presence of all parties interested.

Observed that it was impossible to presume, after the lapse of seventy years, that the Court did not proceed *causa cognita*, but merely on an *ex facie* consideration, by reason of the minister of that day having no interest to object as there was sufficient free teind to satisfy his augmentation without including the lands struck out.

Dundas v Waddell, 1880, 7 R. (H.L.) 19; 5 App.Cas. 249; 17 S.L.R. 433.

(117)

Consent of common agent.

In a locality a heritor had claimed exemption from stipend on the ground that he held his lands of S under a title *cum decimis inclusis*. The Lord Ordinary in 1778 exempted these and lands of other heritors in an interlocutor, against which the common agent represented, praying for a recall of the interlocutor, "except in so far as respects the lands of S." The Lord Ordinary recalled the interlocutor, except as regards the lands of S, and a rectified scheme of locality was made up giving effect to the exemption claimed, and became final. **Held** in a subsequent locality that as in a question with an individual heritor seeking to establish an immunity of this kind, the common agent represents the whole heritors, his consent is the consent of the whole heritors, and therefore a plea of *res judicata*, founded on the proceedings of the previous locality, sustained.

Duke of Buccleuch v Common Agent for Inveresk, 1868, 7 M. 95; 41 J. 55; 6 S.L.R. 88.

(118)

Erroneous assumption of parties.

From a decree of locality in 1820 certain lands were omitted in consequence of their having been erroneously assumed by the parties to be held upon a title *cum decimis inclusis et nunquam antea separatim*; and there not being other teind in the parish to pay the full amount of the modified stipend, a part thereof was not localled. In an action raised by the minister in 1867 for reduction of the decree, **held** (1) that the decree and proceedings in the locality did not constitute *res judicata*, so as to preclude the minister from challenging the validity of the *decimæ*

inclusæ right; but (2) that although the title cum decimis inclusis proved to be invalid, the minister was not entitled to bygone arrears of stipend, but only to have it found that the lands should not be exempted in future.

Elder v Fotheringham, 1869, 7 M. 341; 41 J. 199; 6 S.L.R. 220.

(119)

Question between heritor and Crown whether certain teinds were bishops' teinds—Effect of (1) former decree of locality, and (2) judgment in litigation between heritors' predecessor and common agent.

In 1817 final localities of a parish were approved of by the Court, the allocation having been made on the assumption that the teinds of the parish in the hands of the Crown were bishops' teinds, entitled to be postponed in the allocation for stipend to teinds held on heritable rights. In a subsequent locality in 1840 one of the heritors contended that the teinds were not bishops' teinds, and brought a reduction of the decree of 1817, which was conjoined with the process of locality. In this reduction he called all the heritors and the Crown, but a record was closed as between him and the common agent alone. The common agent pleaded res judicata in respect of the decree of 1817, and the plea was sustained in 1846. In a subsequent locality the successor of that heritor objected to the scheme of division, on the ground that the teinds in question were not bishops' teinds. The Crown pleaded res judicata in respect of the decrees (1) of 1817 and (2) of 1846. Plea sustained (per Lord Benholme and Lord Neaves on the ground of the decree of 1817, and per Lord Justice-Clerk Moncreiff and Lord Cowan on the ground of the decree of 1846).

Opinions that general questions decided in one locality regulate future localities.

Bonar v The Lord Advocate, 1870, 9 M. 58; 43 J. 28; 8 S.L.R. 69.

Cf. Lady Willoughby de Eresby v Speir, 1876, 14 S.L.R. 162. RES JUDICATA, No. 97.

Cheape v Lord Advocate, 1871, 9 M. 377; 43 J. 182; 8 S.L.R. 286, No. 2, supra.

(120)

Judgment that teinds were college teinds—Crown a party and not objecting.

An interlocutor was pronounced in a locality finding that certain teinds were college teinds. The Crown held bishops' teinds in the parish, and was a party to the process, but did not object to the finding. Held in a subsequent locality that the judgment, being on a point fairly contested in the locality, and having a practical bearing on its being worked out, was res judicata against the Crown.

Thomson v Lord Advocate, 1872, 10 M. 849; 44 J. 551; 9 S.L.R. 542.

(2) RES JUDICATA.

[See RES JUDICATA IV.]

(3) AUGMENTATION.

(121)

Modification in kind—Conversion into money.

A stipend was modified in 1812 at 660 ling fish, 1200 cans of oil, 236 lisponds of butter, and £1 12s. in money. The money value in 1869 and previous years was about £475, but the heritors denied that there were teinds in the parish beyond £254, and the minister had never drawn beyond that amount. In a new process of augmentation and locality at the minister's instance, on the allegation that there were unvalued teinds in the parish, there being no opposition, the stipend was converted into £300 in money, with £10 for communion elements.

Smith v Heritors of Unst, 1870, 9 M. 305.

(122)

Value of feu-duties from glebe not to be taken into consideration.

In an application by a minister for augmentation of stipend, held that the revenue derived from portions of the glebe feued under the Glebe Lands (Scotland) Act, 1866, was not to be taken into account in determining whether or not an augmentation should be granted.

Minister of Kilmacolm v Heritors, 1875, 3 R. 32; 13 S.L.R. 16.

(123)

Non-residence of minister.

The minister of a parish, under an agreement with the parishioners, ceased to reside in the parish, and contributed an annual sum to the salary of an ordained assistant, who occupied the manse and performed all the duties. Thereafter the minister raised a process of augmentation of the stipend. The heritors resisted the augmentation, and maintained alternatively that if any augmentation were granted, it should be made payable to the ordained assistant. The Court granted an augmentation, but directed that it should be paid to the assistant.

Minister of Carsphairn v Heritors, 1893, 20 R. 521.

(124)

Long interval since previous augmentation—Augmentation of seven chalders.

The minister of a parish applied for an augmentation of seven chalders. There had been no augmentation for fifty-nine years, and it appeared that the previous minister, who had occupied the benefice for fifty-six years, had been possessed of considerable private means. All the heritors assented to the augmentation. In the circumstances, the Court granted an augmentation of seven chalders.

Minister of Dalserv v Heritors, 1908 S.C. 1123; 45 S.L.R. 949; 16 S.L.T. 262.

(125)

Augmentation of four and a half chalders—Exhaustion of free teind.

The minister of a parish applied for an augmentation of four and a half chalders, which, if granted, would exhaust the free teind. The heritors did not oppose the

application. In the circumstances, the Court granted the augmentation of four and a half chalders craved.

Minister of Maybole v Heritors, 1909 S.C. 247; 46 S.L.R. 293; 16 S.L.T. 645.

(126)

Augmentation of ten and a half chalders—Collegiate charge.

Circumstances in which, an augmentation of 14½ chalders having been asked to a stipend of 29½ chalders by each of two collegiate ministers, 10½ chalders were granted.

Ministers of St. Cuthbert's, 1882, 20 S.L.R. 35.

(4) PROCEDURE.

(127)

Existence of free teind denied—Grounds requiring investigation—Declarator—Sist.

In a process of augmentation, wherein the heritors opposed the augmentation on the ground that the teinds were exhausted, process sisted to enable the minister to bring a declarator to try the validity of a claim by certain of the heritors that they held their lands cum decimis inclusis et nunquam antea separatis, it not being clear upon the face of the documents produced whether the claim was well founded or not.

Frood v Earl of Stair, &c., 1874, 2 R. 76; 12 S.L.R. 56.

(128)

Augmentation granted pending process of locality.

In a process of augmentation, where the heritors deny the existence of free teind, but do not support their objections by the production of decrees of valuation or other writings which are ex facie conclusive, the Court will not sist process till it shall be determined whether free teind exists or not, but will award an augmentation, and leave that question to be determined in the process of locality. Form of declaration inserted in the decree of augmentation.

Minister of Bonhill v Orr Ewing, 1886, 13 R. 594; 23 S.L.R. 406.

(129)

Where one heritor opposed augmentation on ground of decimæ inclusæ title, but there was other free teind—Process of locality.

In an augmentation the minister condescended upon free teind arising from several different parcels of lands. Only one of the heritors objected to the condescendence, and on the ground that he held his lands under a title cum decimis inclusis, and craved that the process should be sisted that the minister might bring a declarator to try the validity of the objector's decimæ inclusæ right. Held that as there was free teind apart from that of the objecting heritor the minister was entitled to an augmentation, and that the objection of the individual heritor would fall to be disposed of in the locality.

Minister of Borthwick v Dundas, 1876, 3 R. 361; 13 S.L.R. 217.

(130)

Dispute as to the existence of sufficient free teind—Process of locality.

In a process of augmentation the heritors admitted the existence of free teind, but denied that it was sufficient to meet the augmentation craved, and moved for an order on the minister to lodge a condescendence of the free teind which he alleged to exist. The Court granted the augmentation craved, leaving the question whether sufficient free teind existed or not to be determined in the process of locality.

Minister of Peebles v Heritors of Peebles, 1897, 24 R. 293; 34 S.L.R. 294; 4 S.L.T. 258.

(131)

In a process of augmentation, modification, and locality, certain heritors, while admitting the existence of free teind, denied that it was sufficient to meet the augmentation craved, and they moved that a reservation should be inserted in the interlocutor, declaring that the modification should depend on its being shewn to the Lord Ordinary that there existed a fund for the purpose. The Court pronounced an interlocutor granting the augmentation craved, without inserting the reservation asked for.

Minister of Hutton and Fishwick v Lundie, 1902, 4 F. 964; 39 S.L.R. 749; 10 S.L.T. 160.

(132)

Discovery of report of sub-commissioners—Motion for sist—Motion for reservation of heritors' rights.

In a process of augmentation the heritors who had discovered a report of the sub-commissioners dated 1635, and who were about to take steps to obtain a decree of approbation of the report, moved the Court either to sist the process or reserve their rights in the decree of augmentation. The Court refused the motion on the ground that if the heritors got a decree of approbation it was in their power to surrender their teinds if it was found that there was no free teind.

Observed (by Lord President Kinross) that the decree of augmentation would not affect the rights of the heritors and that the reservation asked for was accordingly unnecessary.

Minister of Dunbarney v Heritors of Dunbarney, 1902, 9 S.L.T. 490.

(133)

Process of locality — Old locality basis of new.

Opinion (per Lord Cowan) that when an augmentation of stipend is granted, the allocation of the old stipend falls to be taken as the first step in the new locality.

Magistrates of Edinburgh v Montgomery, 1872, 11 M. 14; 45 J. 10; 10 S.L.R. 4.

(134)

Keeping open locality—New feus.

Held that it was not a sufficient reason for keeping open a locality and remitting to the common agent to prepare a rectified scheme

that new feus had been given off by certain of the heritors.

Common Agent for South Leith v Smith Sligo's Trustees, 1878, 5 R. 731; 15 S.L.R. 412.

(135)

Opening up final locality—Competency.

After a process of locality had proceeded for ten years, a scheme was approved final. It was then opened up on the motion of a heritor, who stated that he desired to found on a sub-valuation. The cause then slept for five years, when it was awakened of consent, and the scheme formerly approved final was again allowed to be seen and objected to. No objections having been lodged for seven months, on the motion of the common agent the scheme was approved final, the Lord Ordinary then refusing to allow objections to be lodged. The Court refused to open up the judgment.

Magistrates of Kinghorn v Common Agent for Kinghorn, 1878, 5 R. 522; 15 S.L.R. 273.

(136)

Lands erroneously included in locality of another parish.

Minister of Rescobie v Carnegy, 1869, 7 M. 514; 41 J. 273; 6 S.L.R. 322, No. 161, *infra*.

(137)

Interim locality—Correction of errors—Interim locality rule of payment till date of final decree.

Objections to an interim scheme of locality, whether in the circumstances enumerated in the Act of Sederunt, 20th June, 1838, or not, are competent for the purpose of correcting errors, to which corrections effect may be given in a final scheme of locality, but the interim locality so long as it is in force will remain the rule of payment.

Baird v Earl of Wemyss, (O.H.) 1903, 11 S.L.T. 453.

(138)

Claim to recover teinds diverted to other parishes—Competition with ministers of extraneous parishes—Procedure.

In a process of augmentation, &c., in which the minister of the parish of I was awarded an augmentation of four chalders, the minister lodged objections to an interim locality prepared by the common agent (which showed an insufficiency of free teind to provide the augmentation), and maintained that he was entitled to reclaim from the ministers of certain extraneous parishes to whose stipends portions of the teinds of I had for 300 years been allocated such an amount as would supply the deficiency. The common agent having pleaded that the process was not a competent one in which to determine this question, the Lord Ordinary, after a report by the teind-clerk, ordered intimation to the ministers of the extraneous parishes, and thereafter sisted them as parties to the process of augmentation, modification, and locality.

Minister of Inverkeillor v Minister of Carmyllie, 1902, 4 F. 719; 39 S.L.R. 551; 9 S.L.T. 479.

(5) EXPENSES.

(139)

Approval of interim locality—Expenses of common agent.

An interim scheme of locality having been approved of by the Lord Ordinary on Teinds, held that the common agent was entitled thereupon to a decree for his expenses up to that date against the heritors in proportion to their liabilities as ascertained by that interim scheme, and was not bound to wait until the true liabilities of the heritors should be fixed in the final locality.

Magistrates of Glasgow v Hay, 1871, 9 M. 520; 43 J. 240; 8 S.L.R. 357.

(140)

Augmentation opposed on ground of no free teind—Search of records for heritors' titles.

A process of augmentation was resisted on the ground that there was no free teind. In the augmentation the minister got a finding of expenses against the whole heritors, but in the locality he obtained expenses only against one whose lands were held to be unvalued, and was found liable in expenses to the others. Held that he was not entitled to the expenses of the search of the records for the heritors' titles, except in so far as it was applicable to the subject found to be unvalued.

M'Leod v Heritors of Morvern, 1869, 7 M. 1103; 41 J. 618; 6 S.L.R. 713.

(141)

Objections by minister to interim locality.

A minister objected to an interim locality, and four heritors lodged answers. He was found liable in expenses to three of them. He succeeded, however, against the fourth, and was found entitled to expenses against him. Held that he was entitled to recover such expenses from him as would have been incurred had he been the sole defender.

Macleod v Heritors of Morvern, 1870, 8 M. 528; 42 J. 245.

(142)

Minister opposing surrender.

A minister who had unsuccessfully objected to a surrender of teinds was not found liable in expenses, in respect that the litigation was caused by the delay of the heritor in making his surrender.

Earl of Minto v Pennell, 1873, 1 R. 156; 11 S.L.R. 66.

(143)

Proving the tenor—Reasonable opposition.

Richmond v Officers of State, 1869, 7 M. 956; 41 J. 539; 6 S.L.R. 614, No. 74, *supra*.

(144)

Expense of new locality imposed on heritor as condition of reduction of existing locality.

Where a decree of locality was reduced on the condition that the locality should stand as the interim rule of payment till a new decree of locality was obtained at the heritor's expense, held that the condition was

competent and binding on the heritor though it involved a temporary encroachment on the stock.

Cameron v Chisholm-Batten, 1869, 7 M. 565; 41 J. 299; 6 S.L.R. 371.

6. REDUCTION OF LOCALITY.

(145)

Effect of decree of reduction.

Duncan v Brown, 1882, 10 R. 332; 20 S.L.R. 223, No. 157, *infra*.

Lord Elibank's Trustees v Hope, 1891, 18 R. 445; 28 S.L.R. 295, No. 153, *infra*.

(146)

Lands alleged to have been wrongly included in locality of adjacent parish.

Minister of Rescobie v Carnegie, 1869, 7 M. 514; 41 J. 273; 6 S.L.R. 322, No. 161, *infra*.

(147)

Condition that locality stand as interim rule of payment.

A heritor having obtained a decree which valued his teind at less than the amount of stipend payable under a final decree of locality brought a reduction of the latter decree. The Teind Court in the decree of reduction inserted on the heritor's motion a condition that the locality should stand as an interim rule of payment until a new decree of locality was obtained and an extract delivered to the minister at the heritor's expense. Held that the heritor was bound by this condition, and that although it might involve a temporary encroachment on the stock, it had competently been adjoined by the Teind Court.

Cameron v Chisholm-Batten, 1869, 7 M. 565; 41 J. 299; 6 S.L.R. 371.

(148)

Heritor claiming exemption from stipend—Acquiescence by common agent in interlocutor giving effect to exemption—*Res judicata*.

Duke of Buccleuch v Common Agent for Inveresk, 1868, 7 M. 95; 41 J. 55; 6 S.L.R. 88, No. 117, *supra*.

(149)

Lands wrongly exempted—Prescription—*Bona fide* perception.

Elder v Fotheringham, 1869, 7 M. 341; 41 J. 199; 6 S.L.R. 220, No. 118, *supra*.

(150)

Locality of city parish—Personal citation of heritors dispensed with—Act of Sederunt, 5th July, 1809.

A rectified scheme of the locality of St. Cuthbert's parish, Edinburgh, having been approved as final, the Lord Ordinary approved of the Auditor's report, and decreed for expenses. After extract had been issued, it was discovered by the teind-clerk that certain lands belonging to the city of Edinburgh had been entered and localled upon twice under different classifications. The Lord Provost and magistrates, when this error was discovered, prepared a summons of

reduction of the said final decree of locality, and as a preliminary to raising the action, petitioned the Court to dispense with the ordinary mode of citation of the heritors of the parish (1075 in number), on the ground of expense, and instead thereof to allow citation by means of notice given in the kirk by the precentor, written notice on the kirk door and subsequent newspaper advertisements in the manner prescribed by the Act of Sederunt, 5th July, 1809, for the raising of actions of augmentation. The expenses of citation in the ordinary way were estimated at about £250, besides agent's fees and other expenses. The Court, in the circumstances, granted the prayer of the petition.

Magistrates of Edinburgh (Locality of St. Cuthbert's), 1881, 8 R. 932; 18 S.L.R. 706.

(151)

Disconformity to sub-commissioners' report—Reduction of decree of approbation in absence by party who obtained it.

M'Neill's Trustees v Campbell, 1872, 11 M. 211; 45 J. 131; 10 S.L.R. 138, No. 35, *supra*.

7. OVER-ALLOCATION.

(152)

Suspension of interim decree of locality on ground of over-allocation.

A heritor who was charged for payment of his proportion of stipend, as modified by an interim decree of locality, presented a note of suspension on the ground that the amount greatly exceeded the teind of his lands as ascertained by an old sub-valuation, of which he had raised an action of approbation. He did not, however, allege that there was not in the hands of the other heritors surplus teind sufficient to meet any claim which he might have for over-payments of stipend. Note refused.

M'Neill's Trustees v Campbell, 1872, 10 M. 753; 9 S.L.R. 480.

(153)

Reduction of locality subject to qualification.

In 1888 the proprietor of the lands of B obtained decree of approbation of a report by sub-commissioners in 1630 valuing his teinds. In 1890 he brought a reduction of a locality approved final in 1868, in which a stipend in excess of the teinds as reported to be the value in the sub-valuation of 1630 had been localled upon his lands. He sought to have the locality set aside as erroneous *ab initio*, on the ground that the teinds were valued by the sub-commissioners in 1630, and that their report had been eventually approved by the Court of Teinds. The Court of Teinds granted decree of reduction, the decree "to have effect only from and after the date of the decree of approbation, 16th July, 1888, for the second half of the crop of 1888, and in all time coming."

Lord Elibank's Trustees v Hope, 1891, 18 R. 445; 28 S.L.R. 295.

8. ADJUSTMENT BETWEEN OVER-PAYING AND UNDER-PAYING HERITORS.

(154)

Over-allocation in former locality adjusted in new.

In two successive localities the teinds of certain lands were localled on for more than the just proportion of each augmentation, in consequence of a previous decree of valuation not being produced; and the stipend so localled was paid by the heritor. In a subsequent locality the decree of valuation was produced. Held that as under the previous decrees of locality the heritor must continue to pay more of the old stipend than was justly due, in the pending augmentation she should be localled on for so much less.

Robertson v Macknight, 1873, 11 M. 389; 45 J. 261; 10 S.L.R. 289.

(155)

Long negative prescription—Effect on claim of over-paying heritor.

The ministers of a parish obtained a series of augmentations beginning with 1797, which were paid under interim decrees of locality till 1861, when a final scheme was approved of. By interim localities in 1800, 1816, and 1826, no part of the stipend was localled on the lands of M in consequence of these being supposed to be exempt. In 1835 the exemption was challenged by some of the other heritors, who obtained a judgment in their favour; and accordingly the lands of M were localled on in an interim scheme in 1853, and in the final scheme in 1861. From 1808 to 1825 these lands had belonged to C's trustees, who, in 1825, conveyed them to F, who possessed them till 1835, when he sold them, and ceased to be a heritor in the parish. In 1875 a heritor of the parish claimed from C's trustees and F the amount of stipend which he had overpaid under interim localities during the respective periods of their possession of M, in consequence of the erroneous exemption of these lands. Held that the claims against both C's trustees and F were cut off by the long negative prescription.

Campbell's Trustees v Sinclair, &c., 1878, 5 R. (H.L.) 119; 3 App.Cas. 765; 15 S.L.R. 522.

(156)

Prescription of claim for repayment—Failure to found on valuation.

Held that although in general prescription does not begin to run against a claim for repayment by an over-paying heritor in a locality against an under-paying heritor until a final decree of locality has been pronounced, it did operate where the over-payments by the heritor were caused by his own act in failing to produce a decree of valuation, and accordingly that in such circumstances the Court would not admit the plea that the heritor was non valens agere in the sense of being unable to sue for repayment

till a final decree of locality had been obtained.

Earl of Fife v Duff, 1887, 15 R. 238; 25 S.L.R. 195.

(157)

Reduction of final locality and approval of rectified final locality—Effect on previous payments.

In 1874 a final scheme of locality exempted from payment of stipend teinds of lands belonging to A, which under an interim scheme had paid stipend from 1859, and thereby A became entitled to repetition of these payments from the heritors, who had paid less than the amount fixed by the final scheme. In 1877 B and C, two of these heritors, raised a reduction of that locality and of two prior localities, on the ground that the value of their teinds had been taken to be £12 instead of £3. The Lord Ordinary in November, 1878, granted decree of reduction, "but ordains the locality of 13th March, 1874, to stand as an interim rule of payment to the minister until the pursuers furnish him with a new decree of locality, and remits to the clerk to prepare a locality accordingly"; and in March, 1879, he "approved of a rectified scheme as a final locality of the said stipend, commencing with crop and year 1878." According to this locality A remained exempt from payment of stipend, and B and C's teinds, which had been valued in the process at £3, were surrendered, and were thus relieved of an over-payment of stipend which had formerly been drawn from stock. In 1881 A raised an action against B and C concluding for payment of their proportion of the over-payments made by him from 1859 to 1874. The defenders pleaded that the rights and liabilities of over-paying and under-paying heritors were regulated by the locality of 1879, under which the pursuer had no claim for over-payments against the defenders. Held that the decree of reduction affected future payments only, and, consequently, that the defenders remained liable to the pursuers in repetition of over-payments as determined by the locality of 1874.

Duncan v Brown, &c., 1882, 10 R. 332; 20 S.L.R. 223.

(158)

Whether over-paying heritor has a claim against titular to whom under-paying heritors have paid surplus teinds.

A heritor brought an action against the Crown for repetition of over-payment of stipend during a course of years under interim decrees of locality, averring that the whole free teinds of the under-paying heritors, other than those allocated as stipend to the minister, had been paid to the Crown as titular, or to its tacksman. The Crown pleaded that the pursuer's claim was against the under-paying heritors, and not against the Crown, and that as regarded payments beyond forty years it was prescribed. Held that neither of these pleas could be satisfactorily disposed of without inquiry into the

facts, and a remit to that effect made before answer.

Chapel's Factor v Lord Advocate, &c., 1872, 44 J. 532; 9 S.L.R. 602.

(159)

Defence by under-paying heritor that whole surplus teind paid to titular.

Opinion that in an action by a heritor to recover over-payments of stipend made under interim decrees of locality it is not a good defence for an under-paying heritor to state that he has paid the whole surplus teind to the titular.

Mackenzie v Lord Advocate, &c., 1878, 5 R. 589; 15 S.L.R. 321.

(160)

Claim of titular for arrears of surplus teind.

Where heritors have for a long time paid stipend in terms of interim decrees of locality proceeding on an erroneous principle, the titular has no claim for repetition of the sums so paid.

Lord Advocate v Landale, (O.H.) 1867, 40 J. 365.

9. QUESTIONS WITH MINISTERS OF ADJOINING PARISHES.

(161)

Objection by minister—Lands in one parish erroneously localised on in another.

In a process of valuation in 1757 certain lands lying in the parish of R had been erroneously described as lying in the parish of A and were included in the subsequent localities of A. In a locality of R in 1868 the minister objected to a scheme of locality which omitted the lands, and claimed that they should be included. Held that the valuation of 1757 was final, but that the minister could maintain his objections and be permitted to prove that the lands lay in his parish, without bringing a reduction of the localities of A, or calling the minister of A as a party to the process of locality.

Minister of Rescobie v Carnegie, 1869, 7 M. 514; 41 J. 273; 6 S.L.R. 322.

(162)

Disjunction and annexation quoad omnia—Payment by annexed lands of former stipend to old parish, but of augmentation to new—Prescription.

In an action raised before the High Commission in 1648 by the minister of Bonhill for the annexation of certain lands in the parishes of Luss and Kilmarnock to the parish of Bonhill, and for augmentation and locality, decrees were pronounced annexing the lands quoad omnia, and localising an augmentation upon the teinds of the annexed lands, as well as upon the other teinds in the parish of Bonhill. The annexed lands thereafter paid augmented stipend to the minister of Bonhill, and continued to make the same payments of stipend as before to the ministers of Luss and Kilmarnock, until, in a process of locality of the parish

of Bonhill raised in 1813, the minister of Bonhill claimed to have the whole of these teinds localised on for payment of his stipend, as it appeared that the teinds of his parish were otherwise insufficient, and that there were free teinds in the parishes of Luss and Kilmarnock to supply the deficiency to their ministers. The heritors in these parishes pleaded prescription. Held that as the right of the minister of Bonhill to claim these teinds only arose when the other teinds in his parish proved insufficient to satisfy his stipend, the usage which had followed on the decrees for two centuries was not inconsistent with his claim, and that he was now entitled to have the whole teinds of the annexed lands localised on for his stipend.

Simpson v Ewing, &c., 1882, 10 R. 313; 20 S.L.R. 228.

(163)

Diversion of teinds to other parishes by teind commissioners—Acts 1633, c. 17 and c. 19—Prescription.

In 1634 the teind commissioners allocated teinds of the parish of I to the payment of portions of the stipends of the ministers of certain extraneous parishes. The minister of I was not a party to the proceedings in which this order was made, and at its date and down to 1900 there remained after making the payments sufficient free teind in I to make up the full amount of his stipend. In 1900, however, he obtained an augmentation of four chalders, and it then appeared that, unless the diverted teinds were available, there was not sufficient free teind in I to provide the augmented stipend. Held that the provision of a competent stipend to the minister of I was a first charge on the teinds of that parish, that the appropriation of them to other parishes was necessarily subject to that burden; that the minister of I, not having hitherto had any interest to reclaim the diverted teinds, was not barred by prescription or acquiescence; and that accordingly he was entitled to so much of the diverted teinds as was requisite to make up the amount of his augmented stipend.

Minister of Inverkeillor v Minister of Carmyllie, 1902, 4 F. 719; 39 S.L.R. 551; 9 S.L.T. 479.

(164)

Teinds of lands formerly held runrig, situated partly in one parish and partly in another.

Runrig lands were situated partly in St. Boswells and partly in Melrose parish. In a decree of division the sheriff found that the proprietors should remain liable to teind and other burdens as if no division had been made. The teinds of the whole lands had been localised on in the localities of both parishes, in the proportion of three-fourths of the teind to the minister of the one and one-fourth to the minister of the other. In a new locality of St. Boswells a singular successor objected to being localised on for part of the lands lying in Melrose. Held that the decree of the sheriff, in so far as it

related to the allocation of stipend, was incompetent, and that the practice in former localities did not bind a singular successor, and the objection sustained.

Duke of Buccleuch v Milne, 1868, 6 M. 765; 40 J. 394.

10. WARRANDICE AND RELIEF.

(165)

Obligation of relief of augmentations in feu charter.

Opinions that an obligation in a feu charter by the superior binding himself, his heirs and successors, to relieve the vassal of future augmentations of stipend, is binding only on the superior's successors in the superiority, and not on his general representatives.

M'Callum v Stewart, 1870, 8 M. (H.L.) 1; 42 J. 266; 7 S.L.R. 308.

(166)

Effect of an obligation by the superior in a feu contract dated 1757, to relieve the vassal, inter alia, of all teinds and minister's stipend in all time coming.

Preston v Magistrates of Edinburgh, 1870, 8 M. 502; 42 J. 232; 7 S.L.R. 291.

(167)

King's annuity.

In 1632 the teinds of certain lands were sold by the titular to the heritor for a price, the heritor becoming bound to relieve the titular of the King's annuity of six per cent., and of all taxations to be imposed on the teinds, and of the stipend then payable, the titular becoming bound to warrant the teinds free from all future augmentations. In 1644 the heritor redeemed the King's annuity, and about 1674 these annuities were relinquished by the Crown throughout the country. In 1812 the whole teinds were exhausted by augmentations, including the portion which in 1632 was payable as King's annuity. **Held** that the titular's obligation extended to the whole teinds, including the portion which in 1632 was payable as King's annuity.

Murray v Countess of Rothes, 1874, 2 R. 106; 12 S.L.R. 82.

(168)

Duration of obligation of warrandice—Whether warrandice of tack or of absolute right.

In 1648 A, whose immediate author described himself as "principal tacksman, titular, and having good and undoubted right to the teind sheaves" of the parish of O, by contract of excambion conveyed his right to these teinds to G in exchange for a tack of teinds in another parish, and further bound himself and his successors to warrant G and his successors free of any augmentation of the stipend of O over and above a certain sum "in all tyme coming." In an action raised in 1832 by G's successor for implement of the obligation of warrandice against A's successor, who maintained that that obligation had come to an end, the Court

assolized the defender, being of opinion (1) that as it had been proved that A's author was tacksman of the teinds of O under a tack from a parson, he could not have been titular (parsonage teinds at that date being inalienable); (2) that both tacks had expired many years before the date of the action; and (3) that the clause of warrandice and relief endured for the period of endurance of the tack of the teinds of O only.

Duff v Earl of Seafield, 1883, 11 R. 126; 21 S.L.R. 66.

(169)

Glebe designated on an excambion—Obligation to relieve glebe lands of teind—Rights of heritors inter se.

A new glebe was designed in 1776 out of land belonging to A, to whom the lands of the old glebe were given in exchange for the lands of the new glebe. In connection with this excambion A agreed that all teind payable from the whole lands of A (including the new glebe) should be a burden on A's remaining lands, and the presbytery in designing the new glebe took an obligation from A to relieve the minister and his successors from all public burdens, including teind. In an interim scheme of locality the common agent, in his statement of the teinds of A's successor in the lands, deducted the teind of the land of the glebe. **Held** (per Lord Pearson, Ordinary, and acquiesced in) that the transaction in 1776 had not the effect of making the new glebe teind free so as to affect the rights of the heritors inter se, but merely gave the minister a right of relief.

Baird v Earl of Wemyss, 1906, 8 F. 669; 43 S.L.R. 614; 14 S.L.T. 2.

V. COURT OF TEINDS.

(170)

Jurisdiction—Act 1707, c. 9—Judicature Act, 1825, sec. 54.

Held that from the date of the Act 1707, cap. 9, the Court of Teinds and the Court of Session are not two separate and distinct Courts, each with a peculiar and exclusive jurisdiction, but that the Court of Session is entitled to exercise its whole original jurisdiction, when sitting as the Court of Teinds, and that an action connected with teinds was competently raised in the Teind Court, although some of the conclusions might be appropriate to the judicial branch and others to the discretionary branch of that Court.

Presbytery of Stirling v Heritors of Larchbert and Dunipace, 1900, 2 F. 562; 39 S.L.R. 586; 7 S.L.T. 414.

(171)

Process—Action falling asleep.
Teind causes remitted to the Outer House fall asleep in the same way as ordinary Outer House actions.

Locality of King Edward, (O.H.) 1903, 11 S.L.T. 71.

(172)
Teind-Clerk not to be examined as haver, but remit made to him to inquire and report.

In a teind case a proof on commission of the averments of parties was granted. The pursuer called the Teind-Clerk as a haver and witness, and obtained in this way excerpts from a record in his custody, and also states

prepared by him. The Court ordered the report of the commission to be withdrawn from process, and remitted to the Teind-Clerk to make the necessary investigations and to report.

Fogo v Colquhoun, 1867, 6 M. 105; 40 J. 67; 5 S.L.R. 92.

TENANT. See LANDLORD AND TENANT.

TENANT'S ERECTIONS AND IMPROVEMENTS. See VALUATION.

TENDER. See EXPENSES; PROCESS.

TENOR, PROVING OF. See PROCESS.

TERCE. See SUCCESSION.

TERMINI HABILES. See CONTRACT; PARTNERSHIP.

TESTAMENT. See SUCCESSION.

TESTING OF DEEDS. See WRIT.

THEFT. See JUSTICIARY.

THELLUSSON ACT. See SUCCESSION.

THIRLAGE. See SERVITUDE.

THOLED ASSIZE. See JUSTICIARY.

THREATS. See JUSTICIARY.

THROUGH TRAFFIC. See RAILWAY.

TIDAL RIVER. See RIVER, LOCH, AND SEA.

TIMBER. See ENTAIL; HERITABLE PROPERTY; RIGHT IN SECURITY.

TIME.

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I. COMMENCEMENT OF PERIOD.

(1)

Prescription.

The prescriptive period commences at midnight of the date of infetment.

Simpson v Marshall, 1900, 2 F. 447; 37 S.L.R. 314; 7 S.L.T. 195.

(2)

———Maxim dies inceptus pro completo habetur inapplicable.

Simpson v Melville (O.H.) 1899, 6 S.L.T. 355, No. 12, *infra*.

(3)

Time limit for prosecutions—Sale of Food and Drugs Act Amendment Act, 1879.

Held that the day on which the purchase took place was not to be taken into computation in calculating the statutory period under the Sale of Food and Drugs Act Amendment Act, 1879, sec. 10.

Frew v Morris, 1897, 24 R. (J.) 50; 2 Adam, 267; 34 S.L.R. 527; 4 S.L.T. 342.

(4)

Insurance "from" a certain day.

An insurance company entered into an agreement to insure a tramway company against accidents for twelve months from 24th November inclusive, subject to the condition that no insurance should be effected until the premium was paid. An accident occurred on 24th November before the policy had been issued or the premium paid. On 26th November the premium was paid, and the insurance company acknowledged receipt of it as premium for the risk "from the 24th inst."

Held (1) that the preliminary contract to grant an insurance to cover risk of accident on 24th November on payment of the premium was no longer binding after the accident had happened; and (2) that the terms of the receipt did not import liability except for accidents occurring after the lapse of that day.

Sickness and Accident Assurance Association v General Accident Assurance Corporation, 1892, 19 R. 977; 29 S.L.R. 836.

(5)

Hire of ship from a certain day.

A steam tug was hired for salvage service for "one or four weeks," from the 8th September, at which date she was to be at the disposal of the charterer. She was not ready to start till 2.30 p.m. of the 8th September.

Held that the true meaning of the contract was that the tug was to be ready to start at the earliest moment of the 8th, and accordingly that the owner was in breach of contract.

Mackenzie v Liddell, 1883, 10 R. 705; 20 S.L.R. 451.

(6)

Bankruptcy—Calculation of sixty days prior to bankruptcy—Application of rule dies inceptus—Act 1696, c. 5.

In a case under the Bankruptcy Act, 1696, c. 5, where the question was whether the bankrupt had given a security within sixty days of bankruptcy, **observed** (per Lord M'Laren, Ordinary) "In reckoning time negatively, if we exclude the day of bankruptcy we cannot apply the maxim dies inceptus pro completo habetur to the day of granting the security. It appears to me, however, that whether the efflux of time is reckoned positively or negatively the true principle to be applied is the principle of approximation, which necessarily leads to the rejection of one of the limiting days and to the inclusion of the other. In reckoning time de momento in momentum, the prescribed period, say, sixty days, will run from a particular hour on the first day to the same hour on the sixty-first day."

Greig v Anderson, (O.H.) 1883, 20 S.L.R. 421.

(7)

———Direction that periods of time to be reckoned "exclusive of the day from which such period is directed to run"—Bankruptcy Act, 1856, secs. 5 and 108.

Stiven v Reynolds & Co., 1891, 18 R. 422; 28 S.L.R. 271. BANKRUPTCY, No. 434.

Lipman & Co.'s Trustees, 1893, 20 R. 818; 30 S.L.R. 729; 1 S.L.T. 86. BANKRUPTCY, No. 821.

(8)
Notice of meeting to elect trustee in sequestration—Bankruptcy Act, 1856, sec. 67.

Held that in order to comply with the provisions of the 67th section of the Bankruptcy (Scotland) Act, 1856, there must be an interval of six days between the close of the day of the "Gazette" notice of the award of a sequestration, and the date to be fixed for the election of a trustee.

Wilson, 1891, 19 R. 219; 29 S.L.R. 176.

(9)
Notice to trustee in sequestration of meeting of creditors—Notice sent by post—Bankruptcy Act, 1856, sec. 98.

The Bankruptcy Act, 1856, sec. 98, enacts that "any commissioner, with notice to the trustee, may at any time call a meeting of the creditors." On 26th October one of the commissioners in a sequestration sent a notice to the "Gazette" calling a meeting of the creditors. The "Gazette" containing the notice was published on 27th October between 6 and 7 p.m. On the afternoon of the 27th October the commissioner sent a notice of the meeting to the trustee, but this notice was not delivered to the trustee till 10 a.m. on the 28th, in consequence of its being contained in a registered letter, which could not be delivered after business hours on the 27th, the trustee's office being then shut. In an appeal by the trustee against a resolution passed at the meeting, **held** that due notice had not been given to the trustee, and therefore that the meeting had not been duly called.

Lang's Trustee v Steele, 1892, 19 R. 488; 29 S.L.R. 382.

II. TERMINATION OF PERIOD.

(10)

Liberation of prisoner—Act of Grace, 1696, c. 32.

Held that the maxim in favorabilibus dies inceptus pro completo habetur applied to the ten days allowed by the Act of Grace, 1696, c. 32 (amended by 6 Geo. iv. c. 62), to the creditors within which to provide aliment for their debtors imprisoned for a civil debt, and accordingly that a debtor who was incarcerated at 6.40 p.m. on a certain day might be liberated at 8 a.m. on the tenth day following.

Thomson v Magistrates of Kirkcudbright, &c., 1878, 5 R. 561; 15 S.L.R. 299.

(11)

Poor law—Time for acquiring residential settlement—Dies inceptus.

A person began to reside in a certain parish on the afternoon of 29th May, 1900, and resided there continuously till the morning of 28th May, 1903, when he left the parish. **Held** that he had not resided in the parish for three years, and accordingly had not acquired a residential settlement.

Parish Council of Cavers v Parish Council of Smailholm, 1909 S.C. 195; 46 S.L.R. 170; 16 S.L.T. 627.

v 27

(12)

Prescription—Maxim dies inceptus inapplicable.

A notarial instrument was recorded at 11 a.m. on 7th May, 1868, and possession followed until between 2 and 3 p.m. on 7th May, 1898, when a summons was served on the possessor in an action raising the question of title. **Held** that the summons had operated as an interruption of the prescriptive period, the maxim dies inceptus pro completo habetur having no place in the law of prescription.

Simpson v Melville, (O.H.) 1899, 6 S.L.T. 355.

(13)

Sale—Offer and acceptance—"This for reply by" a day named.

An offer to buy certain goods bore, "This for reply by Monday, 6th inst." A letter accepting the offer was posted on the evening of Monday, the 6th, and did not reach the offerer until the next day. **Held** that the offer had been timeously accepted.

Jacobsen, Sons & Co. v Underwood & Son, 1894, 21 R. 654; 31 S.L.R. 545; 1 S.L.T. 578.

(14)

Notice given by post—Notice of appeal—Summary Prosecutions Appeals Act, 1875.

Sub-sec. (5) of sec. 3 of the Summary Prosecutions Appeals (Scotland) Act, 1875, provides that an appellant shall "within three days" of receiving the appeal case from the inferior judge "give notice of appeal in writing to the respondent." An appellant posted the statutory notice on the third day, but the respondent did not receive it until the morning of the fourth. **Held** that this was sufficient compliance with the statute.

Charleson v Duffes, 1881, 8 R. (J.) 34; 4 Coup. 470; 18 S.L.R. 573.

(15)

Notice of objection—Burgh Voters Act, 1856, secs. 4 and 9—Representation of the People Act, 1868, sec. 20.

A notice of objection to the entry of a person's name on the list of voters for a county, addressed to the person objected to at his residence at Shotts, was posted at Motherwell on the evening of 21st September after the last dispatch for that day. **Held** that the notice was not timeously given under the Burgh Voters Act, 1856, sec. 4, as amended by the Representation of the People Act, 1868, sec. 20.

Neilson v Robertson, 1891, 19 R. 301; 29 S.L.R. 242.

(16)

Notice of claim of damages—Employers' Liability Act, 1880, secs. 4 and 7.

A workman, who on 7th May sustained personal injuries when engaged in his work, sent to his employers notice of injury, which they could not receive in course of post before 19th June. **Held** that this notice had not been given within six weeks of the acci-

dent, in terms of the 4th and 7th sections of the Employers' Liability Act, 1880.

M'Donagh v P. & W. Maclellan, 1886, 13 R. 1000; 23 S.L.R. 717.

See also *M'Govan v Tancred, Arrol & Co.*, 1886, 13 R. 1033; 23 S.L.R. 737. NEGLIGENCE, No. 574.

Connolly v Young's Paraffin Oil Co., 1894, 22 R. 80; 32 S.L.R. 61; 2 S.L.T. 306. NEGLIGENCE, No. 579.

(17)

Fixed number of days for actus legitimus—Period expiring on Sunday—Summary Prosecutions Appeals Act, 1875.

Held, in construing sec. 3 (1) of the Summary Prosecutions Appeals Act, 1875, that when one of the three days after the determination of the inferior judge (within which consignment is to be made) is a Sunday, it is not to be treated as a dies non, but is to be counted, unless it is the last of the three days, and consequently that an appellant who had been convicted on a Saturday, but did not offer to consign until the following Wednesday, was not entitled to have a case stated.

Hutton v Garland, 1883, 10 R. (J.) 60; 5 Coup. 275; 20 S.L.R. 658.

(18)

Period expiring on Sunday—Public Authorities Protection Act, 1893, sec. 1 (a).

Under the Public Authorities Protection Act, 1893, sec. 1 (a), any action brought against a person protected by the Act must be "commenced within six months next after the act, neglect, or default complained of." **Held** that an action in the Sheriff Court against a public authority was not timeously commenced when the six months had expired on a Sunday and the writ had been served on the following day. **Opinions** reserved on the competency of obtaining a warrant of citation, and of serving a writ through the post, on Sunday.

M'Niven v Glasgow Corporation, 1920 S.C. 584; 57 S.L.R. 514; 1920, 2 S.L.T. 57.

(19)

Period expiring on public holiday—Sheriff Courts Act, 1876, sec. 16.

Mackenzie v Munro, 1894, 22 R. 45; 32 S.L.R. 43; 2 S.L.T. 290. SHERIFF, No. 166.

(20)

Process—Appeal—Timeous lodging of caution money—Summary Prosecutions Appeal (Scotland) Act, 1875, sec. 3, sub-sec. 1 (1).

Niddrie and Benhar Coal Co. v Young, 1895, 22 R. 413; 32 S.L.R. 303; 2 S.L.T. 534. JUSTICIARY, No. 2111.

III. MEANING OF PARTICULAR TERMS.

1. WEEK.

(21)

Six weeks—Advertisement—Sale by herit-

able creditor—Titles to Land Consolidation (Scotland) Act, 1868, sec. 118.

The holder of a bond and disposition in security sold the security subjects under the power of sale in the bond on 7th March, 1894. The first of six weekly advertisements of the sale was published on 26th January. **Held** that the sale was invalid, in respect that only 40 days, and not six weeks, had elapsed between the first advertisement and the day of the sale.

Ferguson v Rodger, 1895, 22 R. 643; 32 S.L.R. 525; 3 S.L.T. 36.

(22)

—The holder of a bond and disposition in security exposed the subjects under the power of sale on 23rd March, 1904. The first advertisement had appeared on the morning of 10th February, 1904. **Held** that, as 42 days had elapsed between the morning of the first advertisement and the morning of the exposure, the provisions of the Titles to Land Consolidation (Scotland) Act, 1868, sec. 119, in regard to advertisement had been complied with.

Roscoe v Mackersy, 1905, 7 F. 761; 42 S.L.R. 453; 12 S.L.T. 853.

(23)

"Two consecutive weeks."

Held that a notice which had been inserted in an Aberdeen daily newspaper on Friday in one week, and on Wednesday in the following week, was a notice which had been inserted "for two consecutive weeks" within the meaning of the Aberdeen Municipality Extension Act, 1871, sec. 145.

Magistrates of Aberdeen v Watt, 1901, 3 F. 787; 38 S.L.R. 593; 9 S.L.T. 36.

(24)

Calendar week or trade week—Workmen's Compensation Act, 1897.

Held that in estimating "average weekly earnings" for the purpose of fixing compensation due under the Workmen's Compensation Act the "week" to be taken as the unit of division was not the calendar week, but the trade or pay week of the particular employment.

Fleming v Lochgelly Iron and Coal Co., 1902, 4 F. 890; 39 S.L.R. 684; 10 S.L.T. 114.

(25)

Broken week.

Held that where there was no trade week in the particular employment, the calendar week from Sunday to Saturday is to be taken as the week.

M'Cue v Barclay, Curle & Co., 1902, 4 F. 909; 39 S.L.R. 690; 10 S.L.T. 116.

2. MONTH.

(26)

Calendar or lunar—Construction in testamentary deed.

Opinion (per Lord Young), in construing the terms of a deed of settlement, that the

words "six months" occurring therein fell to be read as meaning six lunar months.

Campbell's Trustees v Cazenove, 1880, 8 R. 21; 18 S.L.R. 4.

(27)

Interpretation Act, 1850, sec. 4.

The 4th section of the Interpretation Act is retrospective, and the word "month" is therefore to be deemed and taken to mean a calendar month in all Acts of Parliament of whatever date, unless words be added showing lunar month to be intended. **Opinions** that by the common law of Scotland "month" means a calendar month.

Farquharson v Whyte, 1886, 13 R. (J.) 29; 1 White, 26; 23 S.L.R. 360.

(28)

Two months for bringing action—Public-houses Acts Amendment Act, 1862, sec. 35.

Under a statute requiring all actions arising from procedure under it to be commenced within two months after the cause of action shall have arisen, **held** that magistrates who were sued for damages on account of a decision pronounced on 15th April were timeously cited by a summons executed on 15th June following.

Ashley v Magistrates of Rothesay, 1873, 11 M. 708; 41 J. 440; 10 S.L.R. 513.

[Appeal not taken on this point, 1874, 1 R. (H.L.) 14; L.R., 2 H.L. Sc. 352; 11 S.L.R. 487.]

3. CLOSE TIME.

(29)

Salmon fishing.

Held (per Lord Young) that where the annual close time expires during the hours of the ordinary weekly close time, it is illegal to commence fishing till the expiry of the remaining hours of the weekly close time.

Custar v Chalmers, 1878, 5 R. (J.) 36; 4 Coup. 46; 15 S.L.R. 578.

(30)

Removal of nets by certain hour on Saturday—Impossibility owing to tide of removing nets at that hour—Salmon Fisheries Act, 1862, sec. 7—Salmon Fisheries Act, 1868, sec. 24, and schedule D.

The Salmon Fisheries Act, 1868, provides for a close time for net fishing "from the hour of six o'clock on Saturday night to the hour of six o'clock on Monday morning." On certain days in the month it was impossible owing to the state of the tide for net fishermen on the Forth to throw fly nets out of fishing order so as to comply with this regulation, the alternative being to throw them out at 8 a.m. **Held** that the impossibility of removing the nets at the prescribed hour did not justify the nets being left beyond the statutory hour.

Osborne v Anderson, 1887, 15 R. (J.) 12; 1 White, 497; 25 S.L.R. 21.

Irving v Phyn, 1891, 19 R. (J.) 7; 3 White, 46; 29 S.L.R. 275.

4. SUNSET AND SUNRISE.

(31)

Local or Greenwich time—Salmon Fisheries (Scotland) Act, 1862, sec. 27.

Held that the times of sunset and sunrise in sec. 27 of the Salmon Fisheries (Scotland) Act, 1862, which deals with illegal fishing at night, are the times at which the sun sets and rises at the locus of the alleged offence, and not the times at which it sets and rises at Greenwich.

MacKinnon v Nicolson, 1916 S.C. (J.) 6; 7 Adam, 713; 53 S.L.R. 269; 1916, 1 S.L.T. 115.

5. WHITSUNDAY.

(32)

A stable and workshop were let for eight years and six months from Martinmas, 1900, with a break in favour of either party "at Whitsunday, 1904," on written intimation that the break was to be taken advantage of being given "six months at least before the said term of Whitsunday, 1904." **Held** that notice given by the lessee on 27th November, 1903, to terminate the lease at Whitsunday, 1904, was not timeously given, in respect that "Whitsunday, 1904," in the lease meant 15th, and not 28th May, and that notice fell to be given six calendar months previous to the 15th.

Fraser's Trustees v Maule & Son, 1904, 6 F. 819; 41 S.L.R. 623; 12 S.L.T. 157.

(33)

Meaning of term interpreted by actings of parties.

The tenants under an agricultural lease for nineteen years from Whitsunday, 1866, in point of fact entered into possession on 26th May, 1866, and remained in possession until 26th May, 1885.

In an action by the tenants against the landlord for compensation for improvements under the Agricultural Holdings Act, 1883, **held** that the term "Whitsunday" occurring in the lease was open to construction, and that the parties had by their actings interpreted it to mean, for the purpose of the lease, the 26th May, or old term, and not the 15th May, or legal term; and that therefore notice given four months before 26th May, 1885, was good notice of the claim.

Hunter v Barron's Trustees, 1886, 13 R. 883; 23 S.L.R. 615.

6. "SUNDAY OR ABOUT THAT TIME."

(34)

Breach of public-house certificate.

A person was convicted of a breach of his certificate upon a complaint which set forth that he did sell liquor "upon Sunday the 31st day of December, 1893, or about that time." In an appeal by him, **held** that the complaint was irrelevant in respect that the words "or about that time" must be taken as including the days immediately before and after the Sunday specified, and therefore

as including hours on Saturday and Monday, when the sale would not have been an offence.

Macdonald v Patterson, 1894, 21 R. (J.) 38; 1 Adam, 366; 31 S.L.R. 517; 1 S.L.T. 565.

7. PUNCTUAL PAYMENT.

(35)

Lease.

A landlord agreed to allow the testamentary trustees of a deceased tenant an abatement of £107 on the arrears of rent due at the tenant's death, "reserving right to claim the said sum of £107 in the event of the rents falling due after Lammas, 1890, not being punctually paid." The estates of the tenant having been subsequently sequestrated, the trustees declined to pay the rent due at Candlemas, 1892, on the ground that the landlord was only entitled to a ranking therefor in the sequestration. On 20th July, 1892, the landlord obtained a decree against them personally, and they then paid the rent with interest. **Held** that the rent due at Candlemas had not been "punctually" paid.

Scott-Chisholme v Brown, 1893, 20 R. 575; 30 S.L.R. 558.

(36)

Bond and disposition in security—Conditions in bond operative "so long as punctual payment shall be made" of the interest—Interest tendered seven days after stipulated date.

A bond and disposition in security provided for payment of interest at the rate of 5 per cent. per annum by quarterly pay-

ments on the first days of February, May, August, and November in each year. By a back letter of even date the lenders agreed, "provided . . . the interest of the loan be punctually paid in terms of the bond and disposition in security," not to call in the loan for a period of fourteen years, and they further agreed to modify the stipulated rate of interest to 4 per cent. "provided and so long as punctual payment shall be made of interest at said lower rate." The lenders were for some time tenants of the security subjects at a rent exceeding the interest on the bond, and the interest was habitually set off against the rent due, but this arrangement came to an end at 1st November, 1917, when the lenders ceased to be tenants. No interest was paid on 1st February, 1918, and by letter of 29th April, 1918, the lenders demanded payment of the interest due at 1st February and 1st May, and intimated that, unless the interest was in future regularly and punctually paid, interest at the rate stipulated in the bond would be exacted. On 13th May payment of the interest due at 1st February and 1st May was made at 4 per cent., and was accepted by the lenders without protest. At the next ensuing term the interest at 4 per cent. was not paid until seven days after the stipulated date, when it was returned by the lenders as being neither timeous nor sufficient. **Held** (1) that the borrower had failed to make "punctual payment" of the interest; and (2) that the lenders were not barred by their actings from enforcing their strict rights under the bond.

Gatty v MacLaine, 1921 S.C. (H.L.) 1; [1921] 1 A.C. 376; 58 S.L.R. 63; 1921, 1 S.L.T. 51.

TITLE TO HERITAGE. See HERITABLE PROPERTY.

TITLE TO PROSECUTE. See JUSTICIARY.

TITLE TO SUE AND TO DEFEND.

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I. TITLE TO SUE.

1. GENERALLY.

(1)

Acquisition of title—Title at date of action.
A, the purchaser of a vessel from B, brought an action of damages in his own name and as assignee of B against C for injuries which had been done to the vessel prior to the date of the purchase. The

summons was served on the 28th June, 1893. On the 29th June the seller of the ship assigned to A all claims competent to him against C. Held (1) that at the date of the action A had no right to damages for injury done to the vessel prior to his purchase, and had no title to sue; and (2) that the subsequent assignation did not remedy the defect.
Symington v Campbell, 1894, 21 R. 434; 31 S.L.R. 372; 1 S.L.T. 478.

(2)

—Formal completion after action raised—Amendment—Act of Sederunt, 20th March, 1907, sec. 2 (a) and (c)—C.A.S., B I. 1.

A company of shipowners brought an action against the owners of a dock for payment of a sum of money which the pursuers had paid to the charterers of one of their ships in respect of extra carriage on a cargo of coals which had been incurred through the defenders' harbour master wrongfully refusing to allow the ship to enter the dock and load the coals there. The defenders maintained that the pursuers had no title to sue, in respect that under the charter party they were not bound to pay the sum in question to the charterers. The pursuers thereupon obtained from the charterers an assignation of their claim against the defenders. **Held** that the pursuers, having a good title at bottom, which they only required to have formally made absolute, were entitled to amend the instance to the effect of suing for themselves and as assignees of the charterers. **Opinion** that in any event the amendment was competent under the Act of Sederunt, 20th March, 1907, sec. 2 (a) and (c).

The Doughty Shipping Co. v The North British Railway Co., (O.H.) 1909, 1 S.L.T. 267.

(3)

—Assignation—Rescission—Re-assignation before intimation of rescission—Action of reduction brought by first assignee pending action of reduction against him at instance of second assignee—Decree in action by second assignee before date of closing record in action by first assignee.

Westville Shipping Co. v Abram Steamship Co., 1922 S.C. 571; 59 S.L.R. 539; 1922 S.L.T. 452. **CONTRACT**, No. 484.

[Affirmed, 1923 S.C. (H.L.) 68; [1923] A.C. 773; 60 S.L.R. 625; 1923 S.L.T. 613.]

(4)

—Joint tenancy—Whole real interest.

One of two persons who ex facie of a lease were joint tenants of a farm raised action for compensation for the taking of part of the farm as a feu. The defenders pleaded that the defender was not in titulo to sue. The claimant answered that he had the whole real interest in the farm and lodged pendente processu an assignation in his favour by the other tenant setting forth that fact. **Opinions** that the claimant had a good title.

Middle Ward District Committee of Lanarkshire County Council v Marshall, 1896, 24 R. 139; 34 S.L.R. 130; 4 S.L.T. 140.

(5)

Deed constituting title not produced—Necessity to prove its tenor.

Where a pursuer was unable to recover deeds of copartnery constituting his title to sue, **held** that it was necessary for him to bring an action of proving the tenor before the action could proceed.

Shaw v Shaw's Trustees, 1876, 3 R. 813; 13 S.L.R. 526.

(6)

Statutory trust—Ultra vires action—Ratepayer—Private trader—Fiduciary relation.

A body of statutory harbour trustees had power to run ferry boats and levy rates. They sometimes hired one of the boats used for their ferry service for excursions beyond the ferry limits. A firm of shipowners who carried on a business of hiring out excursion steamers brought an action to have the trustees interdicted from so using the ferry steamers on the ground that such use was ultra vires. The shipowners paid harbour rates and, as ratepayers, were entitled to vote at the election of trustees and to be themselves elected. **Held** (1) that the pursuers had no title to sue as traders; but (2) that they had a title and interest to sue as ratepayers.

Observed (per Lord Dunedin)—“If any persons are in such a relation as to constitute them trustees, or if without being technically trustees they have a fiduciary duty to others, those persons to whom they owe a fiduciary only will have a title to sue to prevent the infringement of that duty.”

D. & J. Nicol v Dundee Harbour Trustees, 1915 S.C. (H.L.) 7; [1915] A.C. 550; 52 S.L.R. 138; 1914, 2 S.L.T. 418.

(7)

—Lord Advocate.

Observations on the right of the Lord Advocate to bring an action in the public interest.

D. & J. Nicol v Dundee Harbour Trustees, 1915 S.C. (H.L.) 7; [1915] A.C. 550; 52 S.L.R. 138; 1914, 2 S.L.T. 418.

(8)

Defective title of principal party to suit—“Consent and concurrence.”

Where the principal party to a suit has an interest or right of his own, but so qualified by or dependent upon some jus tertii or some limitation or condition that he has no title to sue separately, his defect of title may be cured by the “consent and concurrence” of the person by or on whose right his is qualified or dependent. But when the principal party to a suit has no interest or right of his own, his defect of title cannot be cured by the “consent and concurrence” of the person to whom alone the right of action truly belongs.

Hislop v MacRitchie's Trustees, 1881, 8 R. (H.L.) 95; 6 App.Cas. 560; 19 S.L.R. 571.

(9)

—Importation of new party to cure objection to title.

Observed (per Lord Watson) that the provisions of the Court of Session Act, 1868, sec. 29, did not warrant the importation of a new party into a suit for the purpose of obviating an objection to the title to sue of the original pursuer.

Hislop v MacRitchie's Trustees, 1881, 8 R. (H.L.) 95; 6 App.Cas. 560; 19 S.L.R. 571.

[See Morrison v Morrison's Executrix, 1912 S.C. 892; 49 S.L.R. 578; 1912, 1 S.L.T. 384. **EXECUTOR**, No. 107.]

(10)

Dominus litis.

Where a person had been sisted as dominus litis in an action, and the condescendence negatived his own title to sue, **held** that he was not entitled to insist in the action alone.

Ferguson, Davidson & Co. v Paterson and Dobbie, 1893, 1 F. 227; 36 S.L.R. 153; 6 S.L.T. 219.

(11)

Summons in name of two pursuers called in name of one only—Restriction of conclusions.

A summons bearing to be at the instance of A and B against C was called in name of B only, and his name alone appeared in the partibus. The summons was laid upon a letter by C, binding him to pay to A and B equally the profit made by him on certain building contracts, and concluded for count and reckoning, and for payment "to the pursuers of £1000." In the condescendence B stated that since the action was raised A had been sequestrated, and that B insisted in the action to the effect of enabling him to recover one-half of the profit, and that to this extent the conclusions were restricted. **Held** that B had a good title to sue, and to insist in the action.

Shaw v Gibb's Trustees, 1895, 20 R. 718; 30 S.L.R. 634; 1 S.L.T. 28.

(12)

Concurring pursuer—Title to reclaim.

Held that a person who is a party to a cause only to the extent of giving his consent and concurrence thereto has no title to present a reclaiming note against an interlocutor pronounced in the cause.

Martin v Lindsay, 1894, 21 R. 759.

(13)

Title founded on erroneous construction of statute—Reduction—Necessity for defender to satisfy production.

Held that a defender in an action of reduction was not bound to satisfy production when the pursuer's title to sue rested upon an erroneous construction of a statute, although that construction was averred.

Earl of Perth v Lady Willoughby de Eresby's Trustees, 1869, 7 M. 642; 41 J. 413; 6 S.L.R. 335.

(14)

Declarator of construction of statute—Licensing.

The magistrates of a police burgh having intimated that they claimed under the Burgh Police (Scotland) Act, 1892, to be the licensing authority for the sale of excisable liquors within the burgh, a publican holding a licence for premises in the burgh, which had been granted by the county justices, brought an action for declarator that the licensing jurisdiction within the burgh had not been transferred from the county justices to the burgh magistrates, and for interdict against the magistrates acting as

the licensing authority. **Held** that the pursuer had a title to sue.

Tennent v Magistrates of Partick, 1894, 21 R. 735; 31 S.L.R. 619; 1 S.L.T. 594.

(15)

When objection to title should be raised.

A defender in an action of damages for infringement of copyright, having allowed an interlocutor of a Lord Ordinary repelling a plea of no title to sue, "in so far as of a preliminary nature," to become final, **held** precluded from objecting to the title on the closed record.

Graves & Co. v Logan, 1868, 7 M. 204; 41 J. 126; 6 S.L.R. 164.

(16)

Opening lockfast place—Action by wife of occupier of house.

The wife of a bankrupt brought an action against a person who had been appointed judicial factor on her husband's sequestrated estate under sec. 16 of the Bankruptcy Act, 1856, averring that the defender, while taking an inventory of the effects in the house tenanted by her husband, had wrongfully and without warrant forced open the door of a room which was locked and examined the effects therein, although informed that the effects in the room belonged to the pursuer. **Held** that the defender had not committed a legal wrong, and that, if he had, the pursuer would have had no title to sue, as the right invaded would have been not the pursuer's but her husband's.

M'Lachlan v Bell, 1895, 23 R. 126; 33 S.L.R. 102; 3 S.L.T. 160.

2. INTEREST.

(17)

General rule.

Observed (per Lord Young)—"It is a general, and just short of a universal rule, that title to sue rests upon interest."

Pyper v Christie, 1878, 6 R. 143; 16 S.L.R. 67.

(18)

Action of proving the tenor of recorded deed.

In an action of proving the tenor of a deed recorded in the register of sasines, **held** that, notwithstanding such recording, the pursuer had a sufficient interest to entitle him to sue, his object being to obtain a decree equivalent to the original deed, which he might record for the purpose of doing diligence if necessary.

Browne v Orr, 1872, 10 M. 397; 44 J. 225; 9 S.L.R. 232.

(19)

Reduction of settlement—Pursuer benefiting by settlement under reduction and also by prior settlement.

In an action brought for reduction of a trust disposition and settlement on the ground that the granter was at the date of

execution of unsound mind, the pursuer set forth as his title to sue that he was one of three trustees nominated and appointed in and a beneficiary under a prior trust disposition and settlement executed by the grantor. The pursuer did not call as defenders the two other trustees under the earlier deed. The defender, a beneficiary under the later deed, objected to the pursuer's title to sue on the grounds (1) that he was not entitled to sue as trustee without the concurrence of the two other trustees, or without calling them as defenders; and (2) that the pursuer had no interest, as the value of his interest under the deed sought to be reduced was as large as under the earlier deed. **Held** that the pursuer had a title to sue as a beneficiary under what he alleged to be the only valid settlement of the testator. **Question**, whether he had a title to sue as a trustee.

Duncan v Duncan, 1892, 20 R. 200; 30 S.L.R. 167.

(20)

Title of next of kin to reduce a will to effect of setting up prior will.

In an action for reduction of the last will of a testator, brought by one of his next of kin, it appeared that the effect of the reduction would be to set up a prior will which excluded the next of kin. The pursuer did not maintain that the prior will was invalid, but he produced an agreement signed by the beneficiaries under the prior will binding themselves, in the event of the testator's last will being reduced, to divide the testator's whole estate equally between themselves and his whole next of kin. **Held** that as the pursuer, standing the prior will, had no interest as a next of kin to reduce the last will, he had no title to sue, and action dismissed.

Swanson v Manson, 1907 S.C. 426; 44 S.L.R. 312; 14 S.L.T. 737.

(21)

Title of heir at law and next of kin to sue reduction of later deed and declarator of subsistence of earlier deed.

Where the heir at law and the next of kin of a person deceased brought an action for reduction of certain testamentary deeds executed by the deceased on the ground of facility and circumvention, and for declarator that the succession of the deceased was to be regulated by a prior testamentary deed under which they were residuary legatees, the pursuers did not produce the prior deed founded on, and the defenders alleged that it had been destroyed *animo revocandi*. The pursuers then added an averment that they were respectively heir at law and next of kin of the deceased. **Held** that having the alternative title of heirs *ab intestato* and disponees under the deed alleged to have been revoked, they had a title to sue a reduction of later deeds granted to their prejudice, and that the validity of these deeds fell to be decided in the first place.

Gilchrist v Morrison, 1891, 18 R. 599; 28 S.L.R. 441.

(22)

Exclusion of interest by marriage contract.

Held that a daughter, whose interest in her mother's estate was excluded at the option of her father by her parents' marriage contract, had no title to pursue an action of reduction of a mutual trust disposition and settlement *ex capite lecti*.

Wyllie v M'Bride, 1890, 18 R. 218; 28 S.L.R. 174.

(23)

Substitution excluding heir at law.

Substitution in a general disposition **held** effectual to exclude the heir at law of the original institute from challenging a deed executed by the institute on deathbed.

Park's Curator v Black, 1868, 6 M. (H.L.) 147; 40 J. 642; L.R., 1 H.L. Sc. 392; 5 S.L.R. 726.

(24)

Executrix—No interest in merits—Expenses—Trade union.

A member of a trade union brought an action to interdict the union from applying its funds for political purposes. The pursuer died, and his widow, as his executrix, craved to be sisted as pursuer, in order that she might insist in the action for the purpose of recovering as expenses the sums which he had expended in the litigation. **Held** (1) that the executrix was entitled to be sisted, under reservation of all questions as to her right to insist in the cause; and (2), after hearing the executrix, that, as she had no interest in the merits, and as there had been no unreasonable conduct on the part of the defenders, she should not be allowed to proceed with the action merely for the purpose of recovering expenses; and action dismissed.

Martin's Executrix v M'Ghee, 1914 S.C. 628; 51 S.L.R. 499; 1914, 1 S.L.T. 365.

(25)

Claimant to baronetcy — Declarator of grandfather's legitimacy.

Held that the pursuer of an action of declarator of the legitimacy of his grandfather, who averred, after amendment, that, if successful, he intended to prosecute his claim to a baronetcy, had set forth a sufficient interest to sue.

Bosville v Lord Macdonald, 1910 S.C. 597; 47 S.L.R. 328; 1910, 1 S.L.T. 141.

(26)

Frustra petis quod mox es restitutus.

A liquidator, representing shareholders who had received their shares of certain dividends, claimed that a director of the concern in liquidation should repay to the credit of the liquidation the amount of the said dividends paid during his directorate as having been paid out of capital. **Held** that the maxim, *frustra petis quod mox es restitutus*, applied and that the liquidator had no title or legitimate interest to maintain his claim.

Liquidators of City of Glasgow Bank v Mackinnon, 1882, 9 R. 535; 19 S.L.R. 278.

(27)

Reduction—Illegal bargain—Deed in which pursuer not interested forming part of bargain.

A son sought to reduce (1) a deed of apportionment by his father, alleging that it was founded on an illegal bargain between his father and sisters for the ultimate benefit of a charitable institution, and (2) a deed by which the sisters limited their interest in the father's estate to a liferent, and transferred the fee to trustees for the said institution. **Held** that he had no title or interest to sue for reduction of the second deed.

Craig v Craig's Trustees, (O.H.) 1904, 12 S.L.T. 136.

Building restrictions.

[See BUILDING RESTRICTIONS III.]

(28)

Servitude—*Altius non tollendi*—*Æmulatione vicini*.

Opinion (per Lord President Inglis) that in the case of a servitude *altius non tollendi*, if the owner of the dominant tenement had no interest to enforce it, the Court would not be disposed to entertain it if sought to be enforced in *æmulationem vicini*.

Gould v M'Corquodale, 1869, 8 M. 165; 42 J. 72; 7 S.L.R. 108.

(29)

Sale—Title of vendee and sub-vendee to sue reduction of original contract.

An arrangement was made for the sale of a brewery by A to B at the price of £20,500 fixed on the basis of profits for the last two years as shown by the books. The books were examined by an accountant employed by B, and the sale was completed. B sold the brewery to C for £28,500, which was fixed without reference to profits, and A, at B's request, conveyed the brewery to C. It was afterwards discovered that A's books contained false entries largely increasing the apparent profits, which had been made by his clerk without his knowledge. C, in his own name and as B's assignee, and B raised an action against A for reduction of the contract between A and B, and of the conveyance by A to C, C offering restitution in integrum. **Held** (1) that as C was not privy to the contract between A and B, he had no title to reduce it; (2) that as B had no interest in the subjects after the conveyance by A to C, he had no title to reduce the said contract.

Edinburgh United Breweries v Molleson, 1894, 21 R. (H.L.) 10; [1894] A.C. 96; 31 S.L.R. 922; 1 S.L.T. 602.

(30)

Warrandice—Title of vendee and sub-vendee to enforce obligation to clear title.

A sold a piece of ground with absolute warrandice to B. B sold and disposed it with absolute warrandice to C. C having

found that the ground was burdened, called upon B to have it disburdened. B raised an action against A to have it disburdened. A pleaded that B had no title to sue, as he had disposed the subjects and had assigned the obligation of warrandice to C. **Held** that, apart from his warrandice obligation, A as seller of the subjects was bound to clear the title, and that B had a title as well as an interest to enforce the obligation.

Christie v Cameron, 1898, 25 R. 824; 35 S.L.R. 602.

(31)

Business purchased by shareholders and transferred to company—Title as shareholders to reduce original agreement of sale.

Five individuals purchased a business with a view to transferring it to a limited company which was about to be formed. The company, having been formed, agreed to take over the business from the purchasers. **Held** that although the purchasers had parted with the business, they as shareholders in the company had an interest to bring an action of reduction of the minute of agreement conveying the business to them.

MacLaren v Mayberry, (O.H.) 1904, 11 S.L.T. 636.

(32)

Statutory public body—School board—Bursary—Action by school board against trustees on an educational trust.

One of the conditions laid down in a scheme, under which trustees administered a bursary fund, was that candidates must have passed the qualifying examination of the Scotch code in one of the public schools of two parishes. The school boards of these parishes brought an action against the trustees for declarator that they had acted illegally in awarding a bursary to a candidate who had not complied with the condition. The pursuers maintained that they had an interest and title to sue, in respect that the condition, if enforced, would have the effect of inducing parents to send their children to the public schools of the parishes, and that, in this way, larger grants might be obtained from the Education Department. **Held** that this interest was too remote, and that the pursuers had therefore no title to sue. **Observed** that if their interest had been sufficient the pursuers would have had a title to sue.

School Boards of Dunlop and Stewarton v Patrons of Cunninghame Graham Bursaries Endowment Fund, 1910 S.C. 945; 47 S.L.R. 811; 1910, 2 S.L.T. 95.

(33)

Obligation in restraint of trade—Medical practitioner.

A doctor of medicine agreed with a company, the employers of about 600 workmen in a remote district, to attend the workmen at a fixed salary payable by the company, he being at liberty to practise in the district, but "only during his appointment as medical officer" to the company. The company having terminated the agreement, **held**

that they had a sufficient interest to sue for interdict against the doctor's practising in the district.

Ballachulish Slate Quarries Co. v Grant, 1903, 5 F. 1105; 40 S.L.R. 791; 11 S.L.T. 230.

(34)
Reparation—Insured claim.

A person whose property is injured by fire through the fault of another is not deprived of his title to sue by having his property fully insured.

Port-Glasgow and Newark Sailcloth Co. v Caledonian Railway Co., 1892, 19 R. 608; 29 S.L.R. 577; affirmed, 1893, 20 R. (H.L.) 35; 30 S.L.R. 587.

[See also Delaurier v Wyllie, 1889, 17 R. 167; 27 S.L.R. 148. SHIP, No. 260.]

(35)
Extent of interference with rights—Canal—Riparian owner—Railway siding on bank.

A proprietor of lands bordering on a canal complained of the making by the adjoining owner of a railway siding along the bank. Held that the complainer was not entitled to sue an interdict in general terms against the construction of the siding, not having proved that the siding would necessarily impair his rights in the canal.

Lidgerwood v Lanarkshire and Dumbartonshire Railway Co., (O.H.) 1903, 11 S.L.T. 55.

3. IN PARTICULAR CASES.

(1) ADJUDICATION.

(36)
Residuary legatee—Debtor of testator.

Hinton v Connell's Trustees, 1883, 10 R. 1110; 20 S.L.R. 731. ADJUDICATION, No. 1.

(37)
Reduction and declarator of non-entry—Title of superior to sue reduction of a decree of adjudication of his vassal's right.

Monteith v Ingels, 1869, 7 M. 523; 41 J. 282. SUPERIOR AND VASSAL, No. 79.

(2) AGENT AND PRINCIPAL.

[See AGENT AND PRINCIPAL IV. 2, V. 2 (3), VI. 2.]

(3) ALIMENT.

[See ALIMENT IV. 1.]

(4) ASSIGNEES.

[See ASSIGNATION V. 1.]

(5) ASSOCIATION (VOLUNTARY).

[See ASSOCIATION (VOLUNTARY) V.]

(6) BANKRUPTCY.

Title of bankrupt.

[See BANKRUPTCY IV. 4.]

(38)
Title of trustee—Trustee in foreign bankruptcy.

Obers v Paton's Trustees, 1897, 24 R. 719; 34 S.L.R. 538; 4 S.L.T. 350. INTERNATIONAL LAW, No. 230.

(39)
Challenge of deed of entail.

Howden v Rocheid, 1868, 6 M. 300; 40 J. 166; 5 S.L.R. 210; affirmed, 1869, 7 M. (H.L.) 110; L.R., 1 H.L. Sc. 550; 41 J. 588. BANKRUPTCY, No. 471.

(40)
Reduction of illegal preference — Title of individual creditor — Title of trustee under Bankruptcy Act, 1856, secs. 10 and 11.

Brown & Co. v McCallum, 1890, 18 R. 311; 28 S.L.R. 538. BANKRUPTCY, No. 105.

(41)
Title of individual creditor — Recovery of subject of preference.

Cook v Sinclair & Co., 1896, 23 R. 925; 33 S.L.R. 691; 4 S.L.T. 70. BANKRUPTCY, No. 107.

(42)
Title of purchaser under deed of arrangement.

Smith & Co. v Smyth, 1889, 16 R. 392; 26 S.L.R. 301. BANKRUPTCY, No. 592.

(43)
Trustee under voluntary trust deed.

Fleming's Trustees v McHardy, 1892, 19 R. 542; 29 S.L.R. 483. BANKRUPTCY, No. 121.

(44)
Non-acceding creditor to trust deed for creditors—Stipulation for discharge—Action against trustee for share of estate.

Ogilvie & Son v Taylor, 1887, 14 R. 399; 24 S.L.R. 284. BANKRUPTCY, No. 145.

(45)
Mandatory holding mandate to vote.

Ferguson, Davidson & Co. v Paterson and Dobbie, 1898, 1 F. 227; 36 S.L.R. 153; 6 S.L.T. 219. BANKRUPTCY, No. 414.

(7) BUILDING RESTRICTIONS.

[See BUILDING RESTRICTIONS III.]

(8) BURGH.

(46)
Title of magistrates—Action for payment of burgh customs founded merely on decree in absence against third parties.

Magistrates of Kilmarnock v Mather, 1869, 7 M. 543; 41 J. 290; 6 S.L.R. 355. BURGH, No. 119.

(47)
Magistrates as conservators of river — Statutory obligation on railway company

to remove obstruction to navigation "to the satisfaction of the Board of Trade."

North British Railway Co. v Magistrates of Perth, 1885, 13 R. (H.L.) 37; 10 App.Cas. 579; 22 S.L.R. 593. RIVER, LOCH, AND SEA, No. 62.

(48)

Title of ratepayers—Town-clerk's duties.

A ratepayer who was also honorary treasurer of a burgh sought to have it declared that the town-clerk was bound to attend meetings of the town council and keep records of the proceedings thereat. He founded on certain statutes. **Held** the action was incompetent. **Opinion** that the pursuer had no interest to sue.

Orr v Alston, (O.H.) 1912, 1 S.L.T. 95.

———To sue magistrates.

[See BURGH I. 4.]

(49)

Dean of guild petition—Petitioner unfeitt.

Cranston & Elliot v Dobson, 1899, 2 F. 271; 37 S.L.R. 202; 7 S.L.T. 263. BURGH, No. 251.

(9) BURYING GROUND.

(50)

Action to protect family burying ground.

Held that the representatives of a family had a sufficient title and interest to raise an action to secure the protection of a family burying ground in a churchyard which had been closed, though they did not reside in the parish.

Turner v Committee for the West Church, Greenock, 1869, 7 M. 538; 41 J. 283; 6 S.L.R. 335.

(51)

"Lairholders" in a private cemetery.

Of thirteen thousand "lairholders" in a private cemetery eleven raised an action against the proprietors of the ground to compel them to divest themselves of the property in favour of trustees, to transfer the management of the cemetery to a committee of the lairholders, and for declarator that the defenders were not entitled to derive profit from the interment fees, with other conclusions regarding the mode of burial, &c. **Held** (1) that the pursuers as individual lairholders had a sufficient title to sue, but that they could only insist in the conclusions of the action to the extent of vindicating their own alleged rights, and not those of the whole body of lairholders; (2) that the right of the pursuers, both at common law and ex contractu, was not a right of property in the lairs allocated to them, but only a right to use the same in perpetuity for the purpose of sepulture, with a corresponding obligation on the proprietors of the cemetery to dedicate it exclusively to the same purpose; (3) that the proprietors of the ground were entitled to derive a reasonable profit from interment

fees; and (4) that in these circumstances the defenders were entitled to absolvitor.

Cunningham v Edmiston, 1871, 9 M. 869; 43 J. 468; 8 S.L.R. 576.

(10) COMPANY.

(52)

Objects of company—Enforcement.

Clyde Steam Packet Co. v Glasgow and South-Western Railway Co., (O.H.) 1897, 4 S.L.T. 327. COMPANY, No. 8.

(53)

Contract by agent for intended company—Action by company.

In an action at the instance of a limited company, the pursuers averred that before the company was registered one of its agents entered into a contract with the defenders for the supply by the latter of certain machinery which, it was alleged, turned out to be defective when supplied. **Held** that the company had not set forth a title to sue, as no agent could act for it before it came into existence.

Tinnevelly Sugar Refining Co. v Mirrlees, Watson & Yaryan Co., 1894, 21 R. 1009; 31 S.L.R. 823; 2 S.L.T. 149.

(54)

Shareholders—Title to object to reduction of capital.

Tharsis Sulphur & Copper Co. v Hoggan, 1882, 9 R. 507; 19 S.L.R. 379. COMPANY, No. 72.

Hoggan v Tharsis Sulphur and Copper Co., 1882, 9 R. 1191; 19 S.L.R. 375. COMPANY, No. 75.

(55)

———Ultra vires act—Title of shareholder to object.

Dunn v Banknock Coal Co., (O.H.) 1901, 9 S.L.T. 51. COMPANY, No. 185.

(56)

———Ultra vires act — Preference shareholder—Member of rival company.

Smith v Glasgow and South-Western Railway Co., (O.H.) 1897, 4 S.L.T. 327. COMPANY, No. 186.

(57)

———Illegal act of director not ultra vires of company.

Lee v Crawford, 1890, 17 R. 1094; 27 S.L.R. 853. COMPANY, No. 262.

(58)

———Fraud of director — Minority of shareholders.

Hannay v Muir, 1898, 1 F. 306; 36 S.L.R. 228; 6 S.L.T. 251. COMPANY, No. 263.

(59)

———Balance sheet — Under-valuation of assets — Title of individual shareholders to object.

Young v Brownlee & Co., 1911 S.C. 677; 48 S.L.R. 462; 1911, 1 S.L.T. 303. COMPANY, No. 265.

(60)
Alleged improper allotment—Power of company to commence business when in judgment of directors sufficient shares subscribed.

Brown v Stewart, 1898, 1 F. 316; 36 S.L.R. 221; 6 S.L.T. 262. COMPANY, No. 264.

(61)
Title to reduce agreement between company and corporation.

Rixon v Edinburgh Northern Tramways Co., 1890, 18 R. 264; 28 S.L.R. 209; affirmed, 1893, 20 R. (H.L.) 53; [1893] A.C. 636; 30 S.L.R. 944; 1 S.L.T. 111. COMPANY, No. 193.

[See also *Smyth v Muir*, 1891, 19 R. 81; 29 S.L.R. 94. PROCESS, No. 82.]

(62)
Satisfying production.

Rixon v Edinburgh Northern Tramways Co., 1889, 16 R. 653; 26 S.L.R. 405. COMPANY, No. 194.

(63)
Acceptance by directors of company A of shares in company B in security of advance — Petition by shareholders of company A for removal of company A from list of contributories in liquidation of company B.

Fraser v City of Glasgow Bank, 1879, 6 R. 1259; 16 S.L.R. 744. COMPANY, No. 503.

(64)
Action against vendor — Fraudulent misrepresentation.

Dunnett v Mitchell, 1887, 15 R. 131; 25 S.L.R. 124. FRAUD, No. 133.

(65)
Company in liquidation—Fraudulent representations of directors inducing purchase of shares.

Houldsworth v City of Glasgow Bank, 1880, 7 R. (H.L.) 53; 5 App.Cas. 317; 17 S.L.R. 510. COMPANY, No. 298.

(66)
Trustees of deceased shareholder in company—Liquidation—Contributories but not members of company—Companies' Act, 1862, sec. 76—Ultra vires resolution.

Howling's Trustees v Smith, 1905, 7 F. 390; 42 S.L.R. 321; 12 S.L.T. 628. COMPANY, No. 381.

(67)
Executor of deceased shareholder for undivided profits—Shares disposed of by shareholder's will.

A wife bequeathed certain shares in a company to her husband. She predeceased her husband. Her executor raised an action against the company to recover the undivided profits which had accrued during her life, alleging that they had been fraudulently concealed by the company. **Held**

that the undivided profits formed an integral part of the shares, and that the executor, having no right to the shares, had no title to sue.

Carron Co. v Hunter, 1868, 6 M. (H.L.) 106; L.R., 1 H.L. Sc. 362; 40 J. 546; 5 S.L.R. 695.

(68)
Debenture holder — Action against promoter — False and fraudulent misrepresentation.

Dunnett v Mitchell, 1885, 12 R. 400; 22 S.L.R. 298. COMPANY, No. 18.

Petition for supervision order.

[See COMPANY VI. 3 (2).]

Petition for winding up by Court.

[See COMPANY VI. 4 (2) (3) (4).]

(69)
Liquidator—Action in name of liquidator.
Munro v Hutchison, (O.H.) 1896, 3 S.L.T. 268. COMPANY, No. 498.

(70)
Title to sue director for sums unwarrantably divided as dividend.

Liquidators of City of Glasgow Bank v Mackinnon, 1882, 9 R. 535; 19 S.L.R. 278. COMPANY, No. 319.

(71)
Directors carrying on liquidation under arrangement.

London and North-West American Mortgage Co. v Steuart, (O.H.) 1900, 8 S.L.T. 98. COMPANY, No. 309.

(11) CONTRACT.

(72)
Privity of contract—Re-sale for enhanced price—Title of sub-vendee to sue reduction of original contract.

Edinburgh United Breweries v Molleson, 1894, 21 R. (H.L.) 10; [1894] A.C. 96; 31 S.L.R. 922; 1 S.L.T. 602. *JUS QUÆSITUM TERTIO*, No. 6.

(73)
Personal injury—Contract with A to erect gangway—Injury to B through insufficiency of gangway—Title of B to sue.

Campbell v A. & D. Morrison, 1891, 19 R. 282; 29 S.L.R. 251. NEGLIGENCE, No. 333.

(74)
***Jus quæsitum* — Breach of contract — Reparation.**

Blumer & Co. v Scott & Sons, 1874, 1 R. 379; 11 S.L.R. 192. *JUS QUÆSITUM TERTIO*, No. 1.

(75)
Public official—Resolution of public authority regarding salary.

Burr v Commissioners of Bo'ness, 1896, 24 R. 148; 34 S.L.R. 91; 4 S.L.T. 149. *JUS QUÆSITUM TERTIO*, No. 26.

(76)
 ————**Promise of subscription to provisional committee promoting charitable society—Title of society.**

Morton's Trustees v Aged Christian Friend Society of Scotland, 1899, 2 F. 82; 37 S.L.R. 67; 7 S.L.T. 220. *JUS QUÆSITUM TERTIO*, No. 8.

(77)
 ————**Subscription to charity — Promise made to minister of chapel of ease—Title of committee of management to sue.**

Cambuslang West Church Committee v Bryce, 1897, 25 R. 322; 35 S.L.R. 245; 5 S.L.T. 240. *CONTRACT*, No. 57.

(78)
 ————**Personal or transmissible — Contract for sale of commodity of specified description not manufactured by seller—Assignment of contract—Tender of goods by assignee.**

Cole v C. H. Handasyde & Co., 1910 S.C. 68; 47 S.L.R. 59; 1909, 2 S.L.T. 558. *PERSONAL OR TRANSMISSIBLE*, No. 5.

(79)
 ————**Delectus personæ — Contract for advertisement.**

Grierson, Oldham & Co. v Forbes, Maxwell & Co., 1895, 22 R. 812; 32 S.L.R. 601; 3 S.L.T. 65. *PERSONAL OR TRANSMISSIBLE*, No. 1.

(80)
 ————**Delectus personæ — Erection and maintenance of patent machine.**

International Fibre Syndicate v Dawson, 1901, 3 F. (H.L.) 32; 38 S.L.R. 578. *PERSONAL OR TRANSMISSIBLE*, No. 2.

(81)
 ————**Sale of goodwill of medical practice — Assignment of rights under contract of sale.**

Rodger v Herbertson, 1909 S.C. 256; 46 S.L.R. 208; 16 S.L.T. 646. *PERSONAL OR TRANSMISSIBLE*, No. 4.

(82)
 ————**Imprestible obligation—Specific implement or damages.**

Moore v Paterson, 1881, 9 R. 337; 19 S.L.R. 236. *CONTRACT*, No. 414.

(83)
 ————**Joint parties to agreement — Action for implement.**

One of several parties having a joint right under an agreement is not entitled to sue for implement without the concurrence of the others.

Detrick v Laing's Sewing Machine Co., 1885, 12 R. 416; 22 S.L.R. 312.

(84)
 ————**Contract note—Ex facie party—Contract not signed.**

Ranschoff & Wissler v Burrell, 1897, 25 R. 284; 35 S.L.R. 229. *ARBITRATION*, No. 50.

(85)
Double insurance—Relief.

Sickness and Accident Assurance Association v General Accident Assurance Corporation, 1892, 19 R. 977; 29 S.L.R. 836. *INSURANCE*, No. 127.

(86)
Auctioneer — Conditions of sale — Price of goods sold.

Macdonald & Fraser v Henderson, 1882, 10 R. 95; 20 S.L.R. 55. *SALE OF MOVABLES*, No. 232.

(12) CORPORATION.

[See CORPORATION II. 4.]

(13) CROWN.

(87)
Claim to peerage—Title to reduce service.
 Alexander v Officers of State, 1868, 6 M. (H.L.) 54; L.R., 1 H.L. Sc. 276; 40 J. 470; 5 S.L.R. 475. *SERVICE OF HEIRS*, No. 14.

(88)
Burgh property.
 Conn v Magistrates of Renfrew, 1906, 8 F. 905; 43 S.L.R. 664; 14 S.L.T. 106. *BURGH*, No. 52.
 Grahame v Magistrates of Kirkcaldy, 1882, 9 R. (H.L.) 91; 7 App.Cas. 547; 19 S.L.R. 893. *BURGH*, No. 53.

(89)
Public interest—Lord Advocate.
Observations on the right of the Lord Advocate to bring an action in the public interest.

D. & J. Nicol v Dundee Harbour Trustees, 1915 S.C. (H.L.) 7; [1915] A.C. 550; 52 S.L.R. 138; 1914, 2 S.L.T. 418.

(14) EDUCATION.

(90)
Right to compel provision of education — Pupil child—Parent—Education (Scotland) Act, 1872, sec. 1—Education (Scotland) Act, 1901, sec. 1.

Sinclair v Moulin School Board, 1908 S.C. 772; 45 S.L.R. 570; 15 S.L.T. 1032. *EDUCATION*, No. 48.

(91)
School board—Election—Reduction — Title of ratepayers to sue.

Duncan v Crighton, 1892, 19 R. 594; 29 S.L.R. 448. *EDUCATION*, No. 16.

Title of school board to sue and defend.
 [See EDUCATION I. 1 (5).]

(92)
Educational Endowments Act. 1882—Public bodies—"Directly affected."

Question as to the title of public bodies claiming to be bodies corporate "directly affected by" a scheme adjusted under the

provisions of the Educational Endowments Act, 1882, and as such entitled to present a case to the Court under the 30th section of that Act.

Forrest's Trustees v Commissioners on Educational Endowments, 1884, 11 R. 719; 21 S.L.R. 503.

(93)

Right to bursary.

Martin v MacDougall's Trustees, 1885, 13 R. 274; 23 S.L.R. 190.
M'Donald v M'Coll, 1890, 17 R. 951; 27 S.L.R. 761. EDUCATION, Nos. 143 and 144.

(15) EXECUTOR.

[See EXECUTOR III. 4.]

(16) FRIENDLY SOCIETIES.

(94)

Branch order—Title to sue of friendly society where the society was itself a court or branch of a larger order or friendly society, and had been suspended by the executive council of the parent society—Friendly Societies Act, 1855, secs. 18 and 19.

Simpson, &c. v Ramsay, &c., 1874, 2 R. 129; 12 S.L.R. 92. FRIENDLY SOCIETY, No. 25.

(95)

Member of friendly society—Interdict against payment of money already paid.

In an action in which a member of a friendly society sought to interdict the board of management from paying the expenses of unsuccessful litigation out of the funds, held that the expenses having been paid before the action was raised the pursuer had no interest or title to sue.

Edgar v City of Glasgow Friendly Society, 1914, 2 S.L.T. 408.

(17) HERALDRY.

[See HERALDRY.]

(18) HERITABLE RIGHTS.

(96)

Feudal title—Reduction—Want of assignation of writs to connect with conveyance on which pursuer's notarial instrument proceeded.

Smith v Wallace, 1869, 8 M. 204; 42 J. 82; 7 S.L.R. 122. HERITABLE PROPERTY, No. 184.

(97)

Superior and vassal—Mails and duties—Ffeu-duty.

Prudential Assurance Co. v Cheyne, 1884, 11 R. 871; 21 S.L.R. 606. SUPERIOR AND VASSAL, No. 73.

Nelson's Trustees v Tod, 1896, 23 R. 1000; 33 S.L.R. 727; 4 S.L.T. 80. SUPERIOR AND VASSAL, No. 74.

(98)

Poinding of ground—Arrears of feu-duty—Superior divested of superiority.

Scottish Heritages Co. v North British Property Investment Co., 1885, 12 R. 550; 22 S.L.R. 361. POINDING OF THE GROUND, No. 6.

(99)

Casualty.

Steuart v Watt, (O.H.) 1899, 7 S.L.T. 253. SUPERIOR AND VASSAL, No. 109.

Baillies of Kirkintilloch v Marshall, 1882, 19 S.L.R. 801. SUPERIOR AND VASSAL, No. 110.

(100)

Action by superior for statutory compensation—Claim constituted when vassal was proprietor—Irritancy.

Caledonian Railway Co. v Watt, 1875, 2 R. 917; 12 S.L.R. 592. SUPERIOR AND VASSAL, No. 46.

Building restrictions.

[See BUILDING RESTRICTIONS III.]

(101)

Proprietor—Radical right—Reparation—Injury to property—Evidence that a disposition ex facie absolute was really in security.

M'Bride v Caledonian Railway Co., 1894, 21 R. 620; 31 S.L.R. 497; 1 S.L.T. 559. RIGHT IN SECURITY, No. 163.

(102)

Joint owners—Action at instance of one of several pro indiviso proprietors—Foreshore.

Laird v Reid, 1871, 9 M. 699; 43 J. 336; 8 S.L.R. 422. RIVER, LOCH, AND SEA, No. 58.

(103)

Removing—Action by two of several joint proprietors.

Grozier v Downie, 1871, 9 M. 826; 43 J. 456; 8 S.L.R. 563. LANDLORD AND TENANT, No. 433.

(104)

Pro indiviso proprietor—Mails and duties.

Schaw v Black, 1889, 16 R. 336; 26 S.L.R. 220. MAILS AND DUTIES, No. 3.

(105)

Salmon fishings—Abstraction of water from stream—Passage of salmon impeded—Action at instance of owners of salmon fishings above point of abstraction—Pursuers not riparian owners—Title to sue sustained.

Earl of Kintore v Pirie & Sons, 1902, 5 F. 818; 40 S.L.R. 210; 10 S.L.T. 485. [Affirmed 1906, 8 F. (H.L.) 16; [1906] A.C. 478; 43 S.L.R. 838; 14 S.L.T. 215. FISHINGS, No. 75.]

(106)

Public navigable and tidal river—Pollution—Title as riparian proprietor and as owner of fishings.

Moncreiffe v Perth Police Commissioners, 1886, 13 R. 921. RIVER, LOCH, AND SEA, No. 37.

(107)

Liferenter—Liferenter allenary, with consent of the fiar whose title was not made up.

A mother, who had been infeft in a property in terms of a destination in favour of herself for her liferent use allenary, and of her child nasciturus in fee, raised, along with her son, who had made up no title in his own name, an action of declarator to fix the boundary of the property. **Held** (per Lord Gifford, Ordinary) that the pursuers had a good title to sue.

Otto v Weir, 1871, 9 M. 660; 43 J. 574; 8 S.L.R. 411.

(108)

Heir—Apparency—Reduction of adjudgers' titles.

Dingwall v Burns, 1871, 9 M. 582; 43 J. 354; 8 S.L.R. 385. ADJUDICATION, No. 5.

(109)

General service—Declarator that ex facie absolute disposition was in security only.

M'Andrew v Reid, 1868, 6 M. 1063; 40 J. 600; 5 S.L.R. 653. SERVICE OF HEIRS, No. 10.

(110)

Substitution excluding heir at law—Challenge of ancestor's death-bed deed.

Park's Curator v Black, 1868, 6 M. (H.L.) 147; 40 J. 642; L.R., 1 H.L. Sc. 392; 5 S.L.R. 726, No. 23, supra.

(111)

Claimant to estates — Attainder — Subsequent Crown grant to alleged nearest heir-male of attainted person — Title completed in favour of "heirs and assignees" — Reduction of deeds following upon Crown grant by claimant who had served as nearest heir-male of the elder brother of the attainted heir.

Held no title to sue.

Earl of Perth v Lady Willoughby de Eresby's Trustees, 1871, 9 M. (H.L.) 83; L.R., 2 H.L. Sc. 139; 43 J. 394.

(112)

Action of exhibition ad deliberandum.

Where an action of exhibition of a Crown charter of resignation of certain lands was brought to enable the pursuer to consider whether he should enter as heir to his great-grandfather, in whom it was clear from his own statement that none of the lands embraced in the charter had ever vested, **held** that he had not set forth a title to require exhibition of the deeds under which these lands were held.

Fulton v Earl of Eglinton, 1878, 5 R. 752; 15 S.L.R. 433.

(113)

Heir of entail—Reduction of feu contract between prior heir and his law agent.

Cleland v Morrison, 1878, 6 R. 156; 16 S.L.R. 90. ENTAIL, No. 124.

(114)

Crofter—Cessio—Title of trustee.

Title of the trustee in the cessio of a crofter to sue an ejection and removing of the crofter where no disposition omnium bonorum had been granted.

Mackenzie v Munro, 1894, 22 R. 45; 32 S.L.R. 43; 2 S.L.T. 290.

(115)

March fence — Nature of crofter's right — Crofters' Holdings Act, 1886 — Act 1661, c. 41.

MacDonald v Dalgleish, 1894, 21 R. 900; 31 S.L.R. 751; 2 S.L.T. 67. SMALL HOLDINGS, No. 26.

(116)

Possessory question—Farm road.

Galloway v Cowden, 1885, 12 R. 578; 22 S.L.R. 371. POSSESSORY ACTION, No. 8.

(117)

Action by proprietors in respect of ground reclaimed from sea — Pursuers having no title to foreshore.

Irvine v Robertson, 1873, 11 M. 298; 45 J. 209; 10 S.L.R. 188. POSSESSORY ACTION, No. 9.

(19) HUSBAND AND WIFE.

Title of married woman to sue.

[See HUSBAND AND WIFE III. 6.]

(118)

Separation and aliment—Proof of pursuer's marriage with third party.

In 1897 A, a woman who had in 1875 gone through a regular ceremony of marriage with B, brought an action of separation and aliment against him. B pleaded in defence, inter alia, that he was not the pursuer's husband, in respect that she was the wife of C. It was proved that, in 1868, the pursuer had entered into a regular marriage with C, who was then twenty-six years of age, that C deserted her in 1871, and that she had not heard of him since. There was nothing in the evidence, apart from the lapse of time, to show that C was dead at the date of the action. The Court dismissed the action, **holding** that the pursuer had not instructed a title to sue, in respect that the presumption was that C was alive, and consequently that the pursuer was not the defender's wife.

Sharp v Sharp, 1898, 25 R. 1132; 35 S.L.R. 825.

(119)

Husband suing in his own name for recovery of deceased wife's estate — Action against debtor of estate—Jus relicti.

Circumstances in which **held** that a hus-

band, who was not his wife's executor, had no title to sue as an individual for recovery in name of *ius relict*i of a part of his wife's estate from a debtor to the estate.

Adams v Johnson, (O.H.) 1920, 2 S.L.T. 328.

(120)

Husband after divorce—Wife's estate previously vested.

Ferguson v Jack's Executors, 1877, 4 R. 393; 14 S.L.R. 277. **HUSBAND AND WIFE**, No. 335.

(121)

Husband against wife—Slander.

Young v Young, 1903, 5 F. 330; 40 S.L.R. 301; 10 S.L.T. 570. **SLANDER**, No. 6.

(20) **INSANE, COGNITION OF.**

[See **INSANITY III.**]

(21) **INTERNATIONAL LAW.**

[See **INTERNATIONAL LAW XVI.**]

(22) **JUDICIAL FACTOR.**

[See **JUDICIAL FACTOR IV. 2 (5).**]

(23) **LANDLORD AND TENANT.**

(122)

Pro indiviso proprietor of estate—Action for rent.

Schaw v Black, 1889, 16 R. 336; 26 S.L.R. 220. **LANDLORD AND TENANT**, No. 300.

(123)

Creditor holding decree of mails and duties—Right to sequester for rent.

Robertson's Trustees v Gardner, 1899, 16 R. 705; 26 S.L.R. 547. **MAILS AND DUTIES**, No. 15.

(124)

Water—Pollution—Agricultural tenant.

Fleming v Gemmill, 1908 S.C. 340; 45 S.L.R. 281; 15 S.L.T. 691. **RIVER, LOCH, AND SEA**, No. 47.

(125)

—Pollution—Title of upper heritor.

Hope v Governors of Heriot's Hospital, 1878, 15 S.L.R. 400. **RIVER, LOCH, AND SEA**, No. 46.

(126)

—Question between incoming and outgoing tenant.

Mitchell v Dyker, 1912, 1 S.L.T. 461. **LANDLORD AND TENANT**, No. 565.

(127)

Title of tenant of mill to sue petitory action involving question of heritable right.

Tenant of a mill held to have a title to sue a petitory action in the Sheriff Court for abstracted multures, though it involved a question as to the extent of the thirl.

Stobbs v Caven, 1873, 11 M. 530; 45 J. 340; 10 S.L.R. 347.

(128)

Tenant under superior, of minerals—Declarator against vassals, raising question as to superior's right of property in the minerals.

Baird & Co. v Feuars of Kilsyth, 1878, 6 R. 116; 16 S.L.R. 53. **MINES AND MINERALS**, No. 19.

(129)

Granter of lease divested by ex facie absolute disposition—Title of tenant to sue on lease.

An *ex facie* absolute disposition of heritable subjects was qualified by a back bond declaring that it had been granted in security merely. The disposition was recorded, but not the back bond. The granter of the disposition continued to occupy the subjects, and subsequently granted a lease of part of the property to his son. The father and his disponent having been sequestered, the trustee of the latter challenged the son's right as lessee. In an action brought by the son for declarator that the lease was valid, the trustee of the disponent pleaded that the pursuer had no title to sue, because at the date of the lease the father had been absolutely divested by the disposition, the unrecorded back bond not being effectual against the trustee. Held that the lease, whether it was valid or not, afforded a sufficient title to sue.

Abbott v Mitchell, 1869, 8 M. 268; 42 J. 121; 7 S.L.R. 160.

(130)

Joint tenants—Action at instance of one—Assignment pendente processu.

Middle Ward District Committee of Lanarkshire County Council v Marshall, 1896, 24 R. 139; 34 S.L.R. 130; 4 S.L.T. 140, No. 4, *supra*.

(131)

Possessory question—Tenant under 999 years' lease.

McDonald v Dempster, 1871, 10 M. 94; 9 S.L.R. 83. **POSSESSORY ACTION**, No. 7.

(132)

Entail—Obligation by heir in possession to repay improvement expenditure undertaken by tenant of entailed subjects—Action by tenant's executors against succeeding heir in possession for repayment.

Shepherd's Executors v Mackenzie, 1913 S.C. 144; 50 S.L.R. 105; 1912, 2 S.L.T. 406. **ENTAIL**, No. 320.

Action of removing.

[See **LANDLORD AND TENANT IV. 5 (1).**]

(24) **LAW AGENT.**

(a) **Rights and Liabilities of Parties other than Client.**

[See **AGENT AND CLIENT II. 2, III. 1 (3).**]

(b) **Removal from Roll.**

[See **ADMINISTRATION OF JUSTICE VI. 3 (2).**]

(25) LICENSING.

(133)

Declaration as to who were licensing authorities—Title of publican.

Tennent v Magistrates of Partick, 1894, 21 R. 735; 31 S.L.R. 619; 1 S.L.T. 594.
LICENSING LAWS, No. 2.

(134)

Reduction of public-house certificate—Owners and occupiers of property in neighbourhood.

Bootland v M'Farlane, 1900, 2 F. 1014; 37 S.L.R. 785; 8 S.L.T. 63. LICENSING LAWS, No. 50.

Black v Tennent, 1899, 1 F. 423; 36 S.L.R. 301; 6 S.L.T. 298. LICENSING LAWS, No. 51.

(135)

Burgh prosecutor and members of burgh licensing court—Transfer of licence—Reduction of decision of licensing appeal court.

Held that (a) the burgh prosecutor who had successfully objected to the transfer of a licence in the burgh licensing court, and (b) certain members of that court had a title to sue for a reduction of a decision of the licensing appeal court reversing that of the burgh licensing court.

Sharp v Morrison, (O.H.) 1922 S.L.T. 272.

(26) MINOR AND PUPIL.

[See MINOR AND PUPIL V. 1.]

(27) NEGLIGENCE.

[See REPARATION I. 2.]

(28) NUISANCE.

[See NUISANCE I. 3 (1).]

(29) PARTNERSHIP.

(136)

Action at instance of whole partners—Partnership not disclosed in instance.

Plotzker v Lucas, 1907 S.C. 315; 44 S.L.R. 245; 14 S.L.T. 678. PARTNERSHIP, No. 150.

(137)

Right of individual partner to bring action in name of firm.

Beveridge v Beveridge, 1872, 10 M. (H.L.) 1; L.R., 2 H.L. Sc. 183; 44 J. 171; 9 S.L.R. 419. PARTNERSHIP, No. 47.

(138)

Disclaimer by other partner.

Kinnes v Adam & Sons, 1882, 9 R. 698; 19 S.L.R. 478. PARTNERSHIP, No. 48.

(139)

Instance of partner as individual—Patent affecting business of firm—Patents and Designs Act, 1907, sec. 94 (3).

In an action for revocation of a patent
v 28

relating to concrete, brought with the concurrence of the Lord Advocate, the pursuer averred that he was a civil engineer, and was a member of a firm doing a large business in reinforced concrete, and that "the pursuer's business" was in danger of being affected by the enforcement of the defender's patent. The action was brought in the name of the pursuer as an individual and not of his firm. Held that the pursuer had a title and interest to sue in his own name.

Melville v Cummings, 1912 S.C. 1185; 29 R.P.C. 665; 49 S.L.R. 879; 1912, 2 S.L.T. 130.

(140)

Minority of joint adventurers.

Pyper v Christie, 1878, 6 R. 143; 16 S.L.R. 67. PARTNERSHIP, No. 172.

(141)

Dissolution—Subsequent death of partner before winding-up completed—Title of surviving partner to sue in his own name.

Nicoll v Reid, 1877, 5 R. 137; 15 S.L.R. 89. PARTNERSHIP, No. 121.

(142)

Reconstitution — Employment of agent by old firm—Title of new firm to sue agent.

Brims & Mackay v Pattullo, 1907 S.C. 1106; 44 S.L.R. 819; 15 S.L.T. 198. PARTNERSHIP, No. 151.

(143)

Sole surviving partner—Title to sue removing where partnership subjects held by creditor under disposition and back letter.

In a summons of removing in the Sheriff Court, the pursuer set forth as his title to sue a feu contract in favour of a firm, of which he was the sole surviving partner, at the same time admitting that a creditor of the firm had been infeft upon an ex facie absolute conveyance, qualified by a back-letter obliging the creditor to resell within five years. The defender set forth no title to possess. Held that the title set forth by the pursuer was not sufficient.

Opinion (per Lord Justice-Clerk Moncreiff and Lord Neaves) that if the pursuer had distinctly set forth that the substantial right of property was in him as sole surviving partner of the firm it would have been sufficient, notwithstanding the feudal divestiture.

Traill v Traill, 1873, 1 R. 61; 11 S.L.R. 8.

(144)

Trustees of deceased partner—Option in a contract of copartnership to trustees of a deceased partner to become partners in his stead—Title of one of several executors to enforce the right.

Neilson v Mossend Iron Co., 1885, 12 R. 499; 22 S.L.R. 265.

[Reversed on another point, 1886, 13 R. (H.L.) 50; 11 App.Cas. 298; 23 S.L.R. 867. PARTNERSHIP, No. 33.]

(145)
Trustee of sequestrated firm—Suing solvent partner for debts due to firm's creditors.

Laing Brothers & Co.'s Trustees v Low, 1896, 23 R. 1105; 33 S.L.R. 802; 4 S.L.T. 109. PARTNERSHIP, No. 129.

(146)
Action to enforce sale—Firm converted into limited company between sale and action.

A firm sold a steam crane on condition that it should be fitted up on board a ship and in the meantime stored by the seller until the buyer should ask delivery. The firm, after the sale but before delivery, having been converted into a limited company, the buyer refused to take delivery of the crane, and in an action for payment of the price, at the instance of the firm and the partners thereof and the limited company, pleaded no title to sue. The Lord Ordinary repelled the plea.

Brown v Carron Co., (O.H.) 1898, 6 S.L.T. 90.

(30) PERSONAL REPRESENTATIVES.

[See EXECUTOR III. 4.]

(31) PUBLIC AUTHORITIES AND OFFICIALS.

(147)

Lord Advocate.

Observations on the right of the Lord Advocate to bring an action in the public interest.

D. & J. Nicol v Dundee Harbour Trustees, 1915 S.C. (H.L.) 7; [1915] A.C. 550; 52 S.L.R. 138; 1914, 2 S.L.T. 418.

(148)
Burgh—Sanitary authority—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, sec. 2 (2) and (6).

Glasgow Corporation v Mickel, 1922 S.C. 228; 59 S.L.R. 153; 1922 S.L.T. 160. LANDLORD AND TENANT, No. 307.

(149)
County council—Action to decide in which of the Courts common law offences should be tried.

County Council of Dumfriesshire v Phyn, 1895, 22 R. 538; 32 S.L.R. 438; 2 S.L.T. 580. LOCAL GOVERNMENT, No. 11.

(150)
—Actio popularis—Right of way—Case sisted to allow of county council taking steps to vindicate right of way—Local Government (Scotland) Act, 1894, sec. 42.

Alston v Ross, 1895, 23 R. 273; 33 S.L.R. 205; 3 S.L.T. 213. ROADS AND STREETS, No. 27.

(151)
Parish council—Medical officer of poor-house—Inspector of poor—Dismissal—Title of parish council to sue.

Kilwinning Parish Council v Board of

Management of Cunninghame Combination Poorhouse, 1909 S.C. 829; 46 S.L.R. 370; 1909, 1 S.L.T. 205. POOR, No. 12.

(152)
Fishery board—Title to sue at common law.

Tay District Fishery Board v Robertson, 1887, 15 R. 40; 25 S.L.R. 54. FISHINGS, No. 64.

(153)
Road trustees—Dangers to roads—Barbed wire fences.

Elgin County Road Trustees v Innes, 1886, 14 R. 48; 24 S.L.R. 35. ROADS AND STREETS, No. 81.

(154)
Inspector of poor on behalf of combined parishes.

Chisholm v Marshall, 1874, 1 R. 388; 11 S.L.R. 207. POOR, No. 10.

(32) PUBLIC, MEMBERS OF.

(155)
Actio popularis—Market.

In an action by certain vegetable produce merchants who had been in the habit of using a fruit and vegetable market in a burgh, brought against the corporation for declarator that they had a right to the peaceable use of the market-place during market hours, and for interdict against their exclusion, held that the pursuers, as members of the public, had a good title to sue.

Magistrates of Edinburgh v Blackie, 1886, 13 R. (H.L.) 78; 11 App.Cas. 665; 23 S.L.R. 501.

(156)
—Petition for removal of obstructions from road.

Three labouring men residing near an alleged public road, who had been requested by a committee appointed at a meeting of labouring men to present a petition for the removal of obstructions from the alleged public road, they to be guaranteed against loss, held entitled to insist in the petition without finding caution for expenses.

Potter v Hamilton, 1870, 8 M. 1064; 42 J. 625; 7 S.L.R. 703.

[Cf. Jenkins v Robertson, 1869, 7 M. 739; 41 J. 326; 6 S.L.R. 465. EXPENSES, No. 501.]

Right of way.

[See ROADS AND STREETS I. 4 (1).]

(157)
Ratepayers—School board—Election—Reduction.

Duncan v Crichton, 1892, 19 R. 594; 29 S.L.R. 443. EDUCATION, No. 16.

—**Right to object to illegal assessment.**

[See RATES AND ASSESSMENTS I. 1.]

—**Right to sue burgh magistrates.**
 [See (8), supra.]

(158)
Statutory trust—Harbour—Ratepayer—Rival trader.

D. & J. Nicol v Dundee Harbour Trustees, 1915 S.C. (H.L.) 7; [1915] A.C. 550; 52 S.L.R. 138; 1914, 2 S.L.T. 418, No. 6, *supra*.

(33) PUPILS.

[See (26), *supra*.]

(34) RAILWAY.

[See RAILWAY I. 2.]

(35) REDUCTION OF TESTAMENTARY DEEDS—INTEREST.

[See I. 2, *supra*.]

(36) REPARATION.

[See REPARATION I. 2.]

(37) SHIP.

(159)
Title of one of several joint owners of a ship to sue ship's husband.

Manners v Raeburn & Verel, 1884, 11 R. 899; 21 S.L.R. 723. SHIP, No. 28.

(160)
Purchaser of ship suing party contracting with seller to supply engines.

Blumer & Co. v Scott & Sons, 1874, 1 R. 379; 11 S.L.R. 192. JUS QUÆSITUM TERTIO, No. 1.

(38) SLANDER.

[See also REPARATION I. 2.]

(161)
Individual members of class—Slander of a class.

Browne v Thomson & Co., 1912 S.C. 359; 49 S.L.R. 285; 1912, 1 S.L.T. 123. SLANDER, No. 63.

(162)
Police constable—Bye-law prohibiting policeman from suing without consent of chief constable.

A v B, 1907 S.C. 1154; 44 S.L.R. 870; 15 S.L.T. 327. POLICE FORCE, No. 29.

(163)
Madhouses Act, 1815.

Mackintosh v Weir, 1875, 2 R. 877. [Obsolete under Lunatics Act, 1857.]

(39) STATUTORY BODIES.

(164)
Statutory trust—Harbour—Title of private trader and ratepayer.

D. & J. Nicol v Dundee Harbour Trustees, 1915 S.C. (H.L.) 7; [1915] A.C. 550; 52 S.L.R. 138; 1914, 2 S.L.T. 418, No. 6, *supra*.

(165)
Statutory board—Title of board to common law remedy.

Tay District Fishery Board v Robertson, 1887, 15 R. 40; 25 S.L.R. 54. FISHINGS, No. 64.

(40) STATUTORY OBLIGATIONS AND REMEDIES.

[See STATUTE III.]

(41) TRADE UNION.

[See TRADE UNION V.]

(42) TRUST.

[See TRUST VII. 2.]

(43) MISCELLANEOUS.

(166)
Alien—Letter of naturalisation—Heritage.

Held (by Lord Ormisdale, Ordinary) that an objection taken to an alien's title to sue for implement of an alleged contract for the sale of heritage was obviated by a letter of naturalisation obtained by him after the action was raised.

Goldston v Young, 1868, 7 M. 188; 41 J. 122; 6 S.L.R. 158.

(167)
Debtor's debtor—Cessio—Trustee refusing to sue.

A creditor of a person under cessio raised an action against a person alleged to be a debtor to the estate, concluding alternatively for payment to the pursuer or to the trustee in the cessio, who, it was averred, had refused to move in the matter. *Held* that the pursuer had no title to sue.

Henderson v Robb, 1889, 16 R. 341; 26 S.L.R. 222.

(168)
Multiplepoining—Claim in multiplepoining.

A creditor has no title to claim in a multiplepoining funds to which his debtor has right, except by way of a riding claim upon a claim lodged by his debtor.

Gill's Trustees v Patrick, 1889, 16 R. 403; 26 S.L.R. 292.

(169)
Donee—Title to sue for recovery of gift sent in error to third party.

The pursuer in an action for payment of a sum of money averred that the money was a charitable gift intended for her which had been sent in error to the defender, and which he refused to part with, though requested to do so by the donor. *Held* that the pursuer had relevantly averred a title to sue for recovery of the gift.

Costin v Hume, 1914 S.C. 134; 51 S.L.R. 112; 1913, 2 S.L.T. 374.

(170)

Patent—Revocation—Patent affecting business of firm—Instance of partner as individual—Patents and Designs Act, 1907, sec. 94 (3).

Melville v Cummings, 1912 S.C. 1185; 29 R.P.C. 665; 49 S.L.R. 879; 1912, 2 S.L.T. 130, No. 139, supra.

(171)

Unregistered dentist—Dentists Act, 1878.

The estates of A, who practised dentistry, but was not registered under the Dentists Act, having been sequestrated, he brought an action for interdict against the trustee in his sequestration selling, removing, or otherwise interfering with a number of instruments which belonged to the pursuer. The pursuer on record designed himself as "dental surgeon," but in his practice he had not in any way held himself out as registered under the Dentists Act. The trustee in defence maintained, *inter alia*, that in any view, the pursuer, being an unregistered dental practitioner who had designed himself as a "dental surgeon," was not entitled to the protection of the Court. The Court allowed a proof.

Macpherson v Macpherson's Trustee, 1905, 8 F. 191; 43 S.L.R. 102; 13 S.L.T. 523.

II. TITLE TO DEFEND.

(172)

Right of way—Public company for the preservation of rights of way.

In an action of declarator by a proprietor to have it found that his lands were free from alleged servitudes of right of way, a limited liability company, formed, *inter alia*, for the preservation, defence, and acquisition of public rights of way in Scotland, applied, before defences were due, to be sisted as defenders. The Court sisted them, and allowed defences for them to be received, **holding** that a decree against them would be res judicata in a question with the public.

Macfie v Scottish Rights of Way Society, 1884, 11 R. 1094; 21 S.L.R. 742.

(173)

—Parish council—Action to determine position of admitted right of way—Local Government (Scotland) Act, 1894, secs. 29 and 42.

A proprietor of lands brought an action of declarator for the purpose of determining the position of the boundary between his lands and an admitted right of way. He called as defenders the district committee of the county council, and the county council itself for any interest it might have; but neither the district committee nor the county council lodged defences. The landward committee of the parish council, however, sisted themselves as defenders, and lodged defences. **Held** that the landward committee of the parish council had no title to defend, in respect that neither parish councils nor

their landward committees had authority to litigate with regard to rights of way.

Hope v Landward Committee of Parish Council of Inveresk, 1906, 8 F. 896; 43 S.L.R. 679; 14 S.L.T. 161.

(174)

Pro indiviso proprietor—Bond and disposition with assignation of rents—Defence to action of mails and duties.

One of several pro indiviso proprietors of subjects let as grass parks borrowed a sum of money, and in security thereof granted a bond and disposition over his share of the estate. The bond contained an assignation to the rents. The bondholder raised an action of mails and duties against the tenants for payment of his debtor's share of the rents, calling also as defenders his debtor and the other pro indiviso proprietors. The debtor alone defended the action, and, while admitting the debt, maintained that the pursuer had no title to sue. The Court repelled the defences, **holding** that the debtor had neither interest nor title to object to effect being given to his own assignation.

Schaw v Black, 1889, 16 R. 336; 26 S.L.R. 220.

(175)

Riparian proprietor—Interdict against execution of works.

In an action against the Clyde navigation trustees at the instance of a riparian proprietor, the defenders were, by judgment of the House of Lords, ordained under their Acts to lengthen certain piers in the river. In a note of suspension and interdict, presented by certain shipowners against the Clyde trustees, to have the execution of the works stopped until the sanction of the Board of Trade had been obtained—which it was then, for the first time, averred was required by statute—**held** that the pursuer in the original action was, on his own motion, entitled to be sisted as a respondent, on the ground that he had a material interest in the suspension.

Glasgow Shipowners' Association, &c. v Clyde Navigation Trustees, 1885, 12 R. 695; 22 S.L.R. 374.

(176)

Salmon fishings—Crown grant—Possession.

A proprietor holding a Crown grant of salmon fishings does not require to show possession of the salmon fishings to entitle him to defend an action brought by another person claiming an exclusive right to salmon fishing in the same water.

Maxwell v Lamont, 1903, 6 F. 245; 41 S.L.R. 202; 11 S.L.T. 531.

(177)

Heritable creditor — Poining of the ground.

Held that a heritable creditor has a title to defend an action of poining of the ground.

Scottish Heritages Co. v North British Property Investment Co., 1885, 12 R. 550; 22 S.L.R. 361.

(178)

Action for reduction of agreement.

A heritable bondholder has no title to insist on the performance of obligations in a contract relating to the security subjects made by the debtor with a neighbouring proprietor at a date later than that of his bond. **Held**, accordingly, that the bondholder had no title to defend an action raised by the neighbouring proprietor for reduction of the contract.

Heron v Martin, 1893, 20 R. 1001; 30 S.L.R. 733; 1 S.L.T. 104.

(179)

Heritable office—Title to dispute claim to office—Heir-male—Service.

The Earl of Lauderdale raised an action for declarator that he was entitled to the office of Hereditary Standard Bearer of Scotland. He averred that by the Act 1600, c. 44, the office was confirmed to "Sir James Scrymgeour and his heirs-male," and that the pursuer's predecessors had subsequently acquired right to the office. He called as defender Henry Scrymgeour Wedderburn, who denied the pursuer's right to the office, and, in support of his title to defend the action, averred that he was "heir-male of the Sir James Scrymgeour mentioned in the Act of 1600." **Held** that the defender had averred a sufficient title to defend the action and to dispute the pursuer's claim, and that it was not necessary for him ante omnia to prove by service that he was the person entitled to the office in the event of the pursuer's claim proving invalid.

Earl of Lauderdale v Scrymgeour Wedderburn, 1908 S.C. 1237; 45 S.L.R. 949; 16 S.L.T. 354; reversed on another point, 1910 S.C. (H.L.) 35; [1910] A.C. 342; 47 S.L.R. 532; 1910, 1 S.L.T. 347.

(180)

Petition for service by heir of entail—Disposance—Declarator of invalidity of entail.

Held that an illegitimate daughter who was the dispositive of her father, the institute of entail of certain lands, and who had expedite a notarial instrument setting forth her father's infetment and conveyance in her favour, was not entitled to oppose a petition for service by the heir under the deed of entail, until her right to do so was established by a declarator of the invalidity of the entail, on the ground that the only warrant for her notarial instrument was her father's infetment as institute of tailzie.

Mackenzie v Catton, 1870, 8 M. 457; 42 J. 202; 7 S.L.R. 250.

(181)

Title of third party to oppose interdict where his interests were affected.

Circumstances in which the Court allowed a third party, who averred that his interests were affected, to lodge answers opposing the granting of an interdict.

Gas Power and By-Products Co. v Power Gas Corporation, 1911 S.C. 27; 48 S.L.R. 38; 1910, 2 S.L.T. 241.

(182)

Patent—Claim to be sisted as defender as having the real interest.

In a suspension and interdict against infringement of a patent no appearance was made for the respondents, but a minute was lodged for a third party holding a similar patent, stating that the machine against which the interdict was really directed belonged to him, and had been, by arrangement, worked by the respondents for the purpose of exhibition to the trade, and craving to be sisted as respondent in the action. The Court refused to sist the minuter, and appointed the minute to be withdrawn from the proceedings.

Laing's Sewing Machine Co. v Norrie & Sons, 1877, 5 R. 29; 15 S.L.R. 22.

(183)

Burgh magistrates—Foresore—Title of magistrates to resist declarator of property of foresore.

Scott v Magistrates of Dundee—Keiller v Magistrates of Dundee, 1886, 14 R. 191; 24 S.L.R. 120. RIVER, LOCH, AND SEA, No. 103.

(184)

Competency of indweller in burgh pleading burgh title—Possessory action.

W, who was a pro indiviso owner along with the burgh of Inverness of salmon fishings in the Ness, raised an action against certain indwellers in the burgh to interdict them from fishing on certain days on which, as he averred, he had, by agreement between him and his co-proprietor the burgh, the exclusive right of fishing. The defenders averred that the pursuer had no such exclusive right of fishing, but that the burgh right, which they as inhabitants were entitled to exercise, was a right to fish on every day in such a manner as not to interfere with the pursuer's pro indiviso rights. The action was intimated to the burgh, but no defences were lodged by them. The defenders did not aver that the burgh right of fishing was dedicated to the public, but maintained that it was exercised by the public fishing in the burgh waters. **Held** that the defence was incompetent, in respect that the defenders had no title to raise the question of the extent of the pursuer's pro indiviso rights, that being a question to be determined by agreement or by litigation between the pro indiviso proprietors, and between them alone.

Warrand v Watson, 1905, 8 F. 253; 43 S.L.R. 252; 13 S.L.T. 727.

(185)

Dean of guild warrant—Title of neighbouring proprietor to object.

Maguire v Smith's Trustees, 1912 S.C. 410; 49 S.L.R. 592; 1912, 1 S.L.T. 212. BURGH, No. 162.

Summerlee Iron Co. v Lindsay, 1907 S.C. 1161; 44 S.L.R. 854; 15 S.L.T. 306. BURGH, No. 161.

Scott's Trustees v Shaw, 1892, 19 R. 895; 29 S.L.R. 767. BURGH, No. 191.
 Lawrie v Jackson, 1891, 18 R. 1154; 28 S.L.R. 866. BURGH, No. 252.
 Pitman v Burnett's Trustees, 1882, 9 R. 444; 19 S.L.R. 411. BURGH, No. 186.

(186)

School board and inhabitants—Statutory irritancy—Failure of trust purposes—School Sites Act, 1841.

In 1858, by disposition bearing to be granted under the authority of the School Sites Act, 1841, H, a fee-simple proprietor, conveyed to certain persons as trustees four acres of land "to be applied as a site for a school for the district of . . . for children of the labouring, manufacturing, and other poorer classes . . . and for a residence for the teacher or teachers, and for no other purposes whatever." A school was erected. In 1903 the trustees closed the school, and intimated that they were no longer able to maintain it. The heir of H brought an action against them, concluding for declarator that the site had reverted to him under the provisions of the School Sites Act. The trustees did not defend the action, but (1) the local school board, and (2) certain residents in the locality, parents of children of the class for which the school was intended, were allowed to lodge defences, and they maintained that the school should be conveyed to the school board. **Opinions** that the school board had no title to intervene in the action. **Opinions** that the individual residents had a title to intervene, but no interest to oppose the decree, in respect that their only interest in the matter was to secure free education for their children, and that such education was pro-

vided by statute. **Opinion** (per Lord Young) that they had no title to intervene. Houldsworth v School Board of Cambusnethan, 1904, 7 F. 291; 42 S.L.R. 237; 12 S.L.T. 563.

(187)

Collector of poor rates—Company—Winding up—Poor Law (Scotland) Act, 1845, sec. 88.

In a note by the liquidators of a company for authority, inter alia, to pay a preferable claim for poor rates due by the company, answers were lodged by a collector of poor rates, who maintained that the liquidators should be ordained to pay the claim for poor rates preferably to the liquidators' remuneration and their law expenses. The liquidators stated that their accounts showed a balance in their hands more than sufficient to pay in full all the preferable claims, after payment of the liquidators' remuneration and law expenses, and that the respondent had been informed of this before he lodged answers. **Held** that, in respect the liquidators had admitted the claim for poor rates to a preferential ranking and tendered payment thereof in full, there was no proper question presented to the Court for adjudication on the answers, and note remitted to the Lord Ordinary to proceed.

Liquidators of Scottish Drug Depot v Fraser, 1905, 7 F. 646; 42 S.L.R. 550; 13 S.L.T. 46.

(188)

Adjudication of debt—Plea that debt extinguished—Statute 1621, c. 6.

Macleod's Trustees v Murray, 1891, 18 R. 830; 28 S.L.R. 657. ADJUDICATION, No. 11.

TOLLS. See RAILWAY.

TOWAGE. See SHIP.

TOWN CLERK. See BURGH; MUNUS PUBLICUM.

TOWN COUNCIL. See BURGH.

TOWN PLANNING. See PUBLIC HEALTH.

TRADE DISPUTES. See TRADE UNION.

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TRADE MARK AND TRADE NAME.

For Questions as to the Copyright of Designs, see COPYRIGHT II.

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STATUTES.

- Act 1883—Patents, Designs, and Trade Marks Acts, 1883—46 & 47 Vict. c. 57.
 Act 1885—Patents, Designs, and Trade Marks (Amendment) Act, 1885—48 & 49 Vict. c. 63.
 Act 1887—Merchandise Marks Act, 1887—50 & 51 Vict. c. 28.
 Act 1888—Patents, Designs, and Trade Marks Act, 1888—51 & 52 Vict. c. 50.
 Act 1905—Trade Marks Act, 1895—5 Edw. VII. c. 15.
 Act 1907—Patents and Designs Act, 1907—7 Edw. VII. c. 29, as amended by the Patents and Designs Act, 1919—9 & 10 Geo. V. c. 80.
 Act 1908—Patents and Designs Act, 1908—8 Edw. VII. c. 4.

I. TRADE MARK.

1. RIGHT TO TRADE MARK—REGISTER OF TRADE MARKS.

(1)

Petition for rectification of register of trade marks—Jurisdiction—Act 1883.

Held (by Lord Kincairney, Ordinary) that he had jurisdiction to entertain a petition for rectification of the register of trade marks by a person aggrieved.

Herbert v Cowie Brothers & Co., 1897, 24 R. 361; 14 R.P.C. 436; 34 S.L.R. 280; 4 S.L.T. 243.

(2)

Jurisdiction—Declarator—Act 1883, secs. 90, 111, and 117.

An action was raised by Dewar, a Scottish trader, against Dewar & Sons, a Scottish company, concluding for declarator (1) that the defenders' trade mark, "Dewar's Whisky," had been entered in the register of trade marks without sufficient cause, and should be expunged; (2) that the alleged trade mark was incapable of registration, and that the entry in the register should be expunged; and (3) that the defenders had no exclusive right to use the words registered as a trade mark. The defenders

pleaded "no jurisdiction." **Held** that the action was not an application under sec. 90 of the Patents, Designs, and Trade Marks Act, 1883, for rectification of the register, and that the Court had jurisdiction to entertain it. **Opinion** reserved as to whether the Court had jurisdiction to entertain an application under sec. 90.

Dewar v John Dewar & Sons, 1899, 2 F. 249; 17 R.P.C. 341; 37 S.L.R. 188; 7 S.L.T. 263.

(3)

Competency of rectification after five years—Act 1883, secs. 76 and 90.

Held (by Lord Kincairney, Ordinary) that a person aggrieved by an entry in the register of trade marks is not excluded by the lapse of five years from the date of the entry from presenting a petition for rectification of the register.

Herbert v Cowie Brothers & Co., 1897, 24 R. 361; 14 R.P.C. 436; 34 S.L.R. 280; 4 S.L.T. 243.

(4)

Boord & Son, who had been for five years the registered proprietors of a trade mark, raised an action for infringement against *Thom & Cameron*. *Thom & Cameron* defended the action, and raised a counter action against *Boord & Son*, concluding, *inter alia*, for declarator that the trade mark was incapable of registration, and should be expunged from the register, in respect that it was common property before its registration by *Boord & Son*. **Held** that the lapse of five years was no bar to the removal of the entry, and that the question of *Boord & Son's* right to be on the register had been competently raised.

Boord & Son v Thom & Cameron, 1907 S.C. 1326; 24 R.P.C. 697; 44 S.L.R. 939; 15 S.L.T. 341.

(5)

Removal of trade mark.

Circumstances where **held** that a trade mark relating to whisky should be expunged from the register in respect that it had not been in use prior to 1875.

John Dewar & Sons v Dewar, (O.H.) 1900, 17 R.P.C. 341; 7 S.L.T. 461.

2. WHAT IS TRADE MARK.

(6)

Invented word — Descriptive name — “Granolithic”—Act 1883, sec. 64.

In 1880, Stuart, a manufacturer of artificial stone, registered a device bearing the words “Stuart’s granolithic” as a trade mark for artificial pavement made by him out of cement and crushed granite. This material, compounded in various proportions, had been long known to the trade, and was not protected by patent, but the name had now, for the first time, been invented by Stuart. In 1884 he registered the word “granolithic” as his trade mark for the pavement under the Patents, Designs, and Trade Marks Act of 1883, which for the first time allowed a word to be registered as a trade mark. In a petition for interdict to prevent certain persons from using the word “granolithic” in connection with the manufacture and sale of artificial stone pavements, he complained that these persons had offered to supply pavements under that name, and had issued circulars and price lists in which that name was used to describe the pavements offered for sale. Defendants assailed—Lord Justice-Clerk Moncreiff holding that there had been no infringement, in respect that the name was a descriptive name, and had not been shown to have been used by the defenders for any other reason than that it was a descriptive name; Lords Young and Craighill holding that the name was not such as could be registered under the Act, in respect it was not a distinctive word, and had been shown by the evidence in the case to have been in common use between 1880 and 1884; and Lords Young and Rutherford Clark holding that, assuming the word to be a protected trade mark, the use complained of was not an infringement.

Stuart & Co. v Scottish Val de Travers Paving Co., 1885, 13 R. 1; 23 S.L.R. 11.

3. INFRINGEMENT.

(7)

Resemblance—Risk of native purchaser in foreign market being misled — Interdict in general terms.

A firm who exported biscuits for sale in Burmah and elsewhere abroad, and whose registered trade mark was an architectural drawing showing the front elevation of Glasgow town hall, brought an action to have a merchant interdicted “from in any way using in connection with the sale of biscuits” the pursuers’ trade mark, or any mark substantially the same. It was proved that the defender exported biscuits for sale in Burmah, under a label which contained a picture, drawn in perspective, showing the front and one of the sides of Glasgow town hall. It was admitted that a purchaser at home was not likely to mistake the one design for the other, but there was evidence, however, that the similarity was such as was calculated to mislead native purchasers in the Burmese market. It was not

proved that any one either at home or abroad had in fact been misled. The Court refused the interdict craved.

Cowie Brothers & Co. v Herbert, 1897, 24 R. 353; 14 R.P.C. 436; 34 S.L.R. 280; 4 S.L.T. 243.

(8)

—Effect of long association of the complainers’ goods with a certain device.

A firm of spirit merchants, who had a registered trade mark consisting of a cat standing on a barrel, proved, in an action at their instance for infringement of this mark, that their goods had been so long associated with the mark that they had come to be known as the “Cat and Barrel” brand. Held that, in considering whether certain labels amounted to infringement of the complainers’ trade mark, the effect of this long association must be taken into account; and that labels which showed a cat and a barrel placed differently from those on the complainers’ trade mark, and which did not bear a close resemblance to it, amounted to a practical infringement of the complainers’ trade mark.

Boord & Son v Thom & Cameron, 1907 S.C. 1326; 24 R.P.C. 697; 44 S.L.R. 939; 15 S.L.T. 341.

(9)

Descriptive names—Use of word as description—“Granolithic”—Artificial stone pavement—Act 1883, sec. 64.

Stuart & Co. v Scottish Val de Travers Paving Co., 1885, 13 R. 1; 23 S.L.R. 11, No. 6, supra.

II. TRADE NAME.

(10)

Nature of right—Misrepresentation.

Observed (per Lord Skerrington)—“It is trite law that, apart from statute, there can be no right of exclusive property in a name, either a name under which a trader carries on his business or a name which he chooses to apply to his goods. The remedy which the law gives to a person who has used a particular name in trade is that he is entitled to prevent others from using the same name in such a way as is likely to mislead the public into thinking that the business or the goods so described is or are the business or the goods of the pursuer.”

Williamson v Meikle, 1909 S.C. 1272; 26 R.P.C. 775; 46 S.L.R. 915; 1909, 2 S.L.T. 169.

[See also Charles P. Kinnell & Co. v A. Ballantyne & Sons, 1910 S.C. 246; 27 R.P.C. 185; 47 S.L.R. 227; 1910, 1 S.L.T. 55, No. 15, infra.

(11)

—Misrepresentation—Fraud.

Observed (per Lord McLaren)—“In all such cases the question is whether the respondent, by use of a name which has been employed to designate a particular commercial business or place of

business, thereby represents that he is in right of that business or establishment to the injury of the true proprietor or trader. . . . The absence of fraudulent intention might be a good answer to an action of damages, but it will not entitle the party who has done the wrong to persist in using the trade name after it has been brought home to him that the use of the name is injurious."

Great North of Scotland Railway Co. v Mann, 1892, 19 R. 1035; 29 S.L.R. 848.

(12)

Descriptive name—Descriptive name or fancy name—"Bile Beans."

In 1899 the Bile Bean Manufacturing Co. of Leeds began to sell pills of an oviform shape in the United Kingdom under the name of "Bile Beans for Biliousness." In America, since 1887, the word "bean" had been applied to pills of an oviform shape, and appeared in American drug catalogues, but until the Bile Bean Manufacturing Co. began to make and sell their pills the word "bean" had never been used in the United Kingdom to denote pills. In an action by the Bile Bean Manufacturing Co. to have Davidson, another trader, interdicted from selling as "Bile Beans" pills not of the complainers' manufacture, *opinions* (per Lord Justice-Clerk Macdonald, Lord Kyllachy, Lord Stormonth-Darling, and Lord Ardwall, Ordinary) that the complainers were not entitled to the exclusive use of the name "Bile Beans," in respect that it was a descriptive name, and not a fancy name of the complainers' invention.

Bile Bean Manufacturing Co. v Davidson, 1906, 8 F. 1181; 23 R.P.C. 725; 43 S.L.R. 827; 14 S.L.T. 294.

(13)

—Natural product—Generic name not capable of appropriation as trade name.

In an action for interdict to prevent the defenders using the words "Water of Ayr Stone" to describe stones other than those from the pursuer's quarry, it was proved that the same kind of stone was to be found at various places in the same district, and that the name Water of Ayr Stone had never been used as a trade name in commerce exclusively to denote stone from the pursuer's quarry, but was the generic name of that particular kind of stone. *Held* that the pursuer was not entitled to the exclusive use of the name.

Montgomerie v Donald & Co., 1884, 11 R. 506; 21 S.L.R. 338.

(14)

—"Cellular" clothing—Misrepresentation.

The Cellular Clothing Co., which manufactured cloth of a particular texture, which they sold under the name of "cellular," raised an action for interdict to prevent another trader using the word "cellular" to describe cloth not manufactured by the pursuers. It appeared in a proof that the

word "cellular" appropriately described the cloth sold by the defenders, and that the term "cellular" was used in the trade in two senses—(a) in its primary sense as denoting fabrics of a particular texture, of which there were several kinds in the market, including the pursuers', and (b) as a trade name for the cloth sold by the pursuers. *Held* that the word "cellular" being an ordinary English word, the onus lay upon the pursuers of proving that the word had been so universally recognised by the trade and the public as denoting the pursuers' goods that its application to other goods involved misrepresentation, and that the pursuers had failed to discharge that onus. *Observed* that if the use of the word had involved misrepresentation, the pursuers would have been entitled to interdict, although there had been no fraud in its use.

Cellular Clothing Co. v Maxton & Murray, 1899, 1 F. (H.L.) 29; [1899] A.C. 326; 16 R.P.C. 397; 36 S.L.R. 605; 7 S.L.T. 15.

(15)

—"Horse Shoe" boilers.

A firm of boilermakers, who had for many years sold boilers under the name "Horse Shoe" boilers, brought an action against another firm to restrain them from selling, under the name "Horse Shoe," boilers not manufactured by the pursuers. In a proof it appeared (1) that when the pursuers first applied the name "Horse Shoe" to their boilers, their boilers were protected by a patent (although the patent had nothing to do with the section of the boilers being of horse shoe shape); (2) that all the boilers sold by them under the name "Horse Shoe" were not of horse shoe shape, some of them being cylindrical and some U-shaped; (3) that although other firms manufactured boilers of horse shoe shape, they did not sell them as "Horse Shoe" boilers, but sold them under other names. In the circumstances of the case the Court *held* that the pursuers had proved that the name "Horse Shoe" had come in the trade to be identified with their boilers; and interdicted the defenders from using the words "Horse Shoe" as descriptive of or in connection with boilers (not of the pursuers' manufacture) sold or offered for sale by the defenders without clearly distinguishing such boilers from the boilers of the pursuers.

Charles P. Kinnell & Co. v A. Ballantyne & Sons, 1910 S.C. 246; 27 R.P.C. 185; 47 S.L.R. 227; 1910, 1 S.L.T. 55.

(16)

Local name.

Coal raised from the Lochgelly collieries had for many years been known as "Lochgelly coal," and was the only coal so known in the market, although there was a seam known as the "Lochgelly splint seam," which was not confined to the Lochgelly collieries, but extended under other estates

as well. The Lumphinnans Iron Co., who were lessees of the minerals in the adjoining estate of Lumphinnans, under which the Lochgelly splint seam extended, having begun to advertise and sell coal wrought by them as "Lochgelly splint coal," the lessees of the Lochgelly collieries presented a note of suspension and interdict against their use of the name "Lochgelly" as applied to coal. Interdict granted against the respondents using the name "Lochgelly" to designate any coal wrought by them, excepting coal wrought from their part of the Lochgelly splint seam, and then only under the designation "Lumphinnans splint coal, Lochgelly seam."

Lochgelly Iron and Coal Co. v Lumphinnans Iron Co., 1879, 6 R. 482; 16 S.L.R. 268.

(17)

—Consisting of name of a place yielding a natural product used in a manufacture—Colourable modification.

D and H, two firms of firebrick manufacturers, were lessees of the whole fireclay on the farm of Glenboig, and the works of both were situated on that farm. Each had a separate trade mark, registered under the Trade Marks Registration Act, 1875, which was stamped on each brick made by them, that of H being "Glenboig," while D's was "Star Works, Glenboig," "J. D.," and a star. Y & Sons, another firm of firebrick makers, were lessees of a fireclay field called Heathfield, about two miles from Glenboig, and manufactured firebricks at works there. In 1874, Y & Sons sank a pit into a seam of clay, identical in character with the clay worked on Glenboig, and proceeded to advertise this fact, and in 1882 they commenced stamping their bricks "Young's, Glenboig." D and H thereupon applied for interdict against Y & Sons using this stamp, and against their issuing advertisements as makers of bricks of Glenboig clay. On a reclaiming note, the Court held (1) that Y & Sons, in making use of the word "Glenboig" on their bricks, intended their customers to believe that the bricks so stamped were manufactured at Glenboig, and that the distinction attempted by adding "Young's" was merely colourable; and (2) that they had in so acting infringed the trade marks of the complainers. Interdict was granted accordingly against stamping the words complained of, but, in deference to the opinion of the Court, interdict against the advertisements was not insisted upon.

Dunnachie v Young & Sons, 1883, 10 R. 874; 20 S.L.R. 588.

(18)

Trade name attached to premises—Exclusive right—Name—Misrepresentation—"Sun Foundry, Glasgow."

In 1857 the firm of George Smith & Co. began business as ironfounders in premises at Port-Dundas, Glasgow, of which they were tenants. They gave the name "Sun Foundry" to their premises. In 1871 they

removed to Kennedy Street, where they built a foundry on their own property and transferred the name to it. In 1887 G. B. Millar acquired the whole concern, premises, goodwill, and trade name included. He shortly afterwards transferred to a new firm the business, including goodwill, and the right to use the firm name, but retained the premises, including machinery and patterns, which he let on lease to the new firm. In 1894 the new firm removed from the premises to a new foundry at Clippens, twelve miles distant, but continued to use the name "Sun Foundry, Glasgow," on their circulars and otherwise as the designation of the new foundry. Cowan, who had bought the old foundry in Kennedy Street, and intended to carry on the business there as an ironfounder, then presented a note of suspension and interdict, to prevent George Smith & Co. using the designation "Sun Foundry, Glasgow," on the ground that, as owner of the premises, he had right to the name by which they had long been known, and that the respondents' use of it would lead the public to believe that they were carrying on their work at the complainer's premises, to the injury of his business. Held that the complainer was entitled to interdict.

Cowan v Millar, 1895, 22 R. 833; 32 S.L.R. 619; 3 S.L.T. 66.

(19)

—Castle Brewery.

A firm of brewers sought to interdict another firm of brewers from using the name "Castle Brewery," by which the complainers' brewery was commonly known. Held that there was no proof that the respondents' beer had been mistaken for the complainers', or that the complainers' trade had been interfered with, and no ground for apprehending that the public would be misled or the complainers injured by what the respondents had done, and interdict refused.

Cooper & M'Leod v G. & J. MacLachlan, (O.H.) 1901, 18 R.P.C. 380; 9 S.L.T. 41.

(20)

—Hotel name—Misrepresentation.

A railway company purchased for use as a hotel certain premises to which the original proprietor had sixteen years before given the name "Palace Hotel," and by which name it had ever since been known to the public. Mann, who had under lease successfully managed the hotel as tenant for thirteen of these years, removed to another hotel in close proximity, and advertised his new hotel as the "Palace Hotel," and "Mann's Palace Hotel." In a suspension and interdict by the railway company against Mann it was proved that his use of either name led to many mistakes injurious to the complainers. The Court granted interdict against Mann's using either name, holding (1) that his use of the name "Palace Hotel" amounted to a representation injurious to the complainers' interests; and (2) that it had been proved that the

prefix of his own name was not an addition sufficient to distinguish it from the complainers' hotel.

Great North of Scotland Railway Co. v Mann, 1892, 19 R. 1035; 29 S.L.R. 848.

(21)

Descriptive name—Addition to name.

Held that the proprietor of a hotel near a railway station, known as the "Station Hotel," was not entitled to object to the proprietor of a neighbouring hotel adopting the designation "The Royal Station Hotel," in respect that the term "Station Hotel" was a descriptive designation applicable to both, and the word "Royal" a sufficiently distinctive variation.

Charleson v Campbell, 1876, 4 R. 149; 14 S.L.R. 104.

(22)

Hotel sign—"Golden Lion."

In January, 1896, the proprietors of the Golden Lion Hotel, Stirling, raised an action against Lennox, the tenant of that hotel, and proprietor and occupant of the Station Hotel, Stirling, to interdict him "from using in any way upon or in connection with the Station Hotel a gilt figure or trade sign of a lion, or any painted or printed copy or facsimile thereof which has been used in connection with and recognised as the trade sign of the Golden Lion Hotel, Stirling." **Held** that, having regard to the fact that the words "Station Hotel" were conspicuous on that hotel, the use of a gilt lion on the roof implied no representation that the business of the Golden Lion Hotel had been transferred to it, and did not tend to mislead the public, and that as the pursuer did not aver that any members of the public had in fact been misled, he was not entitled to prove that such was the fact.

Crawford's Trustees v Lennox, 1896, 23 R. 747; 33 S.L.R. 573; 4 S.L.T. 18.

(23)

Maker's name—Identified with goods.

The manufacturer of a sewing machine of a certain construction, which was not patented, had been in use to sell it under his own name for a series of years, and the name had thus obtained an exclusive meaning in the trade as signifying a machine of his manufacture. **Held** that the name had become the property of the manufacturer as a trade mark, and that no one else was entitled to use it.

Singer Manufacturing Co. v Kimball & Morton, 1873, 11 M. 267; 45 J. 201; 10 S.L.R. 173.

(24)

Identified with goods—Rival trader with same initials.

A corset maker whose corsets were marked with the letters C B—the initials of his name—raised an action of interdict against a rival trader who sold corsets made by Connell Brothers & Co. which were stamped C B & Co. A proof showed that C B corsets had come to be known in the trade as corsets made by the pursuer and nobody else, and that the defenders had,

by printing the letters C B in large type and the letters & Co. in very small type, so marked their corsets as to be likely to mislead purchasers into taking them for the pursuer's corsets. The Court granted interdict against the defenders selling corsets not made by the pursuer marked in such a manner as to be calculated to mislead purchasers into the belief that these corsets were C B corsets made by the pursuer.

Bayer v Baird, 1898, 25 R. 1142; 15 R.P.C. 615; 35 S.L.R. 913; 6 S.L.T. 98.

(25)

Circumstances where **held** that a firm of whisky merchants had not the right to the exclusive use of a certain name as applied to whisky.

John Dewar & Sons v Dewar, (O.H.) 1900, 17 R.P.C. 341; 7 S.L.T. 462.

(26)

Sale of bottled beer—Sale in bottles embossed with name of complainer.

Woolley & Son, a firm of beer bottlers, sought to have Morrison, another beer bottler, interdicted from selling beer in bottles embossed with the name "Woolley & Son." The complainers averred that the public purchasing bottles so embossed would understand that the beer had been bottled by the complainers, whereas it was in fact bottled by the respondent. **Held**, after a proof, that interdict fell to be refused.

Woolley & Son v Morrison, 1904, 6 F. 451; 21 R.P.C. 349; 41 S.L.R. 344; 11 S.L.T. 717.

(27)

Dunlop tyres.

In 1904 two brothers, Robert and John Fisher Dunlop, who had been since 1898 in partnership in a cycle and motor repairing business in Kilmarnock under the name of R. & J. F. Dunlop, transferred the motor branch of their business to the Dunlop Motor Co., a company which had been incorporated under the Companies Acts, with a capital of £500, held by the two Dunlops and some of their friends. By the memorandum of association the Dunlop Motor Co. had power, inter alia, to deal in and make motor cars and motoring "accessories." In 1905 the Dunlop Pneumatic Tyre Co., a company registered in England in 1896, who were the makers of a well-known tyre for cycles and motors called the "Dunlop" tyre, the patent for which had recently expired, and who also manufactured cycling and motoring "accessories," presented a note of suspension and interdict against the Dunlop Motor Co., to have the respondents interdicted from carrying on their business under any name containing the name "Dunlop." The Dunlop Pneumatic Tyre Co., like the Dunlop Motor Co., had power to make motor cars, but neither company had ever in fact made any motor cars. **Held** that the respondents had not adopted the name Dunlop Motor Co. for the purpose of passing off their goods as the goods of the

complainers, and that the name Dunlop Motor Co. was not calculated to deceive the public into purchasing the goods of the respondents in the belief that such goods were goods of the complainers' manufacture; and interdict refused.

Dunlop Pneumatic Tyre Co. v Dunlop Motor Co., 1907 S.C. (H.L.) 15; [1907] A.C. 430; 24 R.P.C. 572; 44 S.L.R. 977; 15 S.L.T. 362.

(28)

Firm name—Use of previous employer's name on labels and window blinds.

A person, who had been in the employment of Boswell, a maker and retailer of portmanteaus, and had acted as cashier, and also as head of the sale department, while her master was absent from illness, left Boswell, and set up a retail shop of the same kind on the opposite side of the street. On the blinds of the shop she had printed her own name, adding, "from Boswell"; these blinds she pulled up so as to exhibit none of the inscription, except the word "Boswell." On labels, bill-heads, &c., used in her business, she styled herself "late manager to Boswell." In an action for interdict, brought by Boswell's representative to prevent her from using the name "Boswell" in the ways described, the Lord Ordinary, after a proof, interdicted her, **holding** (1) that the blinds had been used with the intention of misleading the public; and (2) that the defender's position in Boswell's shop had never been truly that of manager. After a hearing in the Inner House, the defender undertook to abstain from designing herself as manager to Boswell in her labels and bill-heads. The Court thereupon found it unnecessary to determine the rights of parties on that matter, and affirmed the Lord Ordinary's judgment, in so far as it dealt with the matter of the window and the blinds.

Boswell v Mathie, 1884, 11 R. 1072; 21 S.L.R. 727.

(29)

Personal name—Right of partner who had purchased goodwill of business to exclusive use of firm name.

Smith, one of the partners of Smith & M'Bride, bought the business and goodwill, and carried the business on for three years in his own name. At the end of that time his former partner, M'Bride, and a person also named Smith, who had entered into partnership with him, began to trade in the same business in the same town, under the name Smith & M'Bride. **Held** that Smith was entitled to interdict against their trading under that name.

Smith v M'Bride and Smith, 1888, 16 R. 36; 26 S.L.R. 22.

(30)

Personal name in conjunction with use of labels and trade marks.

The firm of J H & Co., the sole partner of which was J H, having been sequestrated, the trustee sold the goodwill of the business, with the right to use the firm's name, to

another firm. In a note of suspension and interdict at the instance of the purchasers against J H, who had been discharged, and was proposing to carry on business for himself, to interdict him from using the firm-name and the trade marks, labels, &c., of his former firm of J H & Co., which he had announced his intention of doing, **held** that the use of the labels and trade marks of his former firm by the respondent in conjunction with his own name would be a colourable imitation of these labels and trade marks tending to mislead the public, and that the complainers were entitled to interdict against the respondent using the firm-name, or the trade marks, or labels in any form, of his former firm.

Melrose-Drover, Limited v Heddle, 1901, 4 F. 1120; 39 S.L.R. 529.

(31)

Similarity of name—"Calculated to mislead"—Absence of proof that any one misled.

A, the managing director of the "Kelvindale Chemical Co.," severed his connection with that company, and afterwards started a similar business in the same neighbourhood under the name of the "Kelvinside Chemical Co." The original company sought to interdict him from using the name "Kelvinside" to designate the new company. It was admitted that that name had not been adopted with any wrongful intention. A proof was led, at which evidence was adduced that inconvenience had arisen through the misdirection and misdelivery of correspondence, but no actual instance of any customer being misled into confusing the two companies was proved. **Held** that the pursuer had failed to prove that the use of the name was calculated to mislead the public into confusing the two businesses, and interdict refused.

Williamson v Meikle, 1909 S.C. 1272; 26 R.P.C. 775; 46 S.L.R. 915; 1909, 2 S.L.T. 169.

(32)

Similarity of name.

A company which had for a number of years been carrying on the business of repairing, pressing, and cleaning gentlemen's clothes under the name of the "Resartus Company," sought to interdict a new company from carrying on the same class of business under the name of the "Sartor Resartus Company," and also asked for interim interdict. The Lord Ordinary granted interim interdict, which subsequently was made final of consent.

Resartus Co. v Sartor Resartus Co., (O.H.) 1908, 25 R.P.C. 808; 16 S.L.T. 210.

(33)

A company, formed in 1878 by the amalgamation of the Scottish National Insurance Co. with another company, carried on general insurance business, but not marine insurance, although by its articles it had power to do so, under the name of the Scottish Union and National Insurance Co. In

1907 a company was formed under the name of the Scottish National Insurance Co., which carried on marine insurance only, although by its articles it had power to undertake other insurances. In an application by the Scottish Union and National Insurance Co. for interdict to prevent the Scottish National Insurance Co from carrying on business under that name, **held** that as the businesses of general insurance and marine insurance were very different, the similarity of the names was not likely to deceive the public, and interdict refused.

The Scottish Union and National Insurance Co. v The Scottish National Insurance Co., 1909 S.C. 318; 26 R.P.C. 105; 46 S.L.R. 267; 16 S.L.T. 671.

(34)

Company name.

Circumstances in which a company carrying on business in London under the name of B & T (London) failed to obtain interdict against a firm carrying on a similar business in Glasgow and Liverpool under the name of B & T.

Baird & Tatlock (London), Limited v Baird & Tatlock, Limited, (O.H.) 1916, 34 R.P.C. 85; 1917, 1 S.L.T. 46.

(35)

Professional designation.

The members of three societies of accountants in Edinburgh, Glasgow, and Aberdeen, which were incorporated by royal charter in 1854, 1855, and 1867 respectively, adopted the designation "chartered accountant," and used the letters "C.A." after their names as an abbreviation of that designation. In 1891 a company called "the Corporation of Accountants, Limited," was registered in Scotland under the Companies Acts. By its articles of association, the members of this company were styled "corporate accountants," and they made public professional use of the letters "C.A." In an action for interdict brought by the three incorporated societies, and certain of their individual members against the Corporation of Accountants, and two of its members, it was proved that the letters C.A. were universally recognised in Scotland by professional persons and the public generally as the designation of the members of the three incorporated societies, and that prior to 1891 no other persons had used these letters in Scotland, with the exception of one or two members of an English society incorporated by royal charter. **Held** that the pursuers were entitled to have the individual defenders interdicted from using for professional purposes, or as a professional designation, the letters C.A., or any other letters or words calculated to lead the public to believe that they were members of one or other of the bodies of accountants in Scotland, which were incorporated by royal charter.

Society of Accountants in Edinburgh v Corporation of Accountants, 1893, 20 R. 750; 30 S.L.R. 677; 1 S.L.T. 41.

(36)

Held that the members of the Corporation of Accountants were not entitled to use the letters M.C.A. as a professional designation, in respect that the designation would be understood by the public to mean member of one or other of the societies of chartered accountants.

Corporation of Accountants v Society of Accountants in Edinburgh, (O.H.) 1903, 11 S.L.T. 424.

III. REMEDY AND DEFENCES.

(37)

Interim interdict.

In an action of interdict against a firm of auctioneers to prevent them selling certain lots of champagne under a certain name, interim interdict refused, in respect that the complainers had long known of the sale, and the seller was acting in good faith.

Ayala & Co. v Dowell, (O.H.) 1893, 1 S.L.T. 374.

(38)

In an action of suspension and interdict to have the respondent restrained from using the words "Bernard's, Edinburgh," in a brand of beer intended for export, interim interdict refused on the respondent undertaking to keep an account of the brands and amounts of beer exported.

Bernard v Bernard, (O.H.) 1893, 1 S.L.T. 29.

(39)

Similarity of name.

Resartus Co. v Sartor Resartus Co., (O.H.) 1908, 25 R.P.C. 808; 16 S.L.T. 210, No. 32, *supra*.

(40)

Interdict—Apprehension of injury.

In an application for interdict against the use of a trade mark, **held** that it was not necessary to prove actual injury sustained, but merely reasonable ground for the apprehension of injury.

Singer Manufacturing Co. v Kimball & Morton, 1873, 11 M. 267; 45 J. 201; 10 S.L.R. 173.

(41)

Undertaking to discontinue infringement.

In an action of interdict to prevent the infringement of a trade mark, interdict granted, notwithstanding that the respondent undertook to discontinue the infringement.

Smith & Wellstood v Carron Co., (O.H.) 1896, 13 R.P.C. 108; 3 S.L.T. 223.

(42)

Sale of goods as of particular person's manufacture—Fraud.

A wine and spirit merchant labelled and sold certain beer as "Bass," whereas it was in fact the beer of another firm of brewers.

Held that to entitle Bass to interdict it was not necessary to prove fraud.

Bass, Ratcliff & Gretton v Laidlaw, (O.H.) 1908, 26 R.P.C. 211; 16 S.L.T. 660.

(43)

Sale of goods as of particular person's manufacture—Proof of sale requisite for interdict.

In order to entitle a wholesale dealer to interdict against a retail dealer selling over his counter goods on the representation that they are of the pursuers' manufacture, when in point of fact they are not, it is not sufficient to prove that in a few instances, when goods of the pursuers' manufacture were asked for, other goods were supplied.

Thomson & Co. v Robertson, 1888, 15 R. 880; 25 S.L.R. 649.

(44)

Messrs. Bass, brewers, brought an action against the lessee of the refreshment rooms at a railway station for interdict against the defender, and all others acting under him, selling as ale manufactured by the pursuers ale not manufactured by them, averring that he had fraudulently made it a practice to sell other ale as the pursuers'. It was not alleged that the pursuers' trade labels had been used by the defender, and he stated on record and in his evidence that he did not keep the pursuers' ale, and had given his barmaids special instructions to tell customers so when they asked for Bass. The barmaids confirmed this evidence, though both he and they admitted that occasionally in the hurry of business persons asking for "Bass" might have been supplied through inadvertence without being told that what they were getting was not Bass. The pursuers adduced some witnesses, who stated that on asking for "Bass" at the defender's bars they had been supplied with ale which was not of the pursuers' manufacture. It further appeared that a scale of charges was exhibited in the refreshment rooms which contained, *inter alia*, the entry "Bass' Burton Ale," with prices annexed. The Court refused to grant interdict.

Bass, Ratcliff & Gretton v Laidlaw, 1886, 13 R. 898; 23 S.L.R. 624.

(45)

Form of interdict.

Observations on the nature of the remedy to which persons are entitled whose goods have been identified with a particular name.

Charles P. Kinnell & Co. v Ballantyne & Sons, 1910 S.C. 246; 27 R.P.C. 185; 47 S.L.R. 227; 1910, 1 S.L.T. 55.

(46)

Competency of interdict where statute imposes a penalty.

An action at the instance of the Institute of Patent Agents and of three patent agents registered under the Patents, Designs, and Trade Marks Acts, 1883 and 1885, against a person who was not so registered, but described himself as a "patent agent" and

practised as such, concluding for declarator that the defender was not entitled to describe himself as a patent agent so long as he was not registered, and for interdict against him so describing himself, dismissed as incompetent, on the ground that the Act of 1888, sec. 1, sub-sec. (4), in making the use of the designation "patent agent" by a person not registered a criminal offence, and subjecting the person so using it to a penalty, did not confer any civil right upon other persons to prevent him from using it.

Chartered Institute of Patent Agents v Lockwood, 1894, 21 R. (H.L.) 61; [1894] A.C. 347; 11 R.P.C. 374; 31 S.L.R. 942; 2 S.L.T. 106.

(47)

Damages—Measure of damages—Necessity for proving specific damage.

A firm of wholesale whisky merchants brought an action against a public-house keeper for interdict against the defender selling whisky as of the pursuers' manufacture or blending which was not of their manufacture or blending, and for £500 as damages on account of such sales. The defender admitted that the pursuers were entitled to interdict, but he maintained that he was liable in nominal damages only, in respect that the pursuers had not proved special damage. The Court held it to be proved that he had fraudulently sold whisky which was not the pursuers' under the pursuers' name in order to discourage the sale of their whisky. There was no evidence that, after the defender's tenancy of his public-house commenced, the total sale of the pursuers' whisky had diminished in the town in which the public-house was situated. Held that the fair inference was that the defender's fraudulent conduct had produced the result which it was intended to produce of substantially injuring the pursuers' trade, and that in the circumstances the damages fell to be assessed at £100.

Thomson & Co. v Dailly, 1897, 24 R. 1173; 34 S.L.R. 850; 4 S.L.T. 291.

(48)

Measure of damages—Expense of detecting fraud.

Question, whether in estimating the amount of damages caused to a wholesale manufacturer by fraudulently retailing articles as of his manufacture, which were not manufactured by him, the expenses incurred by him in detecting the fraud fell to be taken into account.

Thomson & Co. v Dailly, 1897, 24 R. 1173; 34 S.L.R. 850; 4 S.L.T. 291.

(49)

Prosecution—Private prosecutor—Statutory offence—Act 1887, sec. 2 (2).

A trader, who has registered his trade mark in terms of the statutes, has, with the consent of the procurator-fiscal, a title to prosecute a summary complaint setting forth that the accused has made use of the

trade mark in contravention of sec. 2, subsec. (2), of the above Act.

Facts which were held to justify a conviction on such a complaint.

Burns v Turner, 1897, 25 R. (J.) 38; 2 Adam, 450; 35 S.L.R. 265; 5 S.L.T. 226.

(50)

Defences—Disclaimer—Right of owner of trade mark to protect the matter disclaimed.

Held that the registration of a trade mark does not preclude the holder of it from preventing rival traders from misusing another name by which his goods are known, even although in applying for the trade mark he disclaimed the exclusive use of that other name.

Bayer v Baird, 1898, 25 R. 1142; 15 R.P.C. 615; 35 S.L.R. 913; 6 S.L.T. 98.

(51)

———Action for infringement — Necessity of craving for rectification of register before pleading defences — Challenging exclusive right.

In an action for infringement of a trade mark that has been on the register for five years, if the defender desires to plead as his defence, either that the mark should not be on the register as being common property, or that he himself is entitled also to be put on the register as the owner of the same mark, he must take steps to have the register rectified by the expunging of the mark, or by the insertion of his own name, as the case may be.

Boord & Son v Thom & Cameron, 1907 S.C. 1326; 24 R.P.C. 697; 44 S.L.R. 939; 15 S.L.T. 341.

(52)

———Defence of common property—Proof of common property.

Where, in an action for infringement of a registered trade mark, the defence of common property is put forward, the onus on the defender of proving common property is increased by the length of time the mark has been on the register; and he cannot discharge that onus by proof of a few isolated sales under the mark by persons other than the pursuer, but can only discharge it by proof that such a quantity of goods had been sold by such persons under the mark that the mark had come, in a certain market, to be associated with their goods.

Boord & Son v Thom & Cameron, 1907 S.C. 1326; 24 R.P.C. 697; 44 S.L.R. 939; 15 S.L.T. 341.

(53)

———Infringement in ignorance of registration—Act 1883, sec. 58 (a).

In an action by the proprietor of a design registered under the Patents, Designs, and Trade Marks Acts, 1883 to 1902, against an infringer, held that it was no defence to a claim for the statutory penalty under sec. 58 (a) of the Patents, Designs, and Trade

Marks Act, 1883, that the defender was unaware that the design was registered.

Boustead v Dempster, Moore & Co., (O.H.) 1907, 15 S.L.T. 526.

(54)

———Ex turpi causa non oritur actio—False statements made in advertising.

The Bile Bean Manufacturing Co., by means of extensive advertising, established a large business for the sale of certain pills, of an oviform shape, called "Bile Beans for Biliousness." Many of the advertisements contained a story to the effect that bile beans were compounded of ingredients which included a vegetable substance, of wonderful curative properties, which was found in Australia and had long been known to the natives of that continent, but had only recently been discovered after thorough investigation by Charles Forde, an eminent scientist. The labels on the boxes described the bile beans as "Charles Forde's," but did not contain any specific reference to Forde's discovery of the Australian vegetable substance. The Bile Bean Manufacturing Co. raised an action against Davidson, another trader, to have the respondent interdicted from selling as "Bile Beans" pills which were not of the complainers' manufacture. It was proved that there was no such person as Charles Forde, and that the complainers' bile beans did not contain any ingredient which was peculiar to Australia. Held that the repute of "Bile Beans" had been established by fraudulent misrepresentations on the part of the complainers, and therefore that they were not entitled to interdict.

Bile Bean Manufacturing Co. v Davidson, 1906, 8 F. 1181; 23 R.P.C. 725; 43 S.L.R. 827; 14 S.L.T. 294.

(55)

Suspension on ground that articles not properly marked by complainer.

In an action of interdict for infringement of two registered designs referring to the shape and the coloured ornamentation of a teapot, reasons for suspension on the ground that the articles were not marked with the statutory registration mark, and that the complainer had not shown that he took all proper steps to ensure the marking of the articles, repelled.

Johnston v W. & J. A. Bailey, (O.H.) 1893, 1 S.L.T. 322.

(56)

Registration in good faith—Prior use—Damages—Dammum absque injuria—Statutory ground of damages—Act 1883, sec. 90 (1) and (2).

A firm of flour importers in good faith registered as a trade mark under the Trade Marks Registration Acts the word "Diamonddust." The agent for American flour millers, who had been prosecuted unsuccessfully for infringement, brought an action for declarator that the defenders were bound to have the trade mark removed from the register as having been registered without sufficient cause in respect of prior use, and

for damages caused by the actings of the defenders in registering the trade mark. **Held** (1) that the defenders in registering the trade mark had merely exercised a statutory right, that the prosecution of the pursuer, being one of the rights secured by registration, was in the same position, and accordingly at common law any loss sustained by the pursuer was *damnum absque injuria*; and (2) that the Trade Marks Act, 1883, sec. 90 (1) and (2), did not create a statutory ground of damages or provide for the recovery of any other description of damages than are due at common law.

Reid v G. M. Thomson & Co., (O.H.) 1905, 22 R.P.C. 376; 13 S.L.T. 32.

TRADE, OFFENSIVE. See PUBLIC HEALTH.

TRADE UNION.

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STATUTES.

- Act 1871—Trade Union Act, 1871—34 & 35 Vict. c. 31.
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- Act 1906—Trade Disputes Act, 1906—6 Edw. VII. c. 47.
- Act 1913—Trade Union Act, 1913—2 & 3 Geo. V. c. 30.

I. WHAT ASSOCIATIONS ARE TRADE UNIONS.

(1)
Restraint of trade—Company—Registration
 —Act 1871, sec. 5—Act 1876, sec. 16.
 The Edinburgh and District Aerated Water Manufacturers' Defence Association was registered in 1898 under the Companies Acts, 1862 to 1890, for the object, as set forth in its memorandum of association, of protecting the bottles and boxes of members from being dealt with by persons not having lawful authority. By its articles and bye-laws prohibitions were imposed on members with regard to the purchase and exchange of bottles, and the employment of travellers formerly in the employment of

(57)
Process—Petition—Rectification of register
 —Act 1883, secs. 90 and 111.
 A petition to the Scottish Courts under sec. 90 of the Patents, Designs, and Trade Marks Act, 1883, for rectification of the register is incompetent, the correct procedure being by summons.
 Dewar v Dewar & Sons, (O.H.) 1898, 6 S.L.T. 90.

IV. OFFENCES UNDER THE MERCHANDISE MARKS ACTS.

[See JUSTICIARY V. 37.]

other members; and provisions were made for fines for breach of the rules or bye-laws. The "Edinburgh and District Aerated Water Manufacturers' Defence Association, Limited," described as "incorporated under the Companies Acts, 1862 to 1890," brought an action against one of the members for the recovery of the amount of a fine imposed on the defender for a breach of one of the rules. **Held** that the association was a trade union within the meaning of the Trade Union Act Amendment Act, 1876, that consequently its registration under the Companies Acts was void, and that as an unincorporated company it had set forth no title to sue.
 Edinburgh and District Aerated Water Manufacturers' Defence Association v Jenkinson & Co., 1903, 5 F. 1159; 40 S.L.R. 825; 11 S.L.T. 240.

(2)
 ————**Company—Objects—Act 1871, sec. 5—Act 1876, sec. 16.**

The Aberdeen Master Masons' Incorporation was incorporated under the Companies Acts, and the memorandum of association provided that the objects of the incorporation, *inter alia*, were "(1) to take over the whole or any of the assets and liabilities of the incorporated association known as 'The

Aberdeen Master Masons' Association'''; (13) to assist any institution with objects similar to those of the trade, "and not being a trade union"; (22) to do all lawful things conducive to the attainment of the above objects, "provided that the incorporation shall not impose on its members or support with its funds any regulation which, if an object of the incorporation, would make it a trade union." An action having been raised by the incorporation against a member for the payment of dues, the defender averred that the association, whose assets and liabilities were taken over by the pursuers, was a trade union, and pleaded that the pursuers, being a trade union, were not validly registered as a company, and had no title to sue. **Held** that as any act which would make the incorporation a trade union would be null and void under the above quoted clauses of the memorandum of association, the incorporation could not be a trade union, and plea of no title to sue repelled.

Aberdeen Master Masons' Incorporation v Smith, 1908 S.C. 669; 45 S.L.R. 484; 15 S.L.T. 953.

(3)

—Company — Registration — Validity — Company's objects restricting the trading of its members—Title to sue—Act 1871, sec. 5—Act 1913, secs. 1 (2) and 2 (1).

The Performing Right Society was registered in 1914 under the Companies Acts for the purpose, as set forth in its memorandum of association, of exercising and enforcing on behalf of its members, being composers, authors, or publishers, their rights and remedies under the Copyright Act, 1911, or otherwise, in respect of the public performances of their works. By its articles and rules the members who were publishers were obliged to assign, and the others might assign, to the society their interest, present and future, in the right to perform any work published or produced by them. The society then had the sole right to authorise or forbid the public performance of all or any of the works, to grant licences, and to collect fees in respect of such public performances. The balance of the moneys so obtained, after payment of expenses, was to be distributed among those entitled thereto in such proportions as the committee should determine. In an action at the instance of the society for infringement of certain performing rights, the defenders pleaded no title to sue, in respect that, as the pursuers' objects were in restraint of trade, they were a trade union, and, therefore, could not competently be registered as a company under the Companies Acts. **Held** that the society was not a trade union, as its principal objects were to enforce the rights of its members, not to impose restrictive conditions on the conduct of their businesses; and plea of "no title" repelled.

Performing Right Society v Magistrates of Edinburgh, 1922 S.C. 165; 59 S.L.R. 194; 1922 S.L.T. 98.

v 29

II. QUALIFICATION FOR MEMBERSHIP.

(4)

Master plumbers' association — "Master plumber."

The rules of the Aberdeen Master Plumbers' Association provided—Rule 1. "The association shall be composed of master plumbers or firms of master plumbers in Aberdeen and suburbs. . . ." Rule 3. "Upon a member . . . dissolving partnership, or ceasing to carry on business as a master plumber or firm of master plumbers in Aberdeen, such member shall thereupon cease to be a member of the Association. . . ." A member of the association, who had hitherto carried on business on his own account as a plumber, sold his business to a copartnership of which he was a partner. **Held**, on a construction of the rules, that he had lost his qualification for membership of the association. **Observed** that, in the rules in question, "master plumber" did not refer to a grade of craftsmanship, but meant a person carrying on a plumbing business, and not in the service of a master.

Johnston v Aberdeen Master Plumbers' Association, 1921 S.C. 62; 53 S.L.R. 47; 1920, 2 S.L.T. 390.

III. EXCLUSION OF ACTIONS TO ENFORCE RULES.

(5)

Enforcement of agreement as to conditions of employment—Enforcement of agreement to provide benefits—Action for declarator that expulsion of member illegal—Act 1871, sec. 4 (1) and (3) (a).

Employers posted a lock-out notice suspending all employees who were members of a certain trade union, with the exception of foremen. The union having intimated to its members that the notice must apply to all without exception, a member, who was a foreman, thereupon gave notice to his employers that he would leave their employment in a fortnight, in conformity with a rule of the union that such notice must be given by members before leaving situations. During the fortnight he remained at work. Thereafter he was expelled from the union, on the ground that he had remained at work during the lock-out; but he was ultimately reinstated, subject to a fine of £1 and the loss of all benefit to which he was entitled in respect of his former membership. In an action at his instance for declarator that the resolution expelling him was ultra vires of the union and null and void, and for interdict against the union enforcing the resolution, **held** that the action could not be entertained, it being excluded by sec. 4 (1) of the Trade Union Act, 1871, in respect that it was a proceeding instituted with the object of directly enforcing an agreement between members of a trade union concerning the conditions on which they should be employed. **Opinion** (per Lord Mackenzie) that the

action was also excluded by sec. 4 (3) (a), as being a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members. **Opinion reserved** (per Lord Skerrington).

Smith v Scottish Typographical Association, 1919 S.C. 43; 56 S.L.R. 46; 1918, 2 S.L.T. 250.

(6)

Action to enforce agreement for payment of penalty—Action to interdict enforcement of fine—Ground of action that member outside union at date of alleged breach—Act 1871, sec. 4 (2).

A trade union imposed upon a firm, which was a member of the union, a fine for a breach of the rules of the union. Thereafter the firm brought an action against the union for declarator that at the date of the alleged breach it was not a member of the union, and for interdict against the enforcement of the fine. Admittedly the firm was a member at the date of the imposition of the fine. **Held** that the action, in spite of its form, was in substance and effect a proceeding instituted with the object of enforcing an agreement for the payment of a penalty to a trade union within the meaning of sec. 4 of the Trade Union Act, 1871, and was accordingly excluded by that section.

G. & J. Rae v Plate Glass Merchants' Association, 1919 S.C. 426; 56 S.L.R. 315; 1919, 1 S.L.T. 228.

(7)

—**Act 1871, sec. 4—Act 1876, sec. 16.**

An association of manufacturers brought an action against one of the members, averring that they had prescribed the price at which members might sell their goods (as they had power to do under their constitution), and that the defenders had sold their goods at a lower price, and concluding for a sum fixed by the constitution of the association as liquidated damages. **Held** that the association was a trade union, and, accordingly, that the action was incompetent.

Glasgow and District Potted Meat Manufacturers' Society v Geddes, (O.H.) 1902, 10 S.L.T. 481.

(8)

Action by member for reduction of resolution imposing a fine—Fine unenforceable in Court of law—Failure to aver patrimonial loss.

The executive council of a trade union published a recommendation that May Day, 1919, should be observed by the members as a general holiday. The members in certain Glasgow workshops took no action; those in the other shops decided to vote on the recommendation, and in most of these cases the majority voted against the holiday. In one shop, where the majority had voted in favour of the holiday, certain of the minority remained at work. Having been reported for acting against the shop vote they were

fined by the district committee of the trade union, whose decision was confirmed, on appeal, by the executive council. They thereupon brought an action against the trade union, concluding, *inter alia* (1) for declarator that there was no authority in the rules, and no agreement between the pursuers and the defenders, under which the decision of a majority in a shop as to working on any day was binding on the minority; and (2) for declarator that the resolution imposing the fine was ultra vires, and for reduction of the resolution and interdict. The pursuers' averments relative to the first conclusion were met by the defenders by a general reference to the rules. With regard to the fine resolution, the pursuers did not aver that the fine had been enforced or was enforceable, or that they had suffered any patrimonial loss. **Held** that the action was irrelevant in respect (1) that the declarator sought for in the first conclusion was with regard to a fact which was not disputed, and on which no substantive question depended; (2) that, the fine being admittedly unenforceable, the pursuers had not averred the violation of any civil right involving patrimonial interest which entitled them to redress from a Court of law.

Drennan v Associated Ironmoulders of Scotland, 1921 S.C. 151; 58 S.L.R. 146; 1921, 1 S.L.T. 18.

(9)

Action to enforce agreement to provide benefits—Burial allowance—"Benefits to members"—Act 1871, sec. 4 (3) (a).

In an action against a trade union by the widow of a member of the union for payment of the burial allowance provided for by the rules of the union, **held** that this allowance was a "benefit to members" within the meaning of sec. 4 of the Trade Union Act, 1871, and that, accordingly, the jurisdiction of the Court was excluded; and action dismissed.

M'Laren v National Union of Dock Labourers, 1918 S.C. 834; 55 S.L.R. 763; 1918, 2 S.L.T. 175.

(10)

—**Right of membership—Act 1871, sec. 4 (3) (a).**

An action was brought against a trade union by one of its members, concluding (1) for reduction of certain resolutions imposing a fine upon him, and depriving him of membership, and (2) for declarator that his expulsion was illegal, and that he was entitled to damages for loss of benefits attached to membership. **Held** (1) that the society being merely a voluntary association, no action lay at the instance of a member to enforce his right to membership unless he could show patrimonial loss, and that the only loss alleged was deprivation of right under a contract not enforceable by law; and (2) that an action against a trade union directed to enforcing or recovering damages for

breach of an agreement to provide benefits was incompetent.

Aitken v Associated Carpenters and Joiners of Scotland, 1885, 12 R. 1206; 22 S.L.R. 796.

(11)

—Act 1871, sec. 4 (3) (a).

In an action against a trade union at the instance of one of its members to recover benefit money alleged to be due to him in terms of its rules, **held** that prior to the Trade Union Act, 1871, a trade union was an unlawful combination, whose contracts to confer benefits on members could not be enforced in Courts of law, and that as the statute in removing the illegality of such associations expressly provided that nothing in it should have the effect of making agreements to provide benefits to members enforceable in Courts of law, the Court had no jurisdiction to entertain the action.

Shanks v United Operative Masons' Association, 1874, 1 R. 823; 11 S.L.R. 356.

M'Kernan v United Operative Masons' Association, 1874, 1 R. 453; 11 S.L.R. 219.

(12)

—Proposed alterations in rules—Misapplication of funds—Act 1871, sec. 4 (3) (a).

Held that an action at the instance of a member of an unregistered trade union for declarator that certain proposed alterations in the rules were ultra vires, and for interdict against misapplication of the funds of the union, was not a proceeding instituted with the object of directly enforcing an "agreement for the application of the funds of a trade union to provide benefits to members," in the sense of the Trade Union Act, 1871, sec. 4 (3) (a), and that, accordingly, the Court had jurisdiction to entertain the action.

Wilson v Scottish Typographical Association, 1912 S.C. 534; 49 S.L.R. 397; 1912, 1 S.L.T. 203.

(13)

—Obligation to refund benefits paid—Act 1871, sec. 4 (3) (a).

The rules of a trade union provided that a member permanently disabled should receive the sum of £100, but that if he should resume work he must refund the £100, and that at the time of receiving the benefit he must sign an agreement to refund it should he resume work. A member of the union received a payment of £100 in respect of permanent disablement, and signed a memorandum of agreement undertaking to refund that sum if he resumed work. The union, averring that the injured man had resumed work, brought an action for recovery of the £100 and founded on the memorandum of agreement. **Held** that the action was competent in respect that the agreement sued on was not one of the agreements an action on which was excluded by sec. 4 of the Act, and, in particular, was not an agreement for the application of the

funds of the union to provide benefits to members.

Wilkie v King, 1911 S.C. 1310; 48 S.L.R. 1057; 1911, 2 S.L.T. 206.

(14)

—Benefit to dependant of member—Act 1871, sec. 4 (3) (a).

The rules of a trade union provided that if a member became insane his wife, family, or parent, if dependent upon him, should be eligible to receive sick benefit for one year. In an action at the instance of the wife of an insane member against the union for recovery of sick benefit, **held** that, as the agreement was not one for the provision of benefits to a member, but to the dependant of a member, the jurisdiction of the Court was not excluded by sec. 4 (3) (a) of the Trade Union Act, 1871.

Love v Amalgamated Society of Lithographic Printers of Great Britain and Ireland, 1912 S.C. 1078; 49 S.L.R. 788; 1912, 2 S.L.T. 50.

(15)

—Misapplication of funds—Act 1871, sec. 4 (3).

Held that an action for restoration to a trade union of funds alleged to have been illegally paid away was not an action to enforce an agreement to pay benefits, and was competent.

M'Dowall v M'Ghee, (O.H.) 1913, 2 S.L.T. 238.

(16)

—Misapplication of funds—Act 1871, sec. 4.

The general trustees of a trade union presented an application for interdict against the trustees of a branch applying funds in their hands for purposes other than those specified in the rules. **Held** that the application was not excluded by the provisions of sec. 4 of the Trade Union Act, 1871, and interdict granted until the rights of parties should be ascertained.

Amalgamated Society of Railway Servants for Scotland v The Motherwell Branch of the Society, 1880, 7 R. 867; 17 S.L.R. 607.

(17)

—Slander—Action for interdict against trade union—Action for interdict and damages against trustees of union—Act 1906, sec. 4—Act 1871, sec. 9.

Held that an action on the ground of slander, concluding against the trustees of a trade union for damages and against the union and all its officials for interdict against the publication of defamatory statements, was entirely excluded by the Trade Disputes Act, 1906, sec. 4.

Shinwell v National Sailors' Union, (O.H.) 1913, 2 S.L.T. 83.

(18)

—Act 1906—Action raised before Act came into operation.

Held that, notwithstanding sec. 4 (1) of the Trade Disputes Act, a firm was entitled to proceed with an action of damages against a trade union for procuring a breach of con-

tract on the part of the firm's employees, the action having been raised prior to the date on which the Act came into operation.

Russell & Co. v United Society of Boiler-makers, (O.H.) 1907, 15 S.L.T. 118.

IV. POWERS AND LIABILITIES OF TRADE UNIONS.

(19)

Objects—Legality of objects—Promotion of parliamentary representation—Ultra vires—Act 1871—Act 1876, sec. 16.

The decision of the House of Lords in the case of Amalgamated Society of Railway Servants v Osborne, [1910] A.C. 87, to the effect that a rule which purports to confer on a trade union power to levy contributions from members for the purpose of promoting parliamentary representation is ultra vires and illegal, applies equally whether the trade union is or is not registered under the Trade Union Acts of 1871 and 1876.

Wilson v Scottish Typographical Association, 1912 S.C. 534; 49 S.L.R. 397; 1912, 1 S.L.T. 205.

(20)

—Purchase of newspaper shares.

A trade union, by a majority of its members, agreed to support a newspaper by the purchase of shares therein. To obtain the necessary funds the union agreed to impose a levy of 1s. on each member. **Held** that the transaction was ultra vires, as it could not be classed as an investment of the union funds, nor did it fall within the rules which provided that all questions affecting the general interests of the society not dealt with in the rules should be submitted to the votes of the society.

M'Ardle v United Society of Boiler-makers, (O.H.) 1915, 1 S.L.T. 437.

(21)

Liability of trade union for obligations undertaken by one of its branches—Interpretation of rules.

One of the local branches of a trade union guaranteed the costs of its law agent in unsuccessful litigations. **Held** that the funds of the union were liable, it being established on the rules and evidence that the branches were entitled to incur financial responsibility, for which the funds of the union were liable, in matters connected with the business of the branches, in so far as not contrary to the rules; and that the guarantee in question was such a matter, and was not contrary to the rules.

Mackendrick v National Union of Dock Labourers, 1911 S.C. 83; 48 S.L.R. 17; 1910, 2 S.L.T. 215.

(22)

Unregistered trade union—Power of members to alter rules.

Wilson v Scottish Typographical Association, 1912 S.C. 534; 49 S.L.R. 397; 1912, 1 S.L.T. 205. ASSOCIATION (VOLUNTARY), No. 19.

V. TITLE TO SUE.

(23)

Unregistered trade union—Charge of embezzlement brought by trade union against treasurer—Instance—Relevancy of complaint.

A complaint charged the treasurer of "a society called the Scottish Bleachfield Workers' Union" with embezzling the funds of the society. Objections were stated to the relevancy of the complaint, on the ground that it did not set forth (1) the names of the individual members of the society, and (2) the duty of the accused in regard to the funds of the society which came into his hands. The objections were repelled.

Agnew v Addison, 1892, 20 R. (J.) 19; 3 White, 368.

(24)

Trustees of union—Act 1871, sec. 9.

The rules of a trade union provided that "the general secretary for the time being shall be the person appointed to sue and be sued on behalf of the union." **Held** that, under sec. 9 of the Trade Union Act, 1871, the trustees of the union in question had, notwithstanding the above rule, a title to sue.

Gough v Macdonald, 1900, 2 F. 899; 37 S.L.R. 721.

(25)

Member expelled after action raised—Proof.

In an action against a trade union, the defenders pled that the pursuer had no title to sue, not being a member, as he had been expelled since the action was raised. The pursuer replied that the expulsion had been carried through in mala fide to stifle his proof. **Held** that he was entitled to a proof.

M'Dowall v M'Ghee, (O.H.) 1913, 2 S.L.T. 238.

VI. JURISDICTION.

(26)

Registered office of trade union in England—Rules registered in Scotland.

"The National Union of Dock Labourers in Great Britain and Ireland," a trade union which was registered in England and had its registered office there, but which had recorded a copy of its rules with the registrar for Scotland in terms of sec. 6 of the Trade Union Act Amendment Act, 1876, **held** to be subject to the jurisdiction of the Court of Session.

Mackendrick v National Union of Dock Labourers, 1911 S.C. 83; 48 S.L.R. 17; 1910, 2 S.L.T. 215.

(27)

Union carrying on business in Scotland—Trustees resident out of Scotland.

In an action raised against a trade union by one of its members to have the general trustees ordained to restore to the trust funds of the union a large amount of money alleged to have been illegally paid away, the trustees of the union were not resident in Scotland, but a considerable part of the union's busi-

ness was carried on in Scotland, where its rules were recorded. **Held** that the trustees, in respect of their official position, were subject as individuals to the jurisdiction of the Court in respect of the breach of trust alleged against them.

M'Dowall v M'Ghee, (O.H.) 1913, 2 S.L.T. 238.

VII. TRADE DISPUTES.

(28)
“Act done in contemplation or furtherance of a trade dispute”—Act 1906, sec. 3.

A ship belonging to a Belfast firm, after its arrival at Ayr harbour for the purpose of loading a cargo, was detained there owing to the refusal of the harbour employees to work the ship. These employees were members of a Scottish trade union, and their refusal to do the work was due to the

existence of a strike of the shipowners' workmen at Belfast. The shipowners offered to supply their own labour to load the ship, but the harbour trustees refused the offer, and would not permit outside labour to work their cranes. The local secretary of the Scottish trade union had threatened a general strike if outside labour were imported. In an action of damages for the detention of the ship, brought by the shipowners against the harbour trustees, the defenders maintained, *inter alia*, that, as they were acting in furtherance or contemplation of a trade dispute in Belfast or otherwise, with their own employees, they were relieved of liability under sec. 3 of the Trade Disputes Act, 1906. **Held** that, in the circumstances of the case, sec. 3 did not apply.

John Milligan & Co. v Ayr Harbour Trustees, 1915 S.C. 937; 52 S.L.R. 748; 1915, 2 S.L.T. 69.

TRADE WITHIN BURGH. See BURGH.

TRADING DOMICILE. See INTERNATIONAL LAW; JURISDICTION; SHERIFF.

TRADING WITH THE ENEMY. See WAR.

TRAMWAY.

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STATUTE.

Act 1870—Tramways Act, 1870—33 & 34 Vict. c. 78.

I. MANAGEMENT.

(1)

Obligation to maintain line—Tramways taken over by road authority—Act 1870, sec. 28—Dundee Street Tramways, Turnpike Roads, and Police Act, 1878 (41 & 42 Vict. c. xciv.), sec. 22.

Held that, in the absence of specific allegations of disrepair, sec. 28 of the Tramways

Act, 1870, which requires tramway promoters to maintain the line to the satisfaction of the road authority, could not found a complaint against police commissioners who were themselves the road authority and who had acquired the tramways.

Ritchie v Dundee Police Commissioners, 1886, 13 R. (J.) 63; 1 White, 139; 23 S.L.R. 663.

(2)

Nuisance—Street—Snow and salt—Interdict—Actio popularis.

A tramway company, which had a statutory right to use certain streets in a town for their traffic, were in the practice, when a snowstorm occurred, of removing the snow

from their tramway lines to the sides of the street by the use of a snow plough, and thereafter of scattering salt upon the lines. In a suspension and interdict brought by a member of the public to have the tramway company interdicted from continuing this practice, the tramway company pleaded that the operations complained of were within their statutory rights. It was proved that the operations of the tramway company created a nuisance to the complainer and to the public using the streets for horse traffic. **Held** that the statutory powers given to the tramway company to use the streets did not authorise them to create a nuisance, and that the complainer was entitled to an interdict against the company removing snow from the tramway lines in certain streets, and from scattering salt in the manner hitherto practised by them to the nuisance of the complainer and of the public using the streets for the purpose of traffic with horses.

Ogston v Aberdeen Tramways Co., 1896, 24 R. (H.L.) 8; [1897] A.C. 111; 34 S.L.R. 169; 4 S.L.T. 190.

(3)

Rule of road.

Observations on the rule of the road and the proper side on which to pass tramway cars.

Ramsay v Thomson & Sons, 1881, 9 R. 140; 19 S.L.R. 125.

(4)

Observed (per Lord President Inglis) that the rule of the road requires that a tramway car shall be passed by a following vehicle on the left-hand side.

Jardine v Stonefield Laundry Co., 1887, 14 R. 839; 24 S.L.R. 599.

(5)

Conditions of public traffic.

In a case in which a tramway car had run into a cab which was standing in a narrow street in order to take in a passenger with one of its wheels resting on the tramway rail, the tramway company was found liable in damages. **Observed** (per Lord Justice-Clerk Moncreiff) —“It seems clear to me that the driver of the car is bound, in the first place, to observe the rules which are laid down by the company, but besides that he is also bound to act on the rules which regulate the ordinary traffic of the streets. It is, of course, true that the tramway company have a monopoly, of a certain sort, in their line of rails, but that monopoly is subject to this important qualification, that these rails are laid down in the public thoroughfare, and the company is therefore bound to use them in a way consistent with the conditions of public traffic.”

M'Dermid v Edinburgh Street Tramways Co., 1884, 12 R. 15; 22 S.L.R. 13.

(6)

Fares—Maximum fares—Edinburgh Street Tramways Act, 1874 (37 & 38 Vict. c. lxxviii.).

A tramway company were bound by an

agreement, embodied in their Act of incorporation, not to charge passengers more than 1d. per mile or fraction of a mile (the minimum charge for each passenger being 2d). They afterwards obtained an Act which allowed them to charge “a sum not exceeding 2d. per mile for first-class passengers on omnibus routes and any tramway routes worked in connection therewith.” **Held** that the second Act did not alter the rates chargeable for tramway passengers who did not use the omnibus routes.

Edinburgh Street Tramways Co. v Torbain, 1877, 4 R. (H.L.) 87; 3 App.Cas. 58; 14 S.L.R. 729.

(7)

Refusal to pay fare—Glasgow Corporation Tramways Acts, 1870 to 1893—Breach of bye-laws of Glasgow Corporation—Complaint—Relevancy.

Bye-law No. 3, made by the Corporation of Glasgow in terms of their Tramways Acts, provides that every passenger shall pay his legal fare to the tramway conductor, but imposes no penalty for failure to do so. Bye-law No. 26 provides that any person committing a breach of the bye-laws shall be liable to a specified fine. **Held** that a complaint charging the accused with a breach of bye-law No. 3 was relevant, on the ground that bye-law No. 3 must be read along with bye-law No. 26, and that, so read, an offence was constituted.

M'Intyre v M'Pherson, 1913 S.C. (J.) 21; 7 Adam, 37; 50 S.L.R. 190; 1912, 2 S.L.T. 478.

(8)

Checking ticket—Forceable detention of passenger—Apprehension by police on report of conductor—Reparation.

A tramway company issued a bye-law to the effect that passengers on a journey, part of which was performed in one of their omnibuses, the latter part in a tramway car, should have the through ticket checked at the place where the change was made. A person who was aware of the bye-law took a ticket for the through journey, but did not have it checked. Thereafter he tendered his unchecked ticket to the conductor, who refused to take it, and asked him for the fare applicable to the tramway part of the journey. This the passenger refused to give, and shortly afterwards attempted to leave the car. The conductor, by force, prevented him from doing so, and called a policeman, who took the passenger to the police office (he having refused to give his name and address), where he eventually gave his name and address, and was discharged. In an action of damages at the instance of the passenger against the company for wrongful apprehension, **held** (1) that the bye-law of the company was a reasonable one, and that the passenger, who was admittedly aware of it, was bound to conform to it; (2) that not having conformed to it, and refusing to pay the fare, he was acting illegally, and that in these circumstances the conductor had not acted wrongfully in giving

him into custody, that being the only remedy open to the company.

Apthorpe v Edinburgh Street Tramways Co., 1882, 10 R. 344; 20 S.L.R. 256.

(9)

—————**Proof of fraud — Tramways Act, 1870, sec. 51.**

Held that a person cannot be convicted of the statutory offence of travelling without paying the requisite fare unless it appears that he acted with fraudulent intention.

Nimmo v Lanarkshire Tramways Co., 1912 S.C. (J.) 23; 6 Adam, 571; 49 S.L.R. 549; 1912, 1 S.L.T. 305.

(10)

—————**Statutory cars for workmen at reduced fares — Right to charge other passengers ordinary fares — Hamilton, Motherwell, and Wishaw Tramways Act, 1900 (63 & 64 Vict. c. cxxi.), sec. 75.**

A tramway company was bound by its private Act to run cars for workmen at reduced fares specified in the Act. **Opinions** that the Act did not warrant the company in discriminating in the matter of fares between workmen and other passengers who were allowed to travel in cars for workmen.

Nimmo v Lanarkshire Tramways Co., 1912 S.C. (J.) 23; 6 Adam, 571; 49 S.L.R. 549; 1912, 1 S.L.T. 305.

(11)

—————**Overcrowding — "Stage carriage" — Glasgow Police Act, 1866 (29 & 30 Vict. c. cclxxiii.), sec. 227.**

Held that a tramway was a stage carriage in the sense of the Glasgow Police Act, 1866, and that the driver of a tramway car was rightly convicted of a breach of bye-laws against overcrowding passed in accordance with the provisions of sec. 227 of that Act.

Black v Neilson, 1898, 25 R. (J.) 98; 2 Adam, 424; 35 S.L.R. 258; 5 S.L.T. 226.

II. LIABILITIES OF TRAMWAY COMPANIES.

[See also NEGLIGENCE II. 5 (4) and III. 4 (5).]

(12)

—————**Master and servant — Liability for defective plant — Employers' Liability Act, 1880, secs. 1 and 2.**

In an action brought under the Employers' Liability Act, 1880, by a trace-boy, employed by a tramway company, against his employers, for damages on account of injuries sustained by him through the falling of a horse belonging to the defenders on which he was riding, **held** that the defenders were liable in damages, the Court being of **opinion** (1) that the horse was part of their plant in the sense of the Act, and was defective; and (2) that, in the circumstances as proved, servants of the defenders superior to the trace-boy must be held to have been aware of the horse's unfitness.

Haston v Edinburgh Street Tramways Co., 1887, 14 R. 621; 24 S.L.R. 435.

(13)

—————**Conductor — "Workman" — Employers and Workmen Act, 1875, sec. 3.**

Opinions that a tramway conductor is a "workman" within the meaning of the Employers and Workmen Act, 1875.

Wilson v Glasgow Tramways and Omnibus Co., 1878, 5 R. 981; 15 S.L.R. 656.

(14)

—————**Assessment — Poor rates.**

Tramway companies in a town are assessable for poor rates as owners and occupiers.

Craig v Edinburgh Street Tramways Co., 1874, 1 R. 947; 11 S.L.R. 541.

(15)

—————**Lease — Relief — Public burdens — Valuation of Lands (Scotland) Act, 1854, sec. 6.**

By a contract bearing to be a "lease" the corporation of Glasgow "let" to a tramway company the sole right to use carriages with flange wheels on the whole tramways authorised to be formed by the Glasgow Street Tramways Act, 1870, for the space of twenty-three years, on condition (1) that the company should pay interest on the sum expended by the corporation in making the tramways and certain other annual payments during the lease; and (2) that the company should pay to the corporation "the expense of borrowing, management, &c. [sic], and this provision shall be so construed as to keep the corporation free from all expenses whatever in connection with the said tramways." As the lease extended beyond twenty-one years the company were entered in the valuation roll as owners of the tramways at their annual value, and assessed accordingly. **Held** that the obligation to relieve the corporation "of all expenses whatever in connection with the tramway" imported an obligation to relieve the corporation of landlord's taxes.

Glasgow Corporation v Glasgow Tramways and Omnibus Co., 1898, 25 R. (H.L.) 77; [1898] A.C. 631; 35 S.L.R. 967; 6 S.L.T. 129.

(16)

—————**Breach of obligation imposed by private Act — Title of private individuals to sue — Jurisdiction of Court — Reference clause — Edinburgh Tramways Act, 1871 (34 & 35 Vict. c. lxxxix.), sec. 8 — General Tramways Act, 1870, sec. 33.**

By sec. 8 of the Edinburgh Tramways Act, 1871, it is enacted that where in any road, in which a double line of rail is laid there shall be less width between the footpath and the nearest rail than 9 feet 6 inches the company shall construct a passing place. **Held** (1) that two private individuals were entitled to complain of a breach of this obligation, and that the local authorities referred to in the Act were not the only parties entitled to do so; and (2) that the jurisdiction of

the Court of Session was not excluded by the statutory clauses of reference.

Adamson v Edinburgh Street Tramways Co., 1872, 10 M. 533; 44 J. 279; 9 S.L.R. 369.

(17)

Jurisdiction—Exclusion of jurisdiction of Courts by statutory clauses of reference—Claim of damages—General Tramways Act, 1870, sec. 33.

Sec. 33 of the Tramways Act, 1870, refers to arbitration differences arising "with respect to the amount of any compensation to be made by or to the promoters." Held that the section did not apply to a claim of damages for a wrong done outwith the powers conferred by the statute.

Lanarkshire Tramways Co. v Magistrates of Motherwell, (O.H.) 1908, 16 S.L.T. 63.

III. CONSTRUCTION OF UNDERTAKING.

[See COMPULSORY POWERS VIII.]

IV. TRANSFER OF EXISTING UNDERTAKING.

(18)

Sale to local authority — Price — Rental value—Tramways Act, 1870, sec. 43.

Sec. 43 of the Tramways Act, 1870, provides that where the promoters of a tramway in any district are not the local authority, the local authority may, within six months after the expiration of a period of

twenty-one years from the time when such promoters were empowered to construct such tramway, require the promoters to sell to them "their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district," such value to be determined by a referee appointed by the Board of Trade. In an action for reduction of an award by a referee under this provision, held that, having regard to the fact that the tramway company could not assign the right to use the tramways, the "then value" of the tramway meant the then value of the tramway lines, and that in ascertaining the value the basis of the calculation should be the sum that would be required to construct the lines less a sum for depreciation.

Edinburgh Street Tramways Co. v Magistrates of Edinburgh, 1894, 21 R. (H.L.) 78; [1894] A.C. 456; 31 S.L.R. 953.

V. VALUATION.

[See VALUATION VI.]

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I. CONSTITUTION AND REVOCABILITY.

1. CONSTITUTION.

(1)

Whether writing imported a declaration of trust.

In 1835 a person executed a mortis causa settlement in favour of a nephew and two nieces. In 1837 he sold by public auction, in virtue of a power of sale contained in a heritable bond, certain subjects which were purchased by the nephew to whom he granted an absolute disposition. In 1839 the nephew delivered to each of the two nieces a writing in these terms:—"This is to certify that I do renounce all claim upon that property . . . which formerly belonged to my uncle David Miller, and which was bought in my name upon 5th May,

1837." The testator died in 1842. In an action brought by one of the nieces against the representatives of the nephew, concluding for declarator that the subjects were held by him in trust for the testator, **held** that the writing did not import a trust for behoof of the testator, and action dismissed.

Evans v Craig, 1871, 9 M. 801; 43 J. 442; 8 S.L.R. 534.

(2)

Whether letter by son as registered owner of shares imported an acknowledgement of trust for father.

A person, having borrowed money for that purpose, acquired shares in a joint stock company, of which he was himself manager and a large shareholder, and took the transfer in the name of his son. The son's name stood on the register as owner of the shares, and the dividends were paid to him, and applied by him for his own purposes. Eight years after the transfer the son granted a letter, prepared by and addressed to an accountant, in whose hands the management of his father's affairs then was, in these terms:—"In reply to your inquiry as to the shares standing in my name, I have to explain that I paid nothing for them, and that they are held practically in trust for my father. I undertake that I shall not transfer them to any one without your knowledge." Five days afterwards the son granted a trust deed for his creditors. The father's estates were subsequently sequestrated. The trustee on the son's estate having brought an action against the father's trustee for delivery of the share certificate, a proof was allowed. The son deponed that the shares were his absolute property, and the father deponed that he, the father, was to have the control of them if he needed it in the family interest. It was explained that the son had no safe place for keeping such documents as the certificate. **Held** that there was no evidence of an existing trust in the son at the date of the letter, that the letter could not therefore be regarded as an acknowledgement which the son was bound or entitled to grant, and consequently could not avail his father's creditors in a question with his own creditors.

Wallace v Sharp, 1885, 12 R. 687; 22 S.L.R. 441.

(3)

Mutual settlement—Testamentary gift of power to consume—Gift over of portion unconsumed.

In a mutual settlement by spouses the wife conveyed her whole estates to her husband under the burden of maintaining her whole children, with full power to him "to consume such parts or portions of the capital during his lifetime as he may find or think necessary," and also power "to realise said estates . . . and in general to deal and intromit therewith as freely as" she could have done herself. She appointed him to be her sole executor. Upon the death of her husband, if he survived her (as he did), she conveyed her "said estate

or such portion thereof as may be unconsumed" by him to trustees for certain purposes. In an action by the wife's trustees against the trustees under a will left by the husband, **held** that under the mutual settlement there was no implied trust imposed upon the husband rendering him liable to account for his intromissions with his wife's estate, and that consequently his trustees were not bound so to account.

Denholm's Trustees v Denholm's Trustees, 1908 S.C. 255; 45 S.L.R. 154; 15 S.L.T. 589.

(4)

Testament—Legacy or trust.

A testator, who was survived by his wife and a child, and also by pupil and minor children of a former marriage, left a will and a codicil thereto of even date. The will was in the following terms:—"I [name] do hereby leave and dispose to my wife [name] my whole estate, heritable and moveable, whom I appoint my sole executrix, under the obligation of her paying all my just and lawful debts, and bringing up and educating my children, and I appoint her sole guardian and curator of my children, and I grant her full power of sale of said estate, and I appoint [name] to be law agent on the said estate." By the codicil he appointed two persons named "to act along with my wife as executors and curators to my said children." **Held**, on a construction of the will and the codicil, that the widow was not entitled to have the testator's estate conveyed to her as her own property, subject only to a merely personal obligation to maintain and educate the children, but that a trust was constituted in the widow and the persons named in the codicil for behoof of her and the children.

Urquhart's Executors v Abbott, 1899, 1 F. 1149; 36 S.L.R. 896; 7 S.L.T. 114.

(5)

Direct bequest or trust—Nomination of executors but not of trustees.

A testator by his settlement disposed his whole estate to his wife in life and to his children, subject to payment of his debts and implement of the provisions in his marriage contract in their favour, and he bound his wife to educate and maintain the children until their provisions became payable. Executors were appointed, but no curators for the children were appointed. One of the children was a minor and the other a pupil. **Held** that the executors were not trustees.

Gow's Trustees v Gow, (O.H.) 1912, 2 S.L.T. 256.

(6)

Annuity charged upon heritage.

A testator by his will and settlement nominated and appointed certain persons "to be my trustees; to them I give full power to see my will and arrangements fulfilled for the benefit of my heir after named and designed. First, then, dwelling-house and grounds, everything moveable and heritable to remain in the hands of the heirs of T. R., my father, in perpetuity; following up this

to be my desire and will, I fix on J. M. R. . . . to be my heir of Dalling House and grounds as it now stands, heritable and moveable, subject" to certain reservations, and under burden of certain annuities. J. M. R. having made up titles granted a bond and disposition over Dalling House. In an action of poinding of the ground and of mails and duties, at the instance of the bondholder, **held** that, whether J. M. R. or the trustees were the proper disponees of Dalling House under the foregoing will and settlement, it, at all events, imported a trust in favour of the annuitants which the bondholder was not entitled to defeat.

Hyndman v Ross, 1881, 18 S.L.R. 718.

(7)

Trust in person of residuary legatee.

A testator disposed to and in favour of the residuary legatee of his moveable estate the whole residue of his heritable estate, "always with and under the conditions and provisions hereinafter inserted." Thereafter the disponent was "directed to dispose of, either by private bargain or public sale, as may be considered most advantageous, my whole heritable estate other than that specially above conveyed, and that within three years of my death, and invest the free proceeds in Government stock" for certain persons in liferent and their representatives in fee. **Held** that the residuary legatee was constituted a trustee for all concerned, the period of three years being allowed for the advantageous realisation of the estate, and was therefore not entitled to the rents accruing while the estate remained unsold.

Johnston, 1880, 18 S.L.R. 60.

(8)

Appointment of executors—Bequest in liferent and fee.

A testatrix by her holograph will left a liferent of her whole estate to her sister A, and at her death to her sister B, and at the death of the survivor of the sisters the estate was to be divided equally amongst eleven persons named "or the survivors of the above mentioned at the time of succession." The testatrix nominated four persons to be "sole executors and universal intromitters with my moveable estate," and she bequeathed to each of them the sum of £50, but no words of trust were used, nor was any conveyance made to the executors.

Held that the destination of the bequest, and the number of the executors and the amount of their remuneration indicated the intention of the testatrix to constitute a continuing trust.

Bannatyne v Dunlop, (O.H.) 1894, 1 S.L.T. 484.

(9)

Trust or unlimited fee—Trust disposition and settlement inter vivos — Directions to trustees to convey lands with restrictions against burdening or selling — Docquet on trust deed by beneficiary agreeing to its terms and conditions.

The proprietor of certain heritable estates, with a view to their management during

his life, and their subsequent settlement, by trust disposition and settlement inter vivos conveyed his estate to his brother F, and to his nephews A, B, and C, as trustees, and directed them on the death of the survivor of himself and his brother to convey them to his nephews and their heirs male respectively in order. He further directed his trustees to insert in the disposition a clause prohibiting the disponent from selling or burdening the estates with debt except with the consent of his two immediate younger brothers. After the trust disposition had been executed and delivered, and before the death of the truster, A and C signed a docquet thereto, whereby they accepted the office of trustees, and "individually" concurred in and agreed "to the terms and conditions of the foregoing deed." The docquet was signed by B after the truster's death. On the death of the truster and his brother it was agreed between A, B, and C that the estate should be conveyed to A in terms of the settlement, but that the insertion of the conditions should not bar A from maintaining that notwithstanding them he was a fee-simple proprietor. The estates were accordingly conveyed by the trustees to A, "under the prohibition that the disponent for the time being under the destination shall not sell or burden the said subjects hereinbefore disposed with debt . . . except with the consent of his two immediate younger brothers." In an action of declarator at the instance of A, **held** (1) that he was unlimited fiar of the estates; (2) that he was not barred from so maintaining by having signed the docquet to the trust deed; and (3) that averments made by the defenders to the effect that the trust disposition and the docquet were the result of and embodied a family arrangement were not relevant to be remitted to probation.

Johnston v Johnston, 1903, 5 F. 1039; 40 S.L.R. 757; 11 S.L.T. 299.

(10)

Direct disposition to A in liferent and "after his death" to trustees.

A executed a disposition of the lands of K to B, his son, in liferent, for his liferent use only, and "after his death" to "the Provost of Aberdeen" and the holders of certain other offices, "all for the time being, and their successors in their respective offices," and X, as trustees. The granter recorded this deed in the Books of Council and Session. A died, survived by his son B, who was his heir at law. B brought an action against the trustees for declarator that he was entitled to the fee of the lands of K as heir at law of his father, on the ground that the disposition of the fee to the trustees did not take effect until after his death. **Held** that on a sound construction of the disposition the lands of K had been effectually disposed to B in liferent and to the trustees in fee.

Edmond v Lord Provost of Aberdeen, 1898, 1 F. 154; 35 S.L.R. 193; 5 S.L.T. 230.

(11)

Inter vivos trust—Disposition defeating wife's right—Simulate trust.

A father transferred all the preference shares in a company which he controlled to trustees for behoof of his daughters. During his lifetime no dividend was paid on the shares. He died possessed of no other estate. His widow, maintaining that the trust was of a simulate character and ineffective during her husband's lifetime, claimed payment from the trustees of (1) a debt due by her husband, and (2) her legal rights in his estate. Action dismissed as irrelevant.

Rowley v Rowley, 1917, 1 S.L.T. 16.

(12)

Whether inter vivos or mortis causa.

Terms of a trust settlement which was held to be mainly an inter vivos deed and not to fall under sec. 1 of the Conveyancing Amendment Act, 1887.

Magistrates of Edinburgh v Wright, (O.H.) 1902, 9 S.L.T. 318.

(13)

Testamentary writing and verbal directions.

Question, whether a testamentary writing made the executor universal legatee, or imported a trust to carry out the testator's wishes verbally expressed.

Wilson v Lindsay, 1878, 5 R. 539; 15 S.L.R. 289.

(14)

Separate deeds constituting one trust.

A person executed on the same day (1) a deed assigning stock and moveables to trustees, the income to be paid to him during life, but the capital to be held for beneficiaries, and (2) a mortis causa trust deed in favour of the same trustees, conveying heritage in Scotland. **Held** that the two deeds created one trust, and that the trustees, though not resident in Scotland, were, in respect of the Scottish heritage conveyed by the second deed, subject to the jurisdiction of the Court in an action of reduction of the first.

Charles v Charles' Trustees, 1868, 6 M. 772; 40 J. 397; 5 S.L.R. 502.

(15)

Obligation to test—Deeds alleged to be in fraudem of obligation.

Murray v Macfarlane's Trustees, 1895, 22 R. 927; 32 S.L.R. 715; 3 S.L.T. 63. Succession, No. 335.

(16)

Validity of trust deed—Spouses a majority of trustees—Power to trustees to advance trust funds to spouses.

An antenuptial marriage contract appointed the spouses and the wife's father the sole trustees, and the trustees were empowered at the joint request of the spouses to advance such portion of the trust estate to the husband as the trustees might think right. Under the marriage contract the wife had a liferent allanarly, which was

declared not to be affectable by her own or her husband's debts or deeds or the diligence of their creditors. **Held** that as the spouses were a majority of the trustees, and might consequently lend any part of the trust funds to the husband, the marriage contract was not effectual to protect the wife's liferent.

McCallum v McCulloch's Trustees, 1904, 7 F. 337; 42 S.L.R. 256; 12 S.L.T. 630.

(17)

Delivery—Disposition to heritage taken by father in favour of self and children nominatim—Subsequent testamentary disposition—Repugnancy.

The purchaser of a piece of land took the disposition to himself for behoof of three of his children nominatim, and to their heirs, with power to him, so long as the youngest of the children was in minority (but not afterwards, except with their consent), to raise money for building by granting a bond and disposition in security. The deed remained in his possession until his death, when it was found that he had executed a settlement conveying the property to a nephew. In an action to reduce this conveyance, raised by one of the children named in the original disposition, **held** that the conveyance challenged was inoperative and invalid, the granter not being in titulo to dispose of the property.

Gilpin v Martin, 1869, 7 M. 807; 41 J. 430; 6 S.L.R. 518.

(18)

Bond and disposition in security taken by father in favour of himself as trustee for his daughter—Recording in Register of Sasines—Bond undelivered.

A father lent money belonging to himself upon a bond and disposition in security, taking the bond in favour of himself as trustee for his daughter nominatim, and recorded the bond in the Register of Sasines for behoof of himself as trustee for his daughter. The bond bore that the money had been lent by him from funds held by him in trust for his daughter. He retained the bond in his own custody till his death, and his daughter did not know of its existence until afterwards. **Held** (by a court of seven judges) that the recording of the bond in the Register of Sasines did not operate delivery to the daughter so as to create an effectual trust in her favour.

Cameron's Trustees v Cameron, 1907 S.C. 407; 44 S.L.R. 354; 14 S.L.T. 719.

(19)

Precatory trust.

A testator bequeathed his moveable estate to his widow, and stated in his will his "desire" that at her death some part of the estate should go to his brother's and sisters' families—"In particular, I should like not less than £50 sterling left to" his brother's widow, "and I desire that my wife may make a settlement providing for this." The testator's widow having died intestate,

held that her executor was not bound to give effect to the testator's request.

Garden's Executor v More, 1913 S.C. 285; 50 S.L.R. 249; 1912, 2 S.L.T. 482.

(20)

Executory trust—Liferent and fee—Gift to parent in liferent and to his children in fee.

A testator, by his holograph will, directed his trustees "to make over" certain heritable properties to his eldest son "with the burden upon them of thirty pounds stg. to his two oldest children by his first marriage during his lifetime and at his death so as to be equally divided amongst his other children." Held that the testator had expressed his intention that his son should have a liferent only, and had directed his trustees to take the necessary steps to carry this into effect; and, accordingly, that the trustees were bound to execute a conveyance of the property in favour of the son for his liferent only, and in favour of his children (other than the two eldest) in fee.

Brash's Trustees v Phillipson, 1916 S.C. 271; 53 S.L.R. 205; 1916, 1 S.L.T. 16.

(21)

Constructive trust.

Observed (per Lord Westbury)—"An obligation to do an act with respect to property creates a trust; and if a fiar, bound to fulfil an obligation, acquires or retains, by means of his neglect of that duty, a greater estate than he would otherwise have had, he is a trustee of such excess of interest for the benefit of the persons who would have been entitled to it if the obligation had been duly fulfilled."

Fleeming v Howden, 1868, 6 M. (H.L.) 113; 40 J. 616; L.R., 1 Sc.App. 372; 5 S.L.R. 698.

(22)

Observed (per Lord Shaw)—"A contractual obligation with regard to property, which has not effectually and actually brought about either a security upon it or a conveyance of it, is not per se the foundation of a trust or of a declarator of trust."

Bank of Scotland v Liquidators of Hutchison, Main & Co., 1914 S.C. (H.L.) 1; 51 S.L.R. 229; 1914, 1 S.L.T. 111.

(23)

Held that the purchase by a mother, who had a power of apportionment of a fund, of the interest of one of her children in the fund, was made in trust for the child.

McDonald v McGrigor, 1874, 1 R. 817.

(24)

Partnership.

Where a partner on the expiry of a contract of copartnership and of a lease of the partnership premises, without notice to his copartner, takes a new lease in his own name and carries on the same business on his own account, he is bound to communicate a share of the profits to his former copartner.

McNiven v Peffers, 1868, 7 M. 181; 41 J. 104; 6 S.L.R. 151.

(25)

Conveyance to company of assets of firm—Lease held by sole partner as trustee for firm—Partner holding lease as trustee for company.

A limited company entered into an agreement whereby it took over the whole assets of a firm. These consisted, inter alia, of the lease of a brickwork which was in the name of R. Y., the sole partner of the firm as trustee therefor. Circumstances in which held that R. Y. had come to hold the lease as trustee for the company.

Liquidator of James Young & Sons v James Young & Sons' Trustee, (O.H.) 1902, 10 S.L.T. 85.

(26)

Director.

A person who allows his name to be set forth in the prospectus of a proposed company as a director, from the time that he agrees to become a director stands in a fiduciary relation to the company, and cannot enter into a contract with a vendor to the company for his own benefit.

Henderson v Huntington Copper and Sulphur Co., 1877, 5 R. (H.L.) 1; 15 S.L.R. 217.

(27)

Trustees.

Trustees held to have acquired salmon fishings in the character of holders of trust property, and bound to communicate the benefit to the trust.

Magistrates of Aberdeen v University of Aberdeen, 1877, 4 R. (H.L.) 48; 2 App.Cas. 544; 14 S.L.R. 490.

(28)

Trustees as individuals taking shares in limited company formed to acquire part of trust estate.

An ironmongery business formed part of a trust estate. The business was converted into a limited liability company. The trustees as individuals subscribed for some of the ordinary shares of the company. Thereafter the beneficiaries under the trust brought an action for declarator that the shares held by the trustees as individuals were truly subscribed for by them as trustees, and that they were bound to execute transfers of the shares to the trustees of the trust on payment out of the trust estate of the sums which they had subscribed. Decree granted as craved.

Taylor v Hillhouse's Trustees, (O.H.) 1901, 9 S.L.T. 31.

(29)

Latent trust—Adjudication.

Opinion (per Lord Watson) that a creditor adjudging heritage held by his debtor subject to a latent trust can be in no better position in a question with the cestui qui trust than if he had obtained a conveyance without value from his debtor.

Heritable Reversionary Co. v Millar, 1892, 19 R. (H.L.) 43; [1892] A.C. 598; 30 S.L.R. 13.

(30)

Implied trust—Mortgage over ship—Agreement for repayments out of profits—Specific appropriation—Breach of trust.

A offered to advance to a shipping company £15,000 on a mortgage over a steam vessel, on "condition that all profits earned by the steamer to be paid to us towards reducing the loan till the loan shall have been reduced to £10,000." The managing committee of the company agreed to accept the offer, subject to the modification "that instead of all the profits being paid to A till the mortgage was reduced to £10,000, they should be paid at the rate of £2000 per annum until then." A agreed to the modification, and the arrangement was approved by the company. Subsequently the advance was made, and the mortgage granted. The company went into liquidation. **Held** that the agreement imported merely a personal obligation by the company to pay to A £2000 per annum from profits, and that A had no preference over the profits.

Graham & Co. v Raeburn & Verel, 1895, 23 R. 84; 33 S.L.R. 61; 3 S.L.T. 146.

Uncertainty.

[See SUCCESSION IV. 10.]

(31)

Trust unworkable—Constitution of new trust with modified purposes—Authority of Court.

Gray v Gray's Trustees, 1877, 4 R. 378, No. 540, *infra*.

(32)

Extent of estate conveyed—De presenti conveyance—Proof—Extraneous declarations of intention.

Gellatly's Trustees v Royal Infirmary of Edinburgh, (O.H.) 1905, 13 S.L.T. 38, No. 55, *infra*.

(33)

Contract—Subject inconsistent with trust purposes.

Held that, in the construction of a trust deed, if the vesting in the trustees of a particular subject is not necessary, or is antagonistic to the purposes of a trust, then the presumption is against such vesting. The purposes of the trust being for the preservation of capital, leaving the enjoyment of the income to the trustor, the presumption was against an annuity due to the trustor falling within the trust conveyance.

Culcreuch's Trustees v Home, (O.H.) 1894, 2 S.L.T. 170.

2. REVOCABILITY.

[See VI. 1, *infra*.]

3. TRUSTEES EX OFFICIO.

[See CHARITABLE TRUSTS AND BEQUESTS II. 3.]

II. PROOF OF TRUST.

Act 1696, c. 25.

(34)

Writ or oath—Patent taken in name of patentees in trust.

Letters patent were taken out in name of two persons, one of whom was a partner of a firm. In an action against the two patentees at the instance of the firm, concluding for declarator that the patent was held for the pursuers' behoof and was their sole property, the pursuers stated that the patent had really been taken out by them and at their expense, and that the insertion of the defenders' names as the patentees had only been for the purpose of compliance with the Patent Acts. **Held** that proof of the pursuers' averments, even against the patentee who was a partner of the pursuers' firm, must be limited under the Act 1696, c. 25, to the defenders' writ or oath.

Laird & Co. v Laird, 1884, 12 R. 294; 22 S.L.R. 200.

(35)

Shares registered in name of law agent.

In an action of declarator that certain shares registered in the name of the defender were in reality the pursuer's property, the pursuer averred that the shares were a portion of those received by him in payment of the price of his business, which had been taken over by the company, that he had agreed, for reasons given, that the shares should be registered in the defender's name, but that he had instructed the defender, who was his law agent, to see that provision was made for the property in the shares remaining with him notwithstanding the registration. He admitted that a written agreement had been executed to which he and the company were parties, whereby the shares in question were allotted to the defender. **Held** that a case of mandate relevant to exclude the operation of the Act 1696, c. 25, had not been averred, and that proof of the pursuer's averments must accordingly be limited to writ or oath of the defender.

Anderson v Yorston, (O.H.) 1906, 14 S.L.T. 54.

(36)

Allegation that assignment in satisfaction of debt truly in security merely.

A debtor assigned to his creditor all his "right, title, and interest" in an extract decree which he held against a third person, "with full power" to the creditor "to use said decree in any manner of way whatever, in the same way as I could have done before granting thereof, in satisfaction of his claim against me." In an action at the instance of the assignor against the assignee for declarator that the assignment was merely in security, **held** that an allegation of an understanding that the assignment was merely in security was an averment of trust, which could only be proved by the writ or oath of the assignee.

Purnell v Shannon, 1894, 22 R. 74; 32 S.L.R. 47; 2 S.L.T. 288.

(37)

—Trust deed for creditors — Sale of assets by trustee to creditor — Proof that creditor purchased in trust for the debtor.

The trustee under a trust deed for creditors sold the whole assets of the debtor to a creditor. Thereafter the grantor of the trust deed brought an action against the creditor for declarator that the creditor purchased the assets on behalf of and in trust for the pursuer, and that the pursuer was entitled to obtain possession of the assets on repaying him the price. **Held** that a plea of the defender that the pursuer's averments could only be proved by the defender's writ or oath fell to be repelled on the ground that no "deed of trust" was averred to which the provisions of the Act 1696, c. 25, could apply.

Gardiner v Cowie, (O.H.) 1897, 4 S.L.T. 256.

(38)

—“Deed of trust”—Missives of sale—Mandate—Agent and principal.

A agreed to sell to B certain heritable subjects. The transaction was completed by a letter signed by A offering to sell the subjects to B at a certain price, and an acceptance by B written below, C becoming bound along with B for payment of the price. C raised an action against B for declarator that the missives of sale were entered into by the defender on behalf of the pursuer, and for decree ordaining the defender to denude of the subjects and convey the same to the pursuer. The pursuer averred that it was agreed between him and the defender, who was a clothier occupying a shop in the premises, that the pursuer should buy the property in question and let the shop to the defender; that the pursuer's name should not be divulged as purchaser to the seller's agent, and that the pursuer gave the defender authority to conclude the bargain in his own name "on the understanding and agreement that the disposition by the seller would be granted and taken in the pursuer's name." The action was raised before a disposition of the subjects was executed. **Held** (1) that the missives of sale constituted a deed of trust in the sense of the Act 1696, c. 25, and (2) that as the defender was authorised to complete the purchase in his own name, the pursuer's averments could only be proved by the defender's writ or oath.

Dunn v Pratt, 1898, 25 R. 461; 35 S.L.R. 365; 5 S.L.T. 285.

(39)

—Agreement relative to heritage.

In 1867 the proprietor of a plot of ground conveyed the same for a price to A and B, in trust for behoof of themselves and twenty other persons, to the extent of one twenty-second share pro indiviso each. In 1897 the Govan Bowling Club raised an action against these twenty-two persons, who were all members of the club, for declarator that the club was entitled to a conveyance on repayment of the price paid, or otherwise, that the conveyance to A and B was a trust in

their persons for the use of the members of the club. The pursuers averred that in 1867 an arrangement, which was embodied in an undated document delivered to the club, had been entered into, whereby it was agreed that the necessary funds should be advanced by twenty-two members of the club, that the club should have the right at any time to repay the sums so advanced, with interest at 5 per cent., and upon doing so, should have a right to demand a conveyance from the persons feudally vested therein; and that in pursuance of this agreement the necessary funds had been contributed by the twenty-two members, and the title taken in favour of A and B for behoof of themselves and the other twenty contributors. **Held** (1) that there was no relevant averment of a trust vested in the twenty-two members for behoof of the club; (2) that there was a relevant averment of an agreement that the club should have the right, upon repaying the twenty-two members the sums advanced by them, to a conveyance of the ground; and (3) that this, being an agreement relative to heritage, could only be proved by writ or oath.

Govan New Bowling Green Club v Geddes, 1898, 25 R. 485; 35 S.L.R. 391; 5 S.L.T. 323.

(40)

Transaction between husband and wife.

The Act 1696, c. 25, does not apply to the case where the trustor is a person who is under a legal disability, and where the trustee already stands in a fiduciary relation to the trustor. So **held** in an action by a widow against her deceased husband's trustees for conveyance to her of certain stocks standing in her husband's name which she averred had been purchased with money belonging to her.

Anderson v Anderson's Trustee, (O.H.) 1898, 6 S.L.T. 204.

(41)

Whether entries in books and letters delivered to deceased equivalent to his writ.

In an action against the executor of a person deceased for recovery of a deposit alleged to have been made by the pursuer with the deceased to secure him against loss from a cautionary obligation, **held** that the trust could be competently proved by entries in the deceased's books in his own hand, showing that he had received the money, coupled with letters from the pursuer to the deceased, found in his repositories, and proved to have been delivered to him at the time of the entries, explaining the transaction.

Thomson v Lindsay, 1873, 1 R. 65; 11 S.L.R. 12.

(42)

Proof prout de jure—Question with third parties—Trust in fraud of creditors.

In an action of reduction and declarator of trust brought by the trustee on A's sequestrated estate to establish his right to lands vested in B by an absolute title, **held** that the pursuer was not limited to proof by writ

or oath of his averment, and that (at a date when A was solvent, and when the creditors represented by the pursuer had no claims against him) A and B had arranged to have the title to A's property taken in name of B, for the fraudulent purpose of defeating the rights of A's creditors in the event of his bankruptcy.

Opinion (per Lord Benholme) that the operation of the Act 1696, c. 25, restricting the method of proof, is limited to questions arising between trusters and trustees and their respective representatives, and does not apply to questions arising with creditors.

Wink v Speirs, 1867, 6 M. 77; 40 J. 47; 5 S.L.R. 76.

(43)

Question with third parties.

In an action of damages the jurisdiction of the Court depended on whether the defender was proprietor of certain heritage in Scotland or held the heritage as trustee merely. **Held** that as the question was not one between trustor and trustee, proof was not limited to writ or oath, and that the documentary evidence taken in connection with the parole proof established that when the summons was served the defender had in reality no patrimonial interest in the property, which, ex facie of the title, was at that date feudally vested in him, and therefore that the Court had no jurisdiction to entertain the action against him.

Hastie v Steel, 1886, 13 R. 843; 23 S.L.R. 559.

(44)

Right to policy of insurance on life of a partner in a company.

Held that it was competent to prove prout de jure that a policy of insurance on the life of a partner of a company belonged to the company.

Forrester, &c. v Robson's Trustees, 1875, 2 R. 755; 12 S.L.R. 464.

(45)

Averment that lease in name of director was in trust for company.

Terms of writ **held** sufficient to instruct a trust in an action at the instance of a joint stock company against one of their directors, to have it declared that the lease of a quarry had been granted to the defender and two other directors in trust for the company.

Opinions that the case alleged was one in which an agent had taken a title in his own name contrary to his mandate, and that, therefore, proof prout de jure would have been competent.

Pant-Mawr Quarry Co. v Fleming, 1883, 10 R. 457; 20 S.L.R. 307.

(46)

Mandate—Right to heritage standing in name of a joint adventurer.

Where one of two joint adventurers took the title to heritage belonging to the adventure in his own name, **held**, in an action at the instance of the other, that as he alleged he had not trusted his co-adventurer to take

the title in his own name he was entitled to a proof prout de jure, the question being one of mandate and not of trust.

Horne v Morrison, 1877, 4 R. 977; 14 S.L.R. 584.

(47)

Trust or mandate—Agreement to purchase for another—Missive of sale.

In an action concluding for an order for the transference (on payment of the purchase price) by the defender to the pursuer of certain shares in a ship purchased by the defender and registered in the defender's name, the pursuer averred that the defender had agreed with her to purchase these shares on her behalf, and that he had registered them in his own name without her authority. The defender denied the pursuer's averments, and also pleaded that, as they sought to establish a trust, they could only, in terms of the Act 1696, c. 25, be proved by writ or oath. **Held** that the Act did not apply, in respect that the pursuer was not seeking the establishment of a trust but the implement of a contract of mandate, which could be proved by parole.

M'Connachie v Geddes, 1918 S.C. 391; 55 S.L.R. 437; 1918, 1 S.L.T. 346.

(48)

Trust disclosed—Purpose not declared—Joint adventure—Assignment.

A feudal title to lands was taken to A and B as trustees for themselves, each to the extent of one-half pro indiviso. By ex facie absolute disposition, B conveyed to an onerous assignee his one-half pro indiviso of the lands. This disposition was recorded. In a competition between B's disponee and A, **held** (1) that the disponee's right was qualified by the trust disclosed in his disponer's title; (2) that the purposes of the trust, not being set forth in the title, might be proved by parole; and (3) that, accordingly, as it was established by such proof that the purpose was a joint adventure by A and B with reference to the lands in question, the disposition by B was only effectual to the extent of his interest in the joint adventure, viz., to the extent of one-half of the free balance on an accounting with A.

Livingstone v Allan, 1900, 3 F. 233; 38 S.L.R. 241; 8 S.L.T. 287.

(49)

Deposit receipt—Writ of depositor—Trust purposes—Competency of parole.

A deposit receipt was taken in the names of two persons "in trust." **Held** that the deposit receipt must be viewed as the writ of the depositors, and that the objects of the trust could be proved by parole notwithstanding the trustees in their evidence differed as to the trust purposes.

National Bank of Scotland v Mackie's Trustees, (O.H.) 1905, 13 S.L.T. 383.

(50)

"Deed of trust."

A deposit receipt is not a "deed of trust" within the meaning of the Act 1696, c. 25;

and accordingly parole proof allowed in an action by a party for declarator that the sum contained in a deposit receipt in the names of others truly belonged to him.

Cairns v Davidson, 1913 S.C. 1054; 50 S.L.R. 850; 1913, 2 S.L.T. 118.

(51)

Whether document simulate.

Question, whether an averment by a son, that a deed resigning partnership with his father and brother was executed merely for the purpose of being shown to his creditors, and to prevent them from interfering with the firm, amounted to an allegation of trust, proveable only by writ or oath under the Statute 1696, c. 25. **Opinions** in the affirmative per Lords Deas and Barcapple—in the negative per Lord President Inglis and Lord Ardmillan.

Tennent v Tennent's Trustees, 1868, 6 M. 840; 40 J. 408; 5 S.L.R. 514.

(52)

Trust for purposes to be specified in separate writing—Nomination of trustees—Sealed letter with indorsation enjoining letter not to be opened until specified date—Opening of letter on allegation by trustees that it contained trust purposes.

By holograph disposition dated in 1888, A disposed the lands of K to his son B "in liferent, but for his liferent use only, and after his death" to trustees "for the uses, ends, and purposes specified, or to be specified by me, in any writing under my hand." The disposition reserved A's own liferent and dispensed with delivery. A died, leaving a trust disposition and settlement, in which he disposed of his whole means and estate, except the lands of K. In his repositories was found a sealed envelope with an indorsation setting forth that "the enclosed deed is not to take effect nor come into operation until after the death of my son B"; and that, as it would not have been for the interest of his son and others, "I therefore enjoin my trustees and executors not to open the envelope, but to secure the deed to be strictly private in all its parts until my son's death." The persons named as trustees in the disposition of 1888 (who had not accepted office) admitted that if the sealed envelope did not contain the purposes for which they were to hold the lands of K, the deceased had left no deed specifying these purposes, but averred that the sealed envelope contained such a deed, and moved for an order to have the envelope opened in order to prove that averment. The pursuer, and also the testamentary trustees, opposed the motion. **Held** that the persons named as trustees in the deed of 1888 were entitled to have the envelope opened.

Edmond v Lord Provost of Aberdeen, 1898, 1 F. 154; 35 S.L.R. 193; 5 S.L.T. 230.

(53)

Declarator of trust.

Terms of nomination of trustees in a holograph writing **held** sufficient to entitle the

trustees named to sue a declarator of trust, &c.

Robb's Trustees v Robb, 1872, 10 M. 692; 44 J. 383; 9 S.L.R. 454.

(54)

Delivery — Ambiguity — Proof of circumstances.

Where a writing founded on as a declaration of trust is ambiguous it is competent to inquire into the circumstances in which it was executed and delivered.

Opinion (per Lord Benholme) that the declaration of trust contemplated by the Statute 1696, c. 25, is a writing in some way delivered to the party interested as trustee.

Evans v Craig, 1871, 9 M. 801; 43 J. 442; 8 S.L.R. 534.

(55)

Extent of trust—De presenti conveyance—Question as to estate conveyed—Declarations of intention outside deed.

In a case where a sum of money had been conveyed to trustees inter vivos and, there being doubt as to the amount intended to be conveyed, declarations of intention by the granter outside the deed of trust itself were averred, **observed** (by Lord Stormonth-Darling), after pointing out that the question was as to the meaning and extent, not of a testamentary gift, but of a de presenti conveyance perfected by delivery of the deed to trustees of an existing beneficiary: "The terms of the deed itself are in that case conclusive, and if these terms, on their just construction, cover more than the subjects actually transferred, a right of action would then arise to the trustees as against the granter himself, no less than against his representatives, to demand full implement of his obligation. This rule applies in our law, although the obligation itself be gratuitous if only it is distinct and irrevocable, and the granter could not escape performance by pleading that he never intended to give so much."

Gellatly's Trustees v Royal Infirmary of Edinburgh, (O.H.) 1905, 13 S.L.T. 38.

III. APPOINTMENT, ASSUMPTION, RESIGNATION AND REMOVAL OF TRUSTEES.

1. APPOINTMENT.

(56)

Nomination of executors—Directions for continuous management of estate—Nomination including appointment as trustees.

A testator in his will nominated certain persons as "executors," and directed them "to make and continue" certain annual payments to certain persons "till death or marriage," and on the expiry of two liferents to divide the proceeds of the estate among specified persons. The executors were further directed to retain, or to realise for reinvestment, in their discretion, various securities held by him. There was no clause conveying any part of the estate to them.

Held that though called "executors" in

the deed, they were truly gratuitous trustees with the powers conferred upon such trustees by the Trusts Act, 1861.

Ainslie v Ainslie, 1886, 14 R. 209; 24 S.L.R. 164.

(57)

Implied devolution on survivors.

Observed that in a mortis causa disposition to trustees the condition of survivorship is implied.

Oswald's Trustees v City of Glasgow Bank, 1879, 6 R. 461; 16 S.L.R. 221.

(58)

Conveyance to trustee, whom failing, his heir—Title of heir of deceased trustee to act.

A testator disposed his whole estate to J. H., "whom failing, the nearest heir male who may be resident in Great Britain and sui juris at the time" of J. H., "as trustee for the ends, uses, and purposes aftermentioned." The trust purposes included payment of certain annuities and of a liferent. J. H. survived the testator and accepted office as sole trustee, but died before all the trust purposes were fulfilled. **Held** that the trust did not lapse by the death of J. H., but that his heir male was entitled to act as trustee and to administer the trust.

Brown v Hastie, 1912 S.C. 304; 49 S.L.R. 250; 1912, 1 S.L.T. 40.

(59)

Heir of last surviving trustee—Whether nomination carried right to office of trustee or only bare trust.

Terms of a trust disposition and settlement on which **held** that the heir of the last accepting and surviving trustee succeeded only to the bare trust title and not to the office of trustee, and the trust having accordingly lapsed the Lord Ordinary appointed a judicial factor.

White v Anderson, (O.H.) 1904, 12 S.L.T. 493.

(60)

Nomination as tutors and curators—Joint appointment.

Opinions that an appointment of testamentary trustees as tutors and curators to a legatee was a joint appointment of the whole accepting trustees, and that one could not hold the office of tutor if the other accepting trustees declined to do so.

Johnston v Johnston's Trustees, 1892, 20 R. 46; 30 S.L.R. 97.

(61)

Marriage contract—Power of spouses to appoint.

Held that when the whole trustees under a marriage contract have died, the spouses are entitled to appoint new trustees, without applying to the Court.

Newlands v Miller, 1882, 9 R. 1104; 19 S.L.R. 819.

(62)

Mutual settlement—Appointment of new trustee by surviving testator—Competency of appointment by one spouse to affect the other spouse's estate.

A husband and wife executed a mutual

settlement. By a codicil the husband after his wife's death, on the narrative that he was "desirous of making additions to the mutual settlement executed by me and my late wife," appointed, "so far as I can competently do so," a new trustee, "as trustee along with the trustees already acting under the foresaid mutual settlement." **Held** in a question between the original trustees and the new trustee, who admitted that the truster had no power to appoint a new trustee over his wife's estate, that the appointment was invalid, on the ground that it was clear from the terms of the codicil that the truster intended to appoint a new trustee not only upon his own but upon both estates.

Malcolm v Goldie, 1895, 22 R. 968; 32 S.L.R. 711; 3 S.L.T. 101.

(63)

Power of trustee to appoint a successor by will—Appointment of two persons—Validity.

A testator by his will nominated B as his executor and trustee and on his death or resignation or removal he appointed C, his brother, to take his place and after C's death he appointed such person as C should by his last will and testament nominate. C acted, but died before the entire execution of the trust, leaving a deed under which he nominated two persons as trustees. **Held** that C had not validly exercised the power of appointment conferred on him by A's will, because C was only entitled thereunder to appoint one person.

Bowman v Bowman, (O.H.) 1910, 1 S.L.T. 381.

(64)

Legacy of residue to trustees—Whether acceptance of office a condition of the gift.

A testator by trust disposition and settlement conveyed his whole means and estate to A, B, C, and D, "and to the acceptors or acceptor, survivor or survivors of them, to be my trustees for executing the trust hereby created." He then directed "my said trustees" to pay the income of the trust estate to his sister in liferent, and on her death "I direct my said trustees, the said" A, B, C, and D "to divide the free residue or remainder of my said means and estate equally amongst themselves, . . . declaring that if any of my said trustees shall die before the said residue shall become payable as aforesaid, then such share or respective shares to which they would have been entitled if they were alive shall vest in and be payable to their several heirs, executors, and successors, and I appoint my said trustees to pay and deliver the same to them accordingly." A predeceased the testator. The three other trustees survived the testator, accepted office as trustees, and were acting as such at the death of the life-rentrix. **Held** (1) that the representatives of A were not entitled to take under the gift of residue, in respect that he had never been a trustee; and (2) that the whole residue fell to be paid to the three accepting and acting trustees, equally—rejecting a claim by the testator's heirs ab intestato to

the share which would have fallen to A had he survived and accepted office as trustee.

Mellis's Trustees v Legge's Executrix, 1898, 25 R. 954; 35 S.L.R. 763.

2. ASSUMPTION.

(65) Act 1861, sec. 1—Executors impliedly appointed trustees—Power of assumption.

Terms of a nomination of certain persons as "executors," upon a construction of which it was held that though called "executors" the nominees were truly "gratuitous trustees nominated in a deed" and therefore were entitled to exercise the powers of assumption conferred on such trustees by sec. 1 of the Trusts Act, 1861.

Ainslie v Ainslie, 1886, 14 R. 209; 24 S.L.R. 164.

(66) ———Implied power to assume.

In a trust deed executed prior to 1861 the truster conferred upon her trustees the power to assume new trustees "in place of such of their number as shall die or resign or become incapacitated." In 1864 the original trustees, though none of them had either died, resigned, or become incapacitated, assumed two additional trustees. Held that the assumption was valid under the Trusts Act, 1861, sec. 1, the deed, though not directly conferring the power, containing nothing expressly to the contrary.

Allan's Trustees v Hairstens, 1878, 5 R. 576; 15 S.L.R. 301.

(67) ———Implied power to assume—Marriage contract with power to spouses, or the survivor, to appoint new trustees—Assumption by trustees—Power contrary to provisions of deed.

By an antenuptial contract of marriage, dated in October, 1860, the spouses provided that, in the case of the death, or resignation, or legal incapacity of the trustees named in the deed, it should be competent to them, the spouses, or to the survivor, to appoint new trustees, and also that the trustees should have power after the death of the survivor to assume new trustees. Held that this trust could not be held, during the lifetime of the survivor of the spouses, to include a power of assumption by the trustees nominated, the provisions of the deed being to the contrary.

Munro's Trustees v Young, 1887, 14 R. 574; 24 S.L.R. 392.

(68) Appointment by Court—Power of assumption granted to trustee so appointed.

A petition by a testamentary trustee for leave to resign and for the appointment of new trustees did not contain a crave that the new trustees should have power to assume other trustees. The Lord Ordinary appointed a new trustee and thereafter on the motion of the beneficiaries gave the new trustee power to assume other trustees.

Lennox, (O.H.) 1901, 9 S.L.T. 271.

(69) Two trustees to be a quorum—Assumption by sole survivor.

Terms of a trust disposition and settlement on which held that the words "two a quorum" contained in it with reference to the trustees did not prevent a sole surviving trustee from assuming new trustees, and that accordingly the Court could not appoint trustees under sec. 12 of the Trusts Act, 1867.

Scott v Lunn, (O.H.) 1908, 15 S.L.T. 1045.

(70) Assumption by quorum—No notice to co-trustees.

In a trust which consisted of three trustees, two of them, as a quorum, executed a deed of assumption of two additional trustees without giving any notice to their co-trustee. Held that the deed of assumption was invalid.

Wyse v Abbott, 1881, 8 R. 983; 19 S.L.R. 77.

(71) Act 1867, sec. 11—Assumption of new trustee without consulting trustee absent abroad—Validity.

Under a trust deed trustees had a power to assume new trustees, the majority of the trustees, original or assumed, being a quorum. The trustees, two months after one of their number had gone to reside permanently in Australia, assumed new trustees, without consulting the absent trustee. Held that the assumption was valid (1) at common law; and also (2) under the Trust Acts, 1867, although at the date of the assumption the absent trustee had not, in terms of sec. 11 of the Act, been absent continuously for six months, the purpose of the Act being to enlarge, and not restrict, the powers of trustees.

Malcolm v Goldie, 1895, 22 R. 968; 32 S.L.R. 711; 3 S.L.T. 101.

(72) Deed of assumption by sole acting trustee—Preparation of petition for consent of Court—Death of sole trustee before petition presented—Petition for consent presented by residuary legatee.

The sole surviving and acting trustee under a trust deed executed a deed of assumption of new trustees on the narrative that the only other surviving trustee was resident in Canton, China. A petition for the consent of the Court, under sec. 11 of the Trusts (Scotland) Act, 1867, was drafted, but before it could be presented the acting trustee died. Thereafter a residuary legatee presented a petition for consent to the deed of assumption. Petition granted.

Lewis, (O.H.) 1895, 3 S.L.T. 29.

(73) Grounds on which Court will interfere.

The Court will not interfere with the exercise by a body of testamentary trustees of their statutory power to assume new trustees unless upon allegations of corruption or impropriety, or such like, upon their part.

Averments by one of a body of testamentary trustees which were held insufficient to support a suspension and interdict against the assumption by the others of a new trustee, who, it was alleged, was to support the action of the respondents in opposition to the interest of the complainer in the administration of the trust.

Neilson v Neilson's Trustees, 1885, 12 R. 670; 22 S.L.R. 420.

(74)

Nobile officium—Marriage contract providing for assumption of new trustees with consent of spouses—Insanity of spouse—Dispensing with consent.

A marriage contract contained a clause empowering the trustees to appoint new trustees with the consent of the spouses. The wife having become insane, the Court, in the exercise of its nobile officium, authorised the trustees to assume new trustees without her consent.

Adamson's Trustees, 1917 S.C. 440; 54 S.L.R. 513; 1917, 1 S.L.T. 300.

3. APPOINTMENT OF TRUSTEES BY COURT.

(75)

Lapsed trust—Act 1867, sec. 12.

The Court has power, under the 12th section of the Trusts Act, 1867, to appoint new trustees in a lapsed trust.

Zoller, 1868, 6 M. 577; 40 J. 304; 5 S.L.R. 371.

(76)

Appointment of trustees or judicial factor—Appointment of trustee under supervision of Accountant of Court.

Circumstances in which the Lord Ordinary refused to appoint a single trustee, the nominee of the petitioners, upon a lapsed trust, and made it a condition of appointing two trustees instead of a judicial factor that the trust should be placed under the supervision of the Accountant of Court, under sec. 18 of the Judicial Factors Act, 1889.

Milroy v Tawse, (O.H.) 1905, 12 S.L.T. 777.

(77)

Trustees predeceasing trustee.

Held competent for the Lord Ordinary to appoint new trustees under sec. 12 of the Trusts Act, 1867, where a trust had lapsed by all the trustees having predeceased the trustee.

Graham, 1868, 6 M. 958; sub nom. Maxwell, 5 S.L.R. 615.

(78)

Failure of testator to appoint trustees.

A testatrix by will bequeathed her whole estate to certain beneficiaries, under burden of a liferent to certain other beneficiaries, but she nominated no trustees for carrying her directions into effect. In a petition under sec. 12 of the 1867 Act for the appointment of trustees to act under the will, no answers

having been lodged, the Lord Ordinary granted the prayer of the petition, but directed that the trust should be placed under the supervision of the Accountant of Court.

Pattullo, (O.H.) 1908, 46 S.L.R. 712; 16 S.L.T. 637.

(79)

English trust—Scottish heritage.

The Court will not appoint new trustees under an English trust, even where part of the trust estate consists of heritable property in Scotland.

Brockie, 1875, 2 R. 923; 12 S.L.R. 604.

(80)

Trustees appointed by Court of Chancery.

Trustees under an English trust, who were empowered to acquire and had acquired heritage in Scotland, having all died, an application was made to the Court of Chancery for the appointment of new trustees, and new trustees were appointed. Held that an application to the Court of Session under the 12th section of the Trusts (Scotland) Act, 1867, to have trustees appointed to administer the Scottish heritage was incompetent.

Hall, 1869, 7 M. 667; 41 J. 357; 6 S.L.R. 428.

(81)

Scottish trust with English beneficiaries—Reversionary interest assigned to English trustees—Appointment of English trustees to be trustees on lapsed trust.

A trust was created in Scotland, the trustor and all the original trustees being Scottish. Owing to the death of the last surviving trustee, the trust lapsed. All the persons interested in the trust were now resident in England, and the trust funds consisted of debenture stock of an English railway. The reversionary interest in the trust estate had been assigned by the beneficiary entitled thereto to a body of English trustees. In a petition for the appointment of new trustees, the petitioners craved that the English trustees should be appointed trustees in the lapsed trust. The Lord Ordinary granted the prayer of the petition, holding the appointment to be competent.

Allardice, (O.H.) 1900, 8 S.L.T. 6.

(82)

Nobile officium—Disagreement among surviving trustees under marriage contract.

The two surviving trustees under an antenuptial contract of marriage, having failed to agree either as to the investment of the funds or as to the nomination and assumption of new trustees, the Court, on an application by the beneficiaries, appointed three new trustees suggested by them, and not objected to by the surviving trustees.

Aikman, 1881, 9 R. 213; 19 S.L.R. 160.

(83)

Disagreement among trustees.

The administration of a trust having come to a stand owing to the refusal of A, one of the two trustees, to co-operate with B,

the other trustee, B, along with the beneficiaries, presented a petition for the removal of A, or otherwise for the appointment of C as a trustee to act along with A and B. At the hearing the respondent A stated that he was willing to join with B in assuming C as a trustee. The Court appointed C to be a trustee.

Dick, 1899, 2 F. 316; 37 S.L.R. 232; 7 S.L.T. 276.

(84)

Appointment of new trustees to replace removed trustee.

It is within the power of the Court, in the exercise of its nobile officium, to appoint new trustees in room of a sole trustee removed from office.

Lamont v Lamont, 1908 S.C. 1033; 45 S.L.R. 811; 16 S.L.T. 220.

(85)

Proposed new trustees resident abroad—Undertaking to submit to jurisdiction of Court.

At the request of a husband and wife, who had left Scotland and had settled in Canada, their antenuptial marriage contract trustees presented a petition to the Court to appoint A and B, residing in Canada, to be trustees in room of the petitioners, and to authorise the petitioners to transfer the trust funds to them, and to resign office. The Court, after A and B had granted a written obligation to submit to the jurisdiction of the Court in all matters relating to the trust, and to obey all orders of the Court thereanent, granted the prayer of the petition.

Simpson's Trustees, 1907 S.C. 87; 44 S.L.R. 62; 14 S.L.T. 447.

(86)

Appointment of Canadian trust company as trustees.

The trustees acting under a Scottish antenuptial contract of marriage and an English marriage settlement, made on the marriage of a Scotsman to an Englishwoman, were the same parties, viz., the spouses themselves, who had left Scotland and settled in Canada, and two other persons who resided in England. The trustees presented a petition to the Court to appoint as trustees, in place of the petitioners, a Canadian trust company incorporated by special Act of Parliament of the Dominion, and having power, inter alia, to undertake the office of trustee; and to authorise the petitioners to transfer the trust funds to the company and to resign. The company entered into a formal obligation, in the event of their appointment, to submit to the jurisdiction of the Court of Session in all matters relating to the trust and to obey all orders of the Court thereanent, and assigned the chambers of a firm of Glasgow writers as their domicile of citation. The Court refused the prayer of the petition.

Stewart's Trustees, 1913 S.C. 647; 50 S.L.R. 430; 1913, 1 S.L.T. 243.

(87)

Non-gratuitous trusts—Trusts for behoof of creditors—Act 1867, sec. 12.

The provisions of the Trusts Act, 1867, apply only to trusts in which the trustees act gratuitously. The Court will not under the 12th section of the Act appoint new trustees in trusts for behoof of creditors.

Mackenzie, &c., 1872, 10 M. 749; 44 J. 428; 9 S.L.R. 478.

(88)

Act 1884, secs. 1 and 2—New appointment when trustees do not act gratuitously.

The trustee appointed under a trust deed for behoof of creditors, which provided for reasonable remuneration being paid to the trustee, having died, the principal creditors presented a petition for the appointment of a new trustee. The Court granted the petition, holding that the operation of the Trusts Act, 1867, is extended by the Trusts Amendment Act, 1884, to trusts in which the trustees do not act gratuitously.

Royal Bank of Scotland, 1893, 20 R. 741; 30 S.L.R. 675; 1 S.L.T. 40.

(89)

Dispensing with reading in minute book.

In a petition under sec. 12 of the Trusts Act, 1867, by the members of an association for holding heritage for appointment of new trustees, the former trustees having all resigned or died, the Lord Ordinary granted the petition on 13th March, and on the motion of the petitioners, who pointed out that sales of a considerable part of their properties had been arranged for settlement at Whitsunday, and that immediate extract was accordingly necessary, dispensed with the reading in the minute book.

Edinburgh Property Association, (O.H.) 1920, 1 S.L.T. 243.

(90)

Powers of trustees appointed by court.

Held that trustees appointed by the Court under sec. 12 of the Trusts Act, 1867, have the same duties and powers as the trustees nominated by the testator, except the power of assuming new trustees unless that is specially conferred by the Court, and accordingly that they had power to appoint and remunerate one of their number as law agent and factor.

Allan's Trustee v. M'Dougall, (O.H.) 1899, 7 S.L.T. 26.

(91)

Assumption.

Lennox, (O.H.) 1901, 9 S.L.T. 271, No. 68, supra.

4. RESIGNATION.

(92)

Trusts Act, 1867, sec. 10—Resignation of whole body of trustees.

A marriage contract executed prior to the Trusts Act, 1861, provided that if any trustee

tee desired to resign, it should be in the power of the other trustees to discharge him. The whole trustees, being desirous to resign, presented a petition, founded on the Trusts Act, 1867, for the appointment of a judicial factor, and for authority to resign. It was opposed by the beneficiaries. **Held** that the trustees had power to resign under the Trusts Acts, 1861 and 1867, and that the power was not excluded by the terms of the marriage contract, and a judicial factor appointed.

Maxwell's Trustees v Maxwell, 1874, 2 R. 71; 12 S.L.R. 39.

(93)

Intimation of resignation to co-trustee—Effect of failure to intimate.

Question, whether a resignation by minute executed and recorded in the form authorised by the Trusts Act, 1867, but not intimated to co-trustees, is effectual in a question with them.

Sinclair v City of Glasgow Bank, 1879, 6 R. 571; 16 S.L.R. 235.

(94)

Effect of intimation—Company.

Held that when one of several persons entered in the register of shareholders of a public company as trustees has divested himself of the office of trustee in terms of sec. 10 of the Act 1867, he has, on intimation thereof to the company (the company not being in liquidation), an absolute right to have his name removed from the register.

Dalglish v Land Feuing Co., 1885, 13 R. 223; 23 S.L.R. 138.

(95)

Acceptance of investment by trustee—Subsequent letter "declining" office of trustee—Resignation not intimated to company.

Ker v City of Glasgow Bank, 1879, 6 R. (H.L.) 52; 4 App.Cas. 549, 598; 16 S.L.R. 285, 507, No. 266, *infra*.

(96)

Revocation of intimated minute of resignation.

Held that a minute of resignation by a trustee, in the form of the Trusts Act, 1867, sec. 10, sched. A, could not be revoked after intimation to the co-trustees, although it did not take effect in terms of the statute till a subsequent date.

Fullarton's Trustees v James, 1895, 23 R. 105; 33 S.L.R. 126; 3 S.L.T. 159.

(97)

Trustees vested with discretionary powers—Application for judicial factor—Possible limitation of factor's powers.

A testator directed his trustees to hold the residue of his trust estate for behoof of his children in alimentary liferent and their issue in fee, with a declaration that the share in the fee should not vest in the grandchildren till they attained the age of twenty-one, and conferred a discretionary power on the trustees to make advances out of capital

to his grandchildren before the fee became vested in them. The trustees, who were gratuitous trustees, having presented a petition for the appointment of a judicial factor and for authority to resign, a curator ad litem appointed to the grandchildren objected to the petition being granted on the ground that it was doubtful whether the Court would authorise a judicial factor to exercise the discretionary power. The Court, while refusing to say ab ante what power the Court might confer on the factor, **held** that the trustees, being gratuitous trustees, had an absolute right to resign, which was not affected by the possibility of the judicial factor appointed in their room having a more limited power of administration.

McConnell's Trustees, 1897, 25 R. 330; 35 S.L.R. 254; 5 S.L.T. 241.

(98)

Resignation of non-gratuitous trustee—Conflict of trustee's private and trust interests.

One of the trustees under a testamentary trust who had accepted office in 1879, and thereby become entitled to a legacy of £50, presented a petition in 1895 for authority to resign. He stated that part of the trust estate consisted of two bonds and dispositions in security, granted by the petitioner and two other persons; that owing to the death of one of his co-obligants, leaving very little estate, and to the sequestration of the estates of the other, the petitioner had come to be practically the sole obligant under the bonds, and that he was unable to fulfil his obligation; that the trustees had resolved in 1892 to enter into possession of the security subjects, and had raised an action against the petitioner and the executor of the deceased co-obligant for payment of the principal and interest under the bonds; that decree in absence had followed; that thereafter negotiations for a compromise had been entered into; and that a direct conflict of interests had thus arisen between the petitioner as an individual and the trust. The petition was not opposed. The Court granted the petition.

Guthrie, 1895, 22 R. 879.

(99)

Alleged inability to devote time to trust affairs.

One of the trustees under a testamentary trust, who had accepted office, becoming thereby entitled to a legacy of £100 under the trust deed, presented a petition for authority to resign, averring that he had accepted office under a misapprehension as to the duties involved; that, owing to the magnitude of the trust estate, the affairs of the trust, if properly attended to by him, were likely to occupy more of his time and attention than, as a man with heavy cares and business responsibilities of his own, he could afford to bestow; that he deemed it prudent and for the best interests of the trust that he should resign; that the trust deed gave no power to resign; and that he was willing to renounce his legacy provided

he was relieved of office. The Court, in respect that no sufficient reason had been stated entitling the petitioner to resign, refused the petition.

Scott v Muir's Trustees, 1894, 22 R. 78; 32 S.L.R. 63; 2 S.L.T. 305.

(100)

Circumstances in which the Court, ex nobili officio, allowed the resignation of two non-gratuitous testamentary trustees who could not resign under the Trusts Acts, and who had not power to resign under the settlement, one of the trustees being of advanced years, and the other being occupied with a public appointment which prevented him attending meetings of trustees.

Alison, 1896, 23 S.L.R. 362.

(101)

Repayment of legacy.

Circumstances in which the Court authorised a testamentary trustee to resign office on repayment of a legacy he had received.

Orphoot, 1897, 24 R. 871; 34 S.L.R. 651; 5 S.L.T. 33.

(102)

Petition for confirmation of resignation—Competency.

One of the trustees under a testamentary trust, who had accepted office in June, 1879, becoming thereby entitled to a legacy of £50 under the trust deed, resigned office in November, 1879, on the ground that a conflict of interests had emerged between him as an individual and the trust, and the resignation was accepted by his co-trustees. The trust deed conferred no power to resign. In 1895, in consequence of a doubt having arisen as to the validity of his resignation, in respect that he was a non-gratuitous trustee, he presented a petition to the Court to authorise and confirm his resignation as at November, 1879. The petition was not opposed. The Court dismissed the petition as incompetent. **Opinions** as to the validity of the resignation reserved.

Maclean, 1895, 22 R. 872; 32 S.L.R. 661; 3 S.L.T. 74.

(103)

Powers of gratuitous trustees conferred by trust deed—Act 1867, sec. 1.

A trustee accepted a legacy under a trust deed, which bequeathed legacies to all the trustees, "but without prejudice to their powers as gratuitous trustees." He was desirous of resigning after an action had been raised against the trustees. **Held** that the trustee was entitled to resign under reservation of all liabilities already incurred by him in respect of the subject-matter of the action.

Assets Co. v Shiress, (O.H.) 1896, 4 S.L.T. 120.

(104)

Implied power to resign conferred in trust deed.

A trust disposition and settlement, which conferred no express power on the trustees to resign, contained a clause declaring that, upon any of the trustees resigning office and accounting for their intromissions, the re-

maining trustees should be bound to discharge them of their office. The truster left legacies to each of his accepting trustees. In a petition presented by two trustees who had acted for some years for authority to resign, **held** that the trustees had power to resign under the deed, and petition refused as unnecessary.

Bunten v Muir, 1894, 21 R. 370; 31 S.L.R. 305; 1 S.L.T. 460.

(105)

Insanity of trustee—Resignation by curator bonis.

Where a trustee became insane, and was placed under curatory, the Court granted authority to his curator bonis to resign his ward's trusts.

Laidlaw, 1882, 10 R. 130; 20 S.L.R. 86.

5. REMOVAL.

(106)

General rule.

Observed (per Lord President Inglis)—"In order to justify us in adopting so extreme a measure as the removal of a trustee, there must be something more than mere irregularity or illegality. We are not in the habit of removing a trustee unless there has been a decided malversation of office."

Gilchrist's Trustees v Dick, 1883, 11 R. 22; 21 S.L.R. 17.

(107)

Disagreement between trustees.

The mere fact that trustees cannot act harmoniously will not justify their removal and the appointment of a judicial factor.

Hope v Hope, 1884, 12 R. 27; 22 S.L.R. 33.

(108)

—A, one of two trustees, who were law agents, wrote to B, his co-trustee, who was law agent in the trust, making a claim for half-fees on all business to be done by B for the trust, and added that on this condition being agreed to he would consider the question of investing the trust funds. B refused to agree to this arrangement. A thereafter refused to approve of an investment suggested by B, assigning no reason for his refusal. He also refused to assume new trustees or to resign. On a petition by the beneficiaries, the Court removed A from the office of trustee, but continued the petition until B had lodged a minute of assumption of two new trustees.

Stewart v Chalmers, 1904, 7 F. 163; 42 S.L.R. 135; 12 S.L.T. 486.

(109)

Absconding trustee—Warrant issued for arrest for embezzlement—Proof.

In a petition for the removal of a sole trustee it was stated that the trustee was believed to have left the country, that a warrant for his apprehension on various charges of embezzlement had been issued, and that proceedings had been raised to have his estate sequestrated. On a remit

by the Division the Junior Lord Ordinary on production of affidavits by the trustee on the sequestrated estate and the procurator-fiscal as to the embezzlement and disappearance of the absconding trustee, removed him from office.

Wishart, (O.H.) 1910, 2 S.L.T. 229.

(110)

Absent trustees—Neglect of trust business.

Four trustees accepted a trust, a majority being a quorum. Two of them, A and B, were sequestrated in 1855, and ceased to reside in Scotland, and thereafter made no answer to communications regarding the management of the trust. On a petition presented by the other two trustees, and concurred in by the beneficiaries, alleging that a beneficial act of management could not be performed owing to the absence and silence of these trustees, and praying for the removal of A and B from the office of trustees, the Court ordered intimation through the Post Office to A and B, and also intimation to their last known agents, with certification; and no appearance having been made, they removed the two absent trustees.

Walker, 1868, 6 M. 973; 5 S.L.R. 543.

(111)

Proof of absence.

In a petition under the Trusts Amendment (Scotland) Act, 1891, sec. 8, for the removal of a trustee on the ground of continuous absence from the United Kingdom the Lord Ordinary refused to accept the extract appointment of a factor loco absentis as sufficient evidence, but allowed the petitioners to lodge affidavits, **holding** that the statute left it in the discretion of the Court to say what evidence should be sufficient.

Dickson's Trustees, (O.H.) 1894, 2 S.L.T. 61.

(112)

Mental incapacity—Medical certificates—Act 1891, sec. 8.

Held (by Lord Stormonth - Darling, after consultation with the other judges) that in a petition for removal of a trustee under sec. 8 of the Trusts (Scotland) Amendment Act, 1891, on the ground of insanity, the Court would be satisfied with such evidence of incapacity as is required in a petition for the appointment of a curator bonis.

Lees, (O.H.) 1893, 1 S.L.T. 42.

(113)

Wilful misconduct.

Where a sole trustee had wilfully failed to carry out the directions of the trust deed, a petition for his removal at the instance of all the parties beneficially interested in the trust was granted.

Whyte, 1891, 28 S.L.R. 901.

(114)

Maladministration.

Circumstances in which **held** that the administration of a trust estate, though in some respects disclosing mistakes and

irregularities, did not afford ground for the removal of the trustee.

Taylor v Adam's Trustees, 1876, 13 S.L.R. 268.

(115)

Mismanagement of trust estate—Bona fides of trustee—No loss to estate.

Where a trustee had invested the trust funds in business, and had kept no sederunt book or trust accounts, but had acted in good faith, and with the result of producing a benefit to the trust estate, the Court, notwithstanding the illegal conduct of the trustee, in the circumstances refused a petition for his removal and the appointment of a judicial factor.

Gilchrist's Trustees v Dick, 1883, 11 R. 22; 21 S.L.R. 17.

(116)

Adverse interest to trust estate.

A trustee, who had brought an action against the trust estate concluding for payment to himself of a certain sum on grounds which involved a charge of fraud against the deceased truster, refused to resign office. The Court, on the petition of two out of his three co-trustees, removed him from the office of trustee.

Cherry v Patrick, 1910 S.C. 32; 47 S.L.R. 17; 1909, 2 S.L.T. 276.

(117)

Sequestration of trustee—Claim by trust on his estate.

A petition at the instance of one of two testamentary trustees and executors, who were also tutors to the truster's pupil children, for the removal of the other trustee from these offices on the ground that his estates had been sequestrated, and that the trust had a claim against his estate, granted.

Whittle v Carruthers, 1896, 23 R. 775; 33 S.L.R. 591; 4 S.L.T. 27.

(118)

Averments of danger to trust funds.

Circumstances in which the Court refused to remove trustees, **holding** that the averments of danger to the trust funds were insufficient and irrelevant.

Dryburgh v Walker's Trustees, 1873, 1 R. 31.

(119)

Petition for removal—Process—Act 1891, sec. 8.

Held that a petition for the removal of a trustee, under sec. 8 of the Trusts Act, 1891, may be presented to a Lord Ordinary.

Johnston v Johnston, 1900, 2 F. 467; 37 S.L.R. 344; 7 S.L.T. 343.

Reid, (O.H.) 1897, 5 S.L.T. 124.

(120)

Non-gratuitous trustee—Incapacity—Appeal to nobile officium—Trusts (Scotland) Amendment Act, 1891, sec. 8.

In a petition to the Inner House for the removal of a trustee on the ground of incapacity, which was presented at common law, and made no reference to the Trusts Act of 1891, **held** that the Court, having

jurisdiction to deal with the question of removal, was not entitled to treat the application as an appeal to its discretion for the exercise of its nobile officium, but was bound to apply the provisions of sec. 8 of the Trusts Act, 1891, and to remove the trustee on proof of his incapacity.

Tod v Marshall, 1895, 23 R. 36; 33 S.L.R. 18; 3 S.L.T. 121.

(121)

Charitable trust—Sequestration of estate—Interim appointment of judicial factor.

Carmont v Mitchell's Trustees, 1883, 10 R. 829; 20 S.L.R. 563. CHARITABLE TRUSTS AND BEQUESTS, No. 60.

6. SUPERSESSON BY APPOINTMENT OF JUDICIAL FACTOR.

[See JUDICIAL FACTOR I. 5.]

IV. ADMINISTRATION OF TRUST.

1. GENERALLY.

(122)

Policy of Scots courts with respect to judicial administration of trusts.

Per Lord Chancellor Selborne—"There is a difference between the course of the courts in England and Scotland respectively as to the grounds which are held sufficient for a general judicial administration at the instance either of fiduciaries or beneficiaries. The Court of Session will not in either case interfere with the administration *extra curiam* except for some special cause shown. The English court, on the other hand, regards the mere exoneration of fiduciaries from the risks and responsibilities of an administration *extra curiam*, and the better security for the interests of beneficiaries afforded by a judicial administration as sufficient reasons (generally) for its intervention."

Orr Ewing's Trustees v Orr Ewing, 1885, 13 R. (H.L.) 1; 10 App.Cas. 453; 22 S.L.R. 911.

(123)

Application by trustees for superintendence order—Application by minority—Competency—Judicial Factors (Scotland) Act, 1889, sec. 18.

An application to the Court by trustees under the Judicial Factors Act, 1889, sec. 18, for a superintendence order with regard to the investment and distribution of the trust estate is competent only at the instance of the trustees as a corporate body or of a majority of them. It cannot be made by a minority, or by a single trustee, who disagree with the administration of the majority.

Coulson v Murison's Trustees, 1920 S.C. 322; 57 S.L.R. 293; 1920, 1 S.L.T. 208.

(124)

Trustees also entitled to act as executors.

Terms of a mutual settlement by a husband and wife nominating certain persons

to be trustees along with the surviving spouse who had been appointed "sole trustee and executor of the predeceaser, held to import their nomination also as executors. **Opinions** that a testamentary conveyance to certain persons as trustees or with a direction to manage does not necessarily imply their appointment as executors.

Martin v Ferguson's Trustees, 1892, 19 R. 474; 29 S.L.R. 401.

(125)

Accountant in Bankruptcy — Bankruptcy (Scotland) Act, 1856, sec. 166.

Question, whether private trusts can be brought under the superintendence of the Accountant in Bankruptcy, in terms of the 166th section of the Bankruptcy (Scotland) Act, 1856.

Raeburn's Trustees, 1888, 15 R. 740.

(126)

Aggregation of separate trust funds — Right to participate in appreciation in value.

Circumstances in which held, in regard to a hospital which had been in existence since prior to 1695, that a special fund, known as the Alexander fund, which had been constituted in that year had since the year 1700 been immixed with and dealt with as part of the funds of the hospital, and must be held to have participated proportionally with the hospital funds in the increase of value of the aggregate funds and property between the years 1700 and 1873; and that a purchase of lands in 1734 was to be regarded as a purchase on account of the joint funds, although the original Alexander bonds were not paid until a subsequent date.

Magistrates of Edinburgh v McLaren, 1879, 8 R. (H.L.) 140; 4 App.Cas. 823; 16 S.L.R. 828.

(127)

Making up trust accounts—"Free annual proceeds"—Income becoming due in one year but not received by trustee until following year.

Held that in making up trust accounts and dealing with the "free annual proceeds" of a trust estate, sums of income becoming due and payable during one financial year, but not actually received by the trustees until the following year, must be treated as part of the revenue of the first year, and not of the second.

Martin's Trustees v Martin, 1904, 41 S.L.R. 588; 12 S.L.T. 95.

2. FACTORS AND LAW AGENTS.

(1) APPOINTMENT AND REMUNERATION.

(128)

Appointment of law agent by trustee—Power of trustees to appoint another agent—Interdict.

A testator gave his trustees a general power of appointing law agents and factors to the trust, and then appointed A to be law agent to the trustees. Held that no permanent right to the law agency was conferred on A, and that he was not entitled

to have other agents employed by the trustees interdicted from acting.

Cormack v Keith & Murray, 1893, 20 R. 977; 30 S.L.R. 852; 1 S.L.T. 152.

(129)

Nomination by trustee of trustee to be factor and law agent—Power of other trustees to terminate appointment.

Terms of a trust settlement under which *opinion* (per Lord Skerrington, Ordinary) that the appointment of a trustee as factor and law agent to the trust was not so expressed as to make the performance of the duties of factor and law agent part of his duty as a trustee, and thus to prevent the other trustees from dismissing him except for some fault or failure of duty.

Nairn's Trustees v R. Stewart & Sons, (O.H.) 1910, 2 S.L.T. 432.

(130)

Appointment of factor by trustee—Powers of trustees to terminate appointment.

A testator by his trust settlement provided that "all business matters in connection with the trust hereby created, including the administration and distribution of my means and estate and the final winding up of the trust, shall be, and the same are hereby entrusted to the said A B, and, failing him, to his firm of A B & Sons, as factors and law agents." *Opinion* (per Lord Skerrington, Ordinary) that the appointment was terminable at the will of the trustees, because the words quoted above did not create an office which A B & Sons were entitled to hold *ad vitam aut culpam*, or confer on A B & Sons a *jus quæsitum* which the trustees could not defeat except on payment of damages.

Nairn's Trustees v R. Stewart & Sons, (O.H.) 1910, 2 S.L.T. 432.

(131)

Appointment of firm by trustee as factors and law agents—Dissolution of firm.

A testator by his trust settlement appointed A B, "and, failing him, his firm of A B & Sons," as factors and law agents of the trust. At the date of the will A B was carrying on business in partnership with his two sons. The testator was predeceased by A B, but survived by the two sons, who carried on the business under the old name. Thereafter one of the sons retired, and the other son continued to carry on the business under the old name. *Held* that the appointment did not lapse by the death of A B, but lapsed on the retirement of the son.

Nairn's Trustees v R. Stewart & Sons, (O.H.) 1910, 2 S.L.T. 432.

(132)

Power to appoint and pay trustee as "factor or cashier"—Whether manager of manufacturing business included under power.

A testator empowered his trustees "to appoint one of their own number to be their factor or cashier, and to allow him a reasonable remuneration for his trouble." *Held*

that this power did not authorise the trustees to appoint and pay one of their own number (he continuing a trustee) as a salaried manager of a manufacturing business which the testator had empowered the trustees to continue.

Mills v Brown's Trustees, 1900, 2 F. 1035; 37 S.L.R. 810; 8 S.L.T. 94.

(133)

Trustees giving one of their number an increased share of trustee's business as manager.

Held that the trustees of a deceased partner, who had become entitled under the contract of copartnership to his share in the business, could not transact with the surviving partner, who was also one of the trustees, to the effect of giving him an increased share of profit, with a view of securing the continuance of his services as managing partner, on the ground that he could not as a trustee be *auctor in rem suam*.

Mackie's Trustees v Mackie, 1875, 2 R. 312; 12 S.L.R. 222.

(134)

Trustee acting as law agent to trust—Informal appointment—Right to remuneration.

A law agent, being one of a body of testamentary trustees who had authority under the testament to appoint a law agent from among their own number, rendered professional services to the trust with the knowledge of his co-trustees, but without having been formally appointed to be law agent to the trust. Circumstances in which the law agent was *held* to have been validly employed, and to be entitled to remuneration for his services. *Observed* that when trustees intend to exercise a power to appoint one of their number to be law agent to the trust, the only proper procedure is to make the appointment and to record it in the minutes of the trust.

Lewis's Trustees v Pirie, 1912 S.C. 574; 49 S.L.R. 439; 1912, 1 S.L.T. 208.

(135)

Business charges — Objections by beneficiary—Personal bar.

Where a beneficiary knew that a trustee acted as law agent to the trust, *held* that he was not entitled *ex post facto* to object to his business charges.

Scott v Handyside's Trustees, 1868, 6 M. 753; 40 J. 387; 5 S.L.R. 195.

(136)

Appointment by trustees appointed by the Court.

Held that trustees appointed by the Court under sec. 12 of the Trusts Act, 1867, have the same duties and powers as the trustees nominated by the testator, except the power of assuming new trustees, and accordingly that they had power to appoint and remunerate one of their number as law agent and factor.

Allan's Trustee v M'Dougall, (O.H.) 1899, 7 S.L.T. 26.

(137)

Sole trustee—Remuneration.

Held that a sole trustee was not entitled to make charges for professional work performed for the trust, although incurred prior to the case of *Home v Pringle*, (H.L.) 1841, 2 Rob.App. 384.

Question, whether the same rule would apply to a trustee appointed agent by his co-trustees.

Aitken v Hunter, 1871, 9 M. 756; 43 J. 413; 8 S.L.R. 510.

(138)

Illegal payment of salary to trustee as manager of manufacturing business—Salary received repaid to trust—Interest.

A body of trustees having improperly appointed one of their number to be a salaried manager, and he having been ordained to repay the salary, held that, having regard to the bona fides of the trustees, and to the fact that the trust had got the benefit of the trustee's services as manager without payment, it was not equitable that the said trustee should be called upon to pay interest.

Mills v Brown's Trustees, 1901, 3 F. 1012; 38 S.L.R. 741; 9 S.L.T. 121.

(139)

Accounting—Accumulation of interest on advances by factor.

In an accounting for trust funds under a family settlement for the 14 years following the truster's death the factor had accumulated interest on his advances, with the principal, at the end of 11 years. Circumstances in which the accumulation was sustained.

Scott v Handyside's Trustees, 1868, 6 M. 753; 40 J. 387; 5 S.L.R. 195.

(2) DUTY OF LAW AGENT.

(140)

Advice as to investments.

Held that it was no part of the duty of a law agent appointed to be factor and law agent to the trustees under a trust disposition and settlement to volunteer his advice to the trustees that a loan made by the testator on personal security was not such an investment of the trust funds as they were entitled to retain, and that therefore he was not liable for loss resulting from their retaining the investment.

Curro v Walker's Trustees, 1889, 16 R. 355; 26 S.L.R. 245.

(141)

—Trustees having been held liable to the beneficiaries on the ground that a trust investment, though falling within the general class authorised by the trust deed, was imprudent and had resulted in loss to the trust, one of the trustees brought an action against the law agent to the trust for relief, on the ground that he had failed in his duty to advise the trustees as to the expediency of the investment. Held (after a proof) that in making the investment the

trustees had not relied on the agent's recommendation, but on their own independent inquiries, and that the agent was not liable in relief. **Opinion** per curiam that it was not the duty of the law agent merely in respect of his appointment as law agent of the trust to make inquiries as to the financial sufficiency of the investment.

Johnstone v Thorburn, 1901, 3 F. 497; 38 S.L.R. 343; 8 S.L.T. 422.

(142)

Duty to beneficiaries.

Beneficiaries under a marriage contract trust held to have no title to sue the law agent to the trust on account of alleged improper investments, because he had not been employed by the pursuers.

Raes v Meek, 1889, 16 R. (H.L.) 31; 14 App.Cas. 558; 27 S.L.R. 8.

(3) RESPONSIBILITY OF TRUSTEES FOR FACTORS AND LAW AGENTS.

(143)

Funds allowed to remain in agent's control.

It is the duty of trustees to keep the trust funds invested or placed in their own names so that they cannot be uplifted without their authority. In an action of damages brought by a beneficiary against trustees, evidence on a consideration of which held that the trustees were personally liable for the loss occasioned by the defalcations of the law agent to the trust, as the trustees had committed a breach of trust in allowing the trust funds to remain in the agent's control.

Ferguson v Paterson, 1900, 2 F. (H.L.) 37; [1900] A.C. 271; 37 S.L.R. 635; 7 S.L.T. 472.

(144)

Failure to supervise law agent—Investment of funds.

Kennedy v Kennedy, 1884, 12 R. 275; 22 S.L.R. 181, No. 282, *infra*.

(145)

Failure to call for accounts—Embezzlement by law agent.

Testamentary trustees, having appointed one of their own number a factor, and carefully superintended his proceedings for a number of years until the major part of the purposes of the trust were fulfilled, instructed him to bring an action of multiplicity for their exoneration and discharge. This process remained in Court for a number of years, during which time the factor rendered his accounts, not to the trustees, who ceased to take any active part in the management of the trust, but to the agent for the beneficiaries. During this period the factor began and continued a practice of keeping in his hands, uninvested, and mixed up with his own funds, a large balance of trust funds. This sum he regularly stated in his accounts, and the beneficiaries received interest on it at 4 per cent. After

some years he became bankrupt. **Held** that the trustees had been guilty of culpa lata by their omission to superintend the actings of the factor, and that they were therefore liable to make good to the beneficiaries the sum which had been lost by his insolvency.

Gordon's Trustees v Scott, 1882, 19 S.L.R. 549.

(146)

—**Extravagant compromise of threatened action—Failure to secure payment of annuities.**

The whole funds of a trust, out of which certain annuities were payable, were lost, and the annuitants thereupon brought an action against the trustees, seeking to make them personally liable for payment of the annuities. They alleged gross negligence against the trustees, and in particular, that they had failed to supervise the actings of their law agent, who eventually turned out to be fraudulent; that they had negligently compromised a threatened action for an extravagant sum; that they had borrowed on the heritable property of the estate to obtain this sum without seeing that the annuities were made prior burdens on that property; and that they had allowed the residuary legatee to obtain possession of the estate without giving security for payment of the annuities. Circumstances in which **held** that the pursuers had not proved that the trustees had failed to exercise that degree of diligence which a man of ordinary prudence would exercise in the management of his own affairs; and defenders assolized. **Observed** (per Lord Atkinson)—“I fail to see how entrusting a law agent of good repute with money to pay estate duty is an act of negligence on the part of a trustee.”

Buchanan v Eaton, 1911 S.C. (H.L.) 40; [1911] A.C. 253; 48 S.L.R. 481; 1911, 1 S.L.T. 422.

(147)

—**Factor withholding payments due to beneficiary.**

A body of trustees under powers contained in the trust deed appointed one of their number their factor. In an action of accounting brought against the trustees, the pursuer alleged that the factor had withheld payments from a beneficiary and had produced receipts “without any money or other consideration being received by her therefor. He procured the said vouchers by abusing the trust and confidence which she reposed in him, and by the exercise of undue influence and dominion over her.” **Held** that the statements of the pursuer quoad hoc were irrelevant and lacking in specification and could not go to proof. **Opinion** reserved as to whether the receipts could be challenged ope exceptionis or must be the subject of a reduction.

Guthrie v Paterson, (O.H.) 1895, 3 S.L.T. 43.

(148)

—**Failure to fulfil trust directions as to audit of factor's accounts.**

A trustor empowered his trustees to

appoint a factor, who might be one of their own number, and directed them “annually, within one month after the 31st day of December in each year during their administration, to cause their factor to make up an account of the intromissions had by him in virtue hereof in the course of the year ending on that date, and to lay the same, with the whole vouchers thereof, before them, to be by them examined and audited.” The trustees did not obey the trustor's direction as to an annual account and audit, but the factor's accounts were occasionally rendered and examined. The factor's account for the period from 1st March, 1888, to 1st June, 1890, which was correct, and was examined by the trustees, showed that the trust estate was due to the factor a balance of £61, and that one and a half year's interest, amounting to £130, was due to heritable creditors. There was no subsequent examination of the factor's accounts by the trustees. In December, 1891, the factor absconded and became bankrupt, leaving unaccounted for a balance of £382 of trust funds, of which £165 had come into his hands between June and December, 1890, and the remainder in 1891. In an action brought by a beneficiary under the trust to have the trustees ordained to replace the balance due by the factor, on the ground of contravention of the trust deed, and separatim, of “gross breach of trust and neglect of duty, whereby a portion of the trust estate had been lost,” it was proved that if the trustees had in January, 1891, called for the factor's account it would have shown that he had in hand £165 of trust funds, subject to his own claim for £61, and to claims by heritable creditors for £130 of arrears of interest. It was proved that prior to December, 1891, the trustees had no cause to doubt the honesty or solvency of the factor. **Held** (1) that there was culpa lata on the part of the trustees in failing to call for the factor's account in January, 1891; (2) that the onus lay upon the trustees to show that if they had called for the account in January, 1891, the balance of £104 then in the hands of the trustee would have been lost notwithstanding, and that the trustees having failed to discharge the onus, they were liable for said sum; (3) that the trustees were not in fault in regard to sums received by the factor after 31st December, 1890, and were not liable therefor.

Carruthers v Carruthers, 1896, 23 R. (H.L.) 55; [1896] A.C. 659; 33 S.L.R. 809; 4 S.L.T. 98.

(149)

—**Trustee acting as law agent—Law agent previously law agent of trustor.**

Trustees **held** liable for the defalcations of the agent of the trust, who was also their co-trustee and had been agent of the trustor and to whom they had handed over the whole control of the trust estate.

Mustard v Mortimer's Trustees, (O.H.) 1899, 7 S.L.T. 71.

(150)

Bank agent also factor for trustees, customers of bank—Fraud—Liability for loss.

Couper's Trustees v National Bank of Scotland, 1889, 16 R. 412; 26 S.L.R. 320. BANK, No. 15.

(4) LAW AGENTS' CHARGES.

(151)

Trustee acting as law agent to trust.

Circumstances in which a law agent was held to have been validly employed by a body of testamentary trustees, and to be entitled to remuneration for his services. Observed that when trustees intend to exercise a power to appoint one of their number to be law agent to the trust, the only proper procedure is to make the appointment and to record it in the minutes of the trust, although, as matter of law, the appointment may competently be proved in other ways.

Lewis's Trustees v Pirie, 1912 S.C. 574; 49 S.L.R. 439; 1912, 1 S.L.T. 208.

(152)

Refusal of creditor to pay law agent's charges on heritable bond granted to trustees—Trust deed allowing trustee to act as law agent.

Testamentary trustees made certain advances to a proprietor of heritable property, who conveyed the property to the trustees in security of the advances. The trustees having entered into possession incurred a debt to one of their number, who was a law agent, for professional charges in connection with the management of the property. The advances having been repaid and the property reconveyed to him, the proprietor refused to pay to the trustees the amount of the law agent's account, on the ground that being himself a trustee the law agent had no right to charge for his services, notwithstanding that the trustees were empowered by the will to employ one of their own number as factor and law agent with the usual remuneration. Held that the proprietor was bound to pay the amount of the account.

Brown's Trustees v Horne, (O.H.) 1904, 12 S.L.T. 614.

(153)

Member of firm.

Where the business of a trust was conducted by a firm of which one of the trustees was a member, held that the rule that agents acting as trustees are not entitled to professional remuneration, but only to reimbursement of actual outlay, was not waived by an indefinite payment by one of the trustees to credit of the account.

Munro's Trustees v Murray & Ferrier, 1871, 9 S.L.R. 174.

(154)

Knowledge of beneficiary.

A beneficiary, who was throughout aware that one of the trustees acted as law agent under the trust, and that the only funds available for payment of the accounts so in-

curred would be funds falling mainly to the beneficiary himself, held, in the circumstances, not entitled to object ex post facto that the business charges were illegal.

Scott v Handyside's Trustees, 1868, 6 M. 753; 40 J. 387; 5 S.L.R. 195.

(155)

Co-trustee claiming share of business charges—Removal.

Stewart v Chalmers, 1904, 7 F. 163; 42 S.L.R. 135; 12 S.L.T. 486, No. 108, supra.

(156)

Scale of charges.

There is a distinction between the scale of charges for attending meetings of trustees when the law agent himself is a trustee, and when he is not, this distinction varying with the circumstances of each case and in particular the subject-matter of the business before the meeting.

Turner v Fraser's Trustees, 1897, 24 R. 673; 34 S.L.R. 495; 4 S.L.T. 344.

(157)

Judicial factor's firm acting as law agents—Fees paid by borrowers of trust funds.

A partner in a firm of law agents was appointed judicial factor on a trust estate. He lent part of the factory funds on heritable security to clients of the firm. The usual fees were paid to the firm by the borrowers in accordance with the table of fees. Held that the factor was not bound to communicate to the factory estate the fees paid by the borrowers to his firm.

Sleigh v Sleigh's Judicial Factor, 1908 S.C. 1112; 45 S.L.R. 826; 16 S.L.T. 244.

(158)

Fees paid by beneficiaries.

A partner in a firm of law agents was appointed judicial factor on a trust estate. The firm did legal work on the employment of the beneficiaries' guardians, and of the beneficiaries themselves after they had attained majority. The work was done in connection with the disbursement of the factory income to the beneficiaries, and also in connection with the preparation of deeds rendered necessary in consequence of certain beneficiaries having applied for an advance of capital. For these services the firm charged fees and commission against the beneficiaries. Held that the factor was not bound to communicate to the factory estate fees and commission recovered from the beneficiaries.

Sleigh v Sleigh's Judicial Factor, 1908 S.C. 1112; 45 S.L.R. 826; 16 S.L.T. 244.

(159)

Liability of trust estate to law agents for expense of unsuccessfully defending an action.

In an action against the sole trustee under a testamentary trust, the final interlocutor decerned against the trustee for payment of a sum of money, and found "that in all questions with the pursuer in this

action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust estate." The trust estate having subsequently been sequestrated on the petition of the successful pursuer of the action, the law agents who had acted for the testamentary trustee claimed to be ranked on the sequestrated estate for their expenses. **Held** that as the law agents for the trustee were presumably acquainted with the whole circumstances of the trust, they were not entitled to rank for their account.

Ferme, Ferme & Williamson v Stephen-son's Trustee, 1905, 7 F. 902; 42 S.L.R. 703; 13 S.L.T. 236.

(160)

Taxation—Beneficiary's right to taxation of law agent's business account after payment of bequest.

A beneficiary having right to a share of residue under a trust settlement granted a discharge to the trustees and their law agent, and afterwards raised an action of accounting against the trustees for the purpose of having the law agent's account taxed, and any overcharge restored to the estate—alleging that he had subsequently discovered that certain of the charges were excessive. **Held** that the pursuer was not precluded by the discharge from raising the action.

M'Farlane v M'Farlane's Trustees, 1897, 24 R. 574; 34 S.L.R. 408; 4 S.L.T. 311.

(161)

Right of trustees to have law agent's accounts taxed by local auditor.

In an action of accounting brought by a beneficiary against testamentary trustees, the pursuer objected to the account of the law agent of the trust. The trust estate was situated in Glasgow, and the law agent was a Glasgow solicitor. The account had been taxed ex parte at the instance of the law agent by the auditor of the Faculty of Procurators in Glasgow, without notice to the pursuer, and the defenders offered to have it remitted back to him. The Lord Ordinary remitted the account to the Auditor of the Court of Session to tax and to report. The defenders reclaimed, and maintained that, in any view, the account should be remitted to a Glasgow accountant to audit, and not to the Auditor of the Court of Session. The Court refused the reclaiming note.

Turner v Fraser's Trustees, 1897, 24 R. 673; 34 S.L.R. 495; 4 S.L.T. 344.

(162)

Payment of charges without taxation—Remit by Court for taxation—Reduction in some items of account and increase in others—Set-off.

Certain beneficiaries under a trust brought an action against the trustees for payment of a sum of money representing part of the trust estate which the pursuers averred the defenders had paid away unwarrantably, in respect that they had paid certain business accounts to the agents of the trust which

had not been audited, and were overcharged, and also commission in connection with investments. The business accounts and charges for commission having been remitted to the Auditor for taxation, he taxed £100 off the business accounts, but stated that he would have allowed £93 more than had been charged in respect of commission. The Lord Ordinary **held** that the defenders were entitled to set off the £93 against the £100.

King v King's Trustees, (O.H.) 1906, 14 S.L.T. 332.

3. RECOVERY OF ESTATE.

(163)

Whether goodwill of business carried on by trustor a trust asset—Personal liability of trustees.

An engineer, who had been many years in India, on his return to this country continued to supply native and other traders in India with cotton presses, which he bought from makers in this country. At the time of his death his average income from this source was about £300 per annum. In an action of accounting brought some years after his death by the beneficiaries under his settlement against his trustees, the pursuers contended that the trustees were bound to account for the value of the goodwill of the testator's business, which they had not sold. The trustees pleaded that, as the deceased's transactions were conducted by him personally, without business premises or clerks, there was no business to which a goodwill could attach. After a proof, **held** that the goodwill was an asset of the deceased's estate which should have been sold by the trustees, and that they fell to be debited with £300 as the value thereof.

Donald v Hodgart's Trustees, 1893, 21 R. 246; 31 S.L.R. 181; 1 S.L.T. 366.

Compare *Philp's Executor v Philp's Executor*, 1894, 21 R. 482; 31 S.L.R. 384; 1 S.L.T. 495. **GOODWILL**, No. 9.

(164)

Neglect to recover debts due to trust.

The tenant of a farm under a current lease died in 1881, leaving a trust settlement, which specially provided that the trustees were not to be "liable singuli in solidum, or for any omissions or neglects of their agents, factors, or managers, . . . but they shall be liable for wilful default, and no further." The trust was accepted by two of the trustees, one of whom had been the trustor's law agent and continued to act as agent and factor on the trust estate. The trustees renounced the lease, and the incoming tenant took over the waygoing crop, manure, &c., on the farm at a valuation, and also made purchases at the displeasing sale, the articles of roup requiring payment either in ready money or by secured bills. His liability to the trust, after paying part of the price, amounted to about £900. The trustees took no steps to recover this debt beyond taking a personal bond from the debtor, and an assignation to an insurance policy on his life for £500, and eventually in the be-

ginning of 1887 the debtor became bankrupt. The beneficiaries thereafter brought a personal action against the trustees to have them found liable to the trust estate for the loss thereby incurred. One of the defenders founded on the fact that he had left the management of the estate in the hands of his co-trustee, the law agent for the trust, and on the clause of immunity in the trust deed. **Held**, after a proof, that there had been gross neglect of duty on the part of both trustees, amounting to "wilful default," for which they were liable.

Carruthers v Cairns, 1890, 17 R. 769; 27 S.L.R. 640.

(165)

Income tax paid in error.

Circumstances in which **held** that private trustees were not personally liable for failure to recover income tax paid in error in respect of income applied for religious purposes.

Free Church of Scotland v Macknight's Trustees, 1916 S.C. 349; 53 S.L.R. 260; 1916, 1 S.L.T. 84.

(166)

Neglect while trustee—Whether a defence to claim as creditor after resignation from trust.

Circumstances in which **held** that the claim of a creditor against a trust estate on which he had formerly been a trustee could not be defeated by allegations of negligence and default on his part when acting as trustee in compelling payment from others, alleged to be debtors to the estate.

Sproat's Factor v M'Lellan, (H.L.) 1877, 14 S.L.R. 454.

4. COMPLETION OF TITLE.

(167)

Title conferred upon trustees by Court of Chancery—Recognition by Scottish courts.

In a trust where the trust estate was situated in England and Ireland as well as Scotland, an application was made in 1870 to the Court of Chancery in England, with a view to cure a defect in the trustees' title, and an order was thereon made which presumably validated the title of the trustees, so far as it was in the power of the Court of Chancery to do so. **Held** that as the trust was as much an English as a Scottish trust, the title conferred on the trustees by the Court of Chancery in 1870 must be recognised as valid, at least until set aside in a competent process.

Rossmore's Trustees v Brownlie, &c., 1877, 5 R. 201; 15 S.L.R. 129.

(168)

Domiciled Englishman owning heritage in Scotland and England—Will executed in England—No express conveyance to trustees—Conveyancing (Scotland) Act, 1874, sec. 46.

A testator domiciled in England died possessed of both English and Scottish heritage. In his will, which was executed in England, there were no words of conveyance of the Scottish heritage in favour of the trustees.

Held that the trustees could make up a title under sec. 46 of the Conveyancing (Scotland) Act, 1874.

Phipps v Phipps' Trustee, (O.H.) 1914, 1 S.L.T. 239.

(169)

Adverse title made up by accepting trustee—Deathbed.

Held that an accepting trustee under a settlement executed on deathbed did not commit a breach of trust in completing his own title as heir-at-law to the heritage conveyed, and in disregarding the deathbed conveyance in favour of a stranger.

Opinion (per Lord Kinnear) that if there had been a breach of trust, prescription would have been of no avail to cure the defect in title.

Thain v Thain, 1891, 18 R. 1196; 28 S.L.R. 902.

(170)

Making up of title to heritage by new trustees in whose favour there is no conveyance—Service by heir of last survivor of former trustees—Conveyancing Act, 1874, sec. 43.

Trustees under a marriage contract acquired right to a heritable bond by assignation to themselves nominatim as trustees, "and the survivor of them, and their or his foresaids and assignees whomsoever." There was no antecedent in the deed to which the expression "their or his foresaids" could refer. All the trustees having died, the survivor of the spouses, by virtue of a power in the marriage contract, appointed new trustees. This deed of appointment contained no conveyance. The heir of the last survivor of the trustees named presented a petition for service as nearest and lawful heir in special to the last survivor in the lands contained in the heritable bond under the provisions of sec. 43 of the Conveyancing Act of 1874. **Held** that this was a competent way of making up the title.

M'Lean, 1892, 19 R. 1043.

(171)

Investment in English company—Authority to curator bonis to register stock in his own name—Acknowledgment of trust by indorsation on stock certificate.

A curator bonis to a lunatic purchased debenture stock of an English railway company as an investment for funds under his charge, and accepted transfers thereof in the name of his ward, per himself. The company, however, intimated that it was contrary to their practice to recognise trusts or limited titles on their register, and declined to register the stock in the ward's name.

In an application by the curator bonis for special power to register the stock in his own name, the Court, in view of the fact that the transfer had already been taken in the name of the ward, granted the authority craved, but **held** that, in investing in the stock of such English companies, it had already been recognised that the appropriate course for a curator bonis was to register in

his own name, and to indorse on the share certificate a statement to the effect that he held the stock for behoof of his ward.

Brodie v London and North-Western Railway Co., (O.H.) 1912, 50 S.L.R. 162; 1912, 2 S.L.T. 447.

See also *Accountant of Court v Crumpton's Curator Bonis*, 1886, 14 R. 55; 24 S.L.R. 38, No. 207, *infra*.

For Intimation of Assignment and Conveyance of Moveables, see *MARRIAGE CONTRACT I. 5 (1) and ASSIGNATION IV. 1.*

5. PAYMENT OF TRUSTER'S DEBTS.

(172)

Payment after expiry of six months—Provision for contingent debts.

Circumstances in which held that testamentary trustees, as they were not trustees for creditors, were entitled after six months to pay the testator's debts *primo venienti* without making provision for a contingent claim arising out of a letter of guarantee granted by the testator. **Observations** on the duties of trustees and executors with regard to payment of debts.

Taylor & Ferguson v Glass's Trustees, 1912 S.C. 165; 49 S.L.R. 78; 1911, 2 S.L.T. 413.

(173)

Payment of trust funds to debtors of trust —Payments to beneficiaries when debts due by trust are unpaid—Personal liability of trustees to creditors of the trust.

A creditor holding personal bonds, granted by a person deceased, for £75,000, and holding also in security thereof an absolute disposition to heritable subjects belonging to the debtor, agreed with the debtor's testamentary trustees to disburden part of the heritable subjects, which had been sold for £75,000, on receiving payment of £25,000, the remaining subjects being considered sufficient to cover the balance of the debt. Some years afterwards, the subjects retained in security having greatly diminished in value, and having, along with the remainder of the trust estate, proved insufficient to cover the debt, the creditor raised an action against the trustees as individuals for payment of trust funds alleged to have been improperly paid while the pursuer's debt remained unpaid (1) to a debtor of the trust, and (2) to the truster's widow and family from the income of the trust as beneficiaries under the trust. After a proof, held that the trustees were personally liable for the sums sued for, as they had failed to show that the pursuer had consented to the payments to the trust debtors and to the beneficiaries being made.

Heritable Securities Investment Association v Miller's Trustees, 1892, 20 R. 675; 30 S.L.R. 354.

(174)

Payment of ordinary debts — Failure to provide for preferential debt.

Liability of trustees who paid a truster's

ordinary debts without retaining enough to pay a preferential debt.

Lamond's Trustees v Croom, 1871, 9 M. 662; 43 J. 321; 8 S.L.R. 412.

Beith v Mackenzie, 1875, 3 R. 185; 13 S.L.R. 113.

(175)

Discharge of claims by a joint stock company, and estate divided—Discharge reduced —Claim in respect of shares held by truster.

A testator died in 1849, having directed his trustees to divide his means among certain beneficiaries. He had been a partner of a joint stock company, and the trustees in 1850, on payment of a certain sum, received a discharge from the secretary of the company of all claims which might be made in respect of the shares which were declared forfeited. The trustees subsequently divided the estate among the beneficiaries. In 1861 the company was wound up under the Companies Acts, and in 1866 it was decided that the discharge to the trustees was invalid, and they were placed on the list of contributories to the company. **Held** that the trustees had paid away the estate in *bona fide* to the legatees, and that, the estate being exhausted, the trustees were not personally liable for a call made on the shares.

Observed (per Lord Justice-Clerk Moncreiff) that if trustees and executors after six months pay away the funds, even to legatees, in the reasonable belief that all debts have been satisfied, they cannot be made personally responsible, although if there were from the first a deficiency of funds the legatees may be obliged to pay back what they have got to the unpaid creditor.

Stewart's Trustees v Evans, 1871, 9 M. 810; 8 S.L.R. 549.

(176)

Proof of debt — Writ of executor and trustee — Writ of beneficiaries — Res inter alios.

In an action of multiplepinding brought by a testamentary trustee, a claim was lodged by A, who averred that "from time to time she made loans of money" to the truster amounting in all to £390. In support of her claim A referred to a probative minute of agreement entered into between the truster's widow, since deceased, who was at the time his executrix and sole trustee, and his eldest son, appended to which was a state of the trust funds, and among the "outstanding debts" was entered "sum on debt due to" A "£390." The state was signed by the widow and eldest son, and appended to it was a docquet signed by the truster's other children, who, with the widow and eldest son, were the beneficiaries under his will, approving of the minute of agreement, and also "approving of and holding as correct, and duly vouched," the state of trust funds. A, to whom the document had not been delivered or exhibited at any time, maintained that the debt of £390 was proved by it, or alternatively that it raised a *prima facie* case of loan which she was entitled to supplement by parole proof. **Held** that the entry of the sum of £390 was ineffectual to

prove a debt due by the trust estate, in respect (a) that the writ in which it occurred was not delivered to A as an acknowledgment by the trustee that the debt was due, and (b) that such an acknowledgment, if delivered to A, would not have been binding on the trust estate.

Dunn's Trustee v Hardy, 1896, 23 R. 621; 33 S.L.R. 438; 3 S.L.T. 329.

(177)

Reference to oath—Discharge.

In an action of multiplepoinding raised by testamentary trustees and executors for their exoneration, they were, in respect of a minute lodged by the defenders approving of the condescendence of the fund in medio, exonerated and discharged. Thereafter claims were lodged by the residuary legatee under the trust settlement, and by one alleging himself to be a creditor and claiming upon a debt which had undergone the triennial prescription. This claimant having been allowed by interlocutor of the Court to prove the constitution and existence of his debt "by the oath of party" proposed to make a reference to the oath of the trustees and executors. **Held** that the reference must be to the oath of the competing claimant, the trustees having been exonerated and discharged.

Opinion (per Lord Shand) that even if there had been no such exoneration the reference could only have been made to the oath of the other claimant, who was the only party opposing or having any interest to oppose.

Farquhar v Farquhar, 1886, 13 R. 596; 23 S.L.R. 407.

6. POWER TO REFER, COMPROMISE, AND DISCHARGE CLAIMS.

(178)

Reference—Prior to Trusts Act, 1867.

Held that prior to the Trusts Act, 1867, testamentary trustees under a deed which contained no power to refer were not entitled to refer important claims of the trust to arbitration.

Thomson's Trustees v Muir, 1867, 6 M. 145; 40 J. 83; 5 S.L.R. 115.

(179)

Curator bonis—Trusts Act, 1867, sec. 2—Trusts (Scotland) Amendment Act, 1884, sec. 2—Retrospective effect.

Opinion (per Lord Kincairney) that sec. 2 of the Trusts (Scotland) Amendment Act, 1884, was declaratory, and therefore retrospective in its effects.

Scott v Craig's Representatives, 1897, 24 R. 462; 34 S.L.R. 304; 4 S.L.T. 264.

(180)

Compromise.

Circumstances in which **held** that trustees, creditors of a company in liquidation, were entitled to enter into an arrangement by way of compromise of their debt with the liquidators.

Observed that in a petition by a liquidator for direction of the Court under the Companies Act, 1862, trustees, who were creditors of the company, had no right to obtain the advice of the Court as to the propriety of a compromise.

City of Glasgow Bank v Geddes's Trustees, 1880, 7 R. 731; 17 S.L.R. 494.

(181)

Alleged extravagant compromise of threatened action—Breach of trust—Personal liability of trustees.

Buchanan v Eaton, 1911 S.C. (H.L.) 40; [1911] A.C. 253; 48 S.L.R. 481; 1911, 1 S.L.T. 422, No. 146, *supra*.

(182)

Compromise by trustee of debt due to trust estate—Subsequent action by beneficiary against debtor—Title to sue.

Hannah v Sharp, (O.H.) 1901, 9 S.L.T. 333, No. 631, *infra*.

(183)

Claims to policy held by trustees—Reasonable compromise.

A policy of insurance bearing to be effected by a lad eighteen years of age on his own life in favour of his heirs, executors, or assigns, passed at once into the possession of the lad's father, who paid all the premiums and retained the policy until his own death twenty-five years afterwards. By his trust disposition and settlement, the father directed his trustees to pay the premium necessary to keep in force the policy, which he described as "belonging to me." After the testator's death, the trustees obtained an assignation from the son of the son's whole interest in the policy upon condition that they should pay the annual premium, and upon the son's death should pay the proceeds to his daughter, after deducting therefrom the total amount of the premiums paid on the policy and the expense of realisation. In a competition between the son's daughter and the residuary legatees of the father, **held** (1) that the policy was the property of the father; but (2) that the question of property was one of difficulty, and that the assignation embodied a reasonable compromise of the son's claims, and was binding on the trustees, and that the son's daughter was entitled to the proceeds of the policy, subject to the deductions specified in the assignation.

Hadden v Bryden, 1899, 1 F. 710; 36 S.L.R. 524; 6 S.L.T. 362.

(184)

Claim by trustee against trust estate.

Question, whether trustees had power to compromise a claim by one of their number against the trust estate.

Lawrie v Lawrie's Trustees, 1892, 19 R. 675; 29 S.L.R. 525.

(185)

Compromise of action to reduce trust deed—Trustee having personal interest—Distribu-

tion of agreed-on sum among beneficiaries—Beneficiaries not consenting to action being defended.

Circumstances under which held that a trustee, whose children had an interest under a will, was entitled to settle an action for reduction of the will on the ground of impecuniation brought by the testator's next of kin and to apportion the outlay on the settlement amongst all the beneficiaries, although two of them did not consent to his defending the action and stood aside.

Russell v Stevenson's Trustee, (O.H.) 1902, 10 S.L.T. 454.

(186)

Discharge of partner of the trustees—Reduction of discharge as gratuitous and sine causa.

In December, 1893, a partner in a large engineering business died, leaving a settlement in which he authorised his trustees to allow his share of the capital in the business "to remain as a loan" to the firm, so long as his trustees considered it reasonably safe to do so. The deceased's capital, ascertained to amount to £19,000, was allowed to remain in the business, which was carried on by the surviving partners, A, B and C, A and B being the surviving trustees. On 23rd December, 1895, C retired from the firm, in terms of an agreement by which he received £9000, the other two partners, A and B, taking over the whole assets of the firm, and binding themselves to "pay and so relieve C of all the obligations due by the firm," and to exhibit to him discharges thereof. The trustees were not parties to this agreement, and no payment was made to the trust. On 3rd November, 1896, A and B, as the surviving trustees of the testator, executed a deed, which, after narrating the agreement, set forth that the granters as trustees foresaid had accepted the new firm and its partners in lieu of the dissolved firm, and discharged the dissolved firm, and C as a partner thereof and as an individual, of all sums due to the trust. On 3rd December, 1896, the new firm and the individual partners granted a trust deed for behoof of their creditors. A and B thereafter assumed D and E as trustees of the testator, and subsequently resigned office. D and E as trustees acceded to the trust for creditors and drew a dividend. D and E as trustees then raised an action against C concluding for payment of the balance of the debt, the summons containing also a conclusion for reduction of the discharge. Held that the discharge granted by A and B as trustees in favour of the defender was entirely gratuitous and sine causa, and was granted by A and B, and obtained by the defender, without any consideration having been received or given therefor, and was invalid and ineffectual to discharge the defender of his liability for the loan, and that the pursuers were entitled to payment from him of the balance of said loan. Held, further, that the pursuers, by acceding to the trust for the creditors of the new firm, were not barred from

claiming payment of the debt from the defender as a partner of the old firm.

Smith v Patrick, 1901, 3 F. (H.L.) 14; [1901] A.C. 282; 38 S.L.R. 613.

7. POWER TO CARRY ON TRUSTER'S BUSINESS OR HOLD HIS INVESTMENTS.

(187)

Executor.

Observations on the difference in position between an executor and a trustee in relation to stock in a joint stock company forming part of the estate to be administered.

Buchan v City of Glasgow Bank, 1879, 6 R. (H.L.) 44; 4 App.Cas. 549 and 583; 16 S.L.R. 512.

(188)

Investments in public companies—Duty to exercise discretion.

A trustee gave a general power to his trustees to continue to hold the investments which he might have at the time of his death in any public companies, "and power to invest the funds . . . which shall devolve upon my daughter in heritage and preference stocks of railways in Scotland or England, and in the stock of Scotch banks." Held that it was competent for the trustees to hold the funds liferented by the daughter in the shape of shares in public trading companies, which were held by the testator at the time of his death, they being bound, however, to exercise their discretion from time to time as to the expediency of retaining them.

Thomson's Trustees v Henderson, 1890, 18 R. 24; 28 S.L.R. 2.

(189)

Company shares—Uncalled liability.

A power given by a testator to his trustees to "hold any investments" he "may die possessed of for such time as they may think fit," entitles the trustees to retain shares in public companies upon which there is an uncalled liability, but only so long as they are satisfied of the safety of the shares as a trust investment, and in the exercise of the power the trustees must act with prudence.

Boyd's Trustees v Boyd, 1908 S.C. 1147; 45 S.L.R. 835; 16 S.L.T. 264.

(190)

Undue delay in realising truster's business—Liability of trustees.

Circumstances in which held that testamentary trustees were not liable for damages on the ground of alleged undue delay in realising the heritable property and licensed businesses, which formed part of a trust estate.

Murray's Trustees v Murray, (O.H.) 1905, 13 S.L.T. 274.

(191)

Shares of unlimited company not realised by trustees—Liability for calls.

Trustees in a testamentary trust continued to hold stock belonging to the truster

in a joint stock banking company with unlimited liability for 13 years after his death. The company having gone into liquidation, held that it was the duty of the trustees to have sold the stock within a reasonable time after the trustor's death, and that they were not entitled to apply the trust funds in payment of calls.

Brownlie v Brownlie's Trustees, 1879, 6 R. 1233; 16 S.L.R. 731.

(192)

Direction to hold specific investment in life-rent and fee—Power to sell during life-rent.

A testator, inter alia, directed her trustees "to hold in their own name my shares of the G. C. Railway Co., and pay the dividends or annual income thereof to" her nephew George "during his lifetime, and immediately after the decease of the said" George "I direct my said trustees to realise the said shares and to pay the price or value thereof" to George's children, whom failing to his heirs, executors, or successors whomsoever. The trustor empowered her trustees "to sell and realise . . . the whole or any part of my estate, heritable or moveable, in so far as may be necessary or proper in their discretion." In 1905, as the shares were yielding no income, George requested the trustees to sell them and to reinvest the proceeds. In a special case presented by the trustees held that the trustees had power to sell the shares.

Galloway v Campbell's Trustees, 1905, 7 F. 931; 42 S.L.R. 712; 13 S.L.T. 256.

(193)

Authority to hold trustor's investments—Formation of new company to replace old company—Right to take new shares.

Held that authority given by a testator to his trustees to continue investments made by him did not authorise them, on the reconstruction of an undertaking by the winding-up of an old company and the formation of a new one, to take up shares in the new company in lieu of shares belonging to the testator in the old one.

Thomson's Trustees v Thomson, 1889, 16 R. 517; 26 S.L.R. 368.

(194)

Power to lend to trustor's firm—Retirement of a partner.

Held that a power given by a testator to lend part of his funds to a firm of which he was a partner applied only to the firm as existing at the date of his death, and did not authorise the trustees to continue the loan to the firm after a partner had retired.

Smith v Patrick, 1901, 3 F. (H.L.) 14; [1901] A.C. 282; 38 S.L.R. 613.

(195)

Money directed to be left invested in a firm for twenty years—Death of partner of firm.

J L, who, with three of his sons, constituted the firm of J L & Son, directed his testamentary trustees "to allow the whole funds belonging to me which may at the

date of my death be lent or invested in the business of J L & Son to remain and continue invested in the hands of and on loan to the firm on their personal security for the period of twenty years from and after my death, they paying interest half-yearly at the rate of 4 per cent." After the trustor's death, the three sons continued to carry on the firm. One of the sons having died, two of the beneficiaries claimed immediate payment of their shares of the estate on the ground that the firm had ceased to exist. Held that, although by the ordinary rule of law the death of a partner dissolved a partnership, yet it was the trustor's intention that the trust funds should remain invested in the business for twenty years, or so long as it remained substantially the same firm and business as it was at his death.

Alexander v Lowson's Trustees, 1890, 17 R. 571; 27 S.L.R. 448.

(196)

Power to continue business—Conversion of business into private limited company.

A testator by his will directed his trustees to realise the business owned and carried on by him, or, alternatively, to "continue" the business if they considered it "desirable to retain the same and conduct it for behoof of" his estate. In the event of realisation the trustees were directed to invest the proceeds in trust investments. The trustees, after carrying on the business for some years, proposed to form it into, and conduct it as, a private limited liability company, with substantially the same capital and under the same control as before. Held that, in the circumstances, the trustees' proposal did not amount to a realisation of the old business (which would require the proceeds to be invested in trust investments), or to the starting of a new business, but was in substance a continuation of the old business.

MacKechnie's Trustees v Macadam, 1912 S.C. 1059; 49 S.L.R. 766; 1912, 2 S.L.T. 44.

(197)

Testamentary trustees becoming partners in a firm—Trustees collectively acting as a partner.

A business was carried on under a deed of copartnership by a body of testamentary trustees, whose interest extended to three-fourths of the capital and profits, and by a surviving partner, whose interest amounted to one-fourth. Held that the trustees collectively constituted one partner, and that they could not act in name of the copartnership without the concurrence of the other partner.

Beveridge v Beveridge, 1872, 10 M. (H.L.) 1; 44 J. 171; L.R., 2 Sc.App. 183; 9 S.L.R. 419.

(198)

Trustees receiving profits of trustor's business carried on by beneficiary for behoof of self and trust—Bankruptcy of firm and beneficiary—Liability of trustees.

A trustor directed his son to carry on his

business for behoof of himself and the truster's family, an annual balance sheet to be made up at the sight of the trustees (who had a discretionary power to wind up the business), and the profits to be divided equally between the son and the truster's widow. This was done for some years. The son became bankrupt both as a firm and an individual. **Held** that the trustees were not partners in the firm.

Paterson's Trustee v Learmont & Co., 1870, 8 M. 500; 42 J. 232.

(199)

Licences bequeathed to beneficiaries—Beneficiaries allowed to conduct licensed businesses for their own behoof—Licences transferred to one of the trustees—Liability of trustees to account for drawings.

A testatrix directed her trustees to make over to her daughters gratuitously licences belonging to her at the date of her death, and to hold her heritable property and pay the income to her daughters. The licences were transferred to one of the trustees, and for upwards of a year after the testatrix's death the trustees allowed the daughters to carry on the licensed businesses, which were conducted in properties belonging to the trust, for their own behoof and rent free. The trust estate having turned out to be insolvent, **held** that the trustees were bound to account to the creditors of the trust for the drawings of the licensed businesses during the period in question.

Murray's Trustees v Murray, (O.H.) 1905, 13 S.L.T. 274.

8. INVESTMENT OF TRUST FUNDS.

(1) DUTY TO INVEST.

(200)

Deposit receipt—Term of payment—Guarantee of indemnity.

A testator empowered his trustees to retain securities upon which his estate might be invested at his death. The trustees accordingly retained certain deposit receipts with a foreign bank which were not yet payable, under a guarantee from two of their number to indemnify them from all loss which they or the trust estate might incur by continuing to hold the said deposit receipts. Before the deposit receipts matured the bank suspended payment. **Held** that neither the trustees nor the guarantors were liable to make good the loss sustained by the bank suspending payment, as it did not appear that the deposit receipts could have been realised before they matured.

Scott's Trustees v Scott, 1895, 23 R. 52; 33 S.L.R. 65; 3 S.L.T. 136.

(201)

Liability of trustees for higher interest—Indemnity clause.

In an action of accounting by beneficiaries against trustees it was proved that, without deliberately considering the question of investment, the defenders had allowed the

trust funds to remain in bank on deposit receipt for a period of nineteen years from April, 1875, during which they yielded interest at the average rate of 2½ per cent. It was proved that during this period safe investments affording over 3 per cent. might have been obtained; but that the expense of investment was saved, that for five years the defenders required to keep money in hand to meet advances to beneficiaries, and that deposit in bank would have been necessary while investments or renewals of investments were being considered. The trust deed provided that the trustees "shall no ways be liable for any omissions in management." **Held** (1) that the trustees had failed to make a proper investment of the trust funds; and (2) that they were bound in their trust accounts to debit themselves with interest at 3 per cent. on the whole funds for the whole period.

Melville v Noble's Trustees, 1896, 24 R. 243; 34 S.L.R. 210; 4 S.L.T. 198.

(202)

Deliberate act of judicial factor in interest of trust estate.

A judicial factor on a trust estate, during the whole course of his administration, kept large sums of money belonging to the trust in bank upon deposit receipt. In answer to a petition for the discharge of the factor (who had died) certain of the beneficiaries maintained that the factor ought to be held liable for the loss of interest caused by keeping the trust funds on deposit receipt. **Held**, after a proof, that the factor was not liable, in respect that it was proved that, having applied his mind to the question, he had deliberately kept the money on deposit receipt because he believed that course to be necessary in the circumstances of the trust; and that while it was probably unnecessary for the factor to keep so much money on deposit receipt, the course adopted by him was not, in the circumstances, unreasonable and imprudent so as to amount to a breach of duty on his part.

Manners v Strong's Judicial Factor, 1902, 4 F. 829; 39 S.L.R. 709; 10 S.L.T. 66.

(2) WHETHER INVESTMENT INTRA VIRES OR ULTRA VIRES.

(a) Authorisation by Statute.

(203)

Act 1884, sec. 3—Investments "approved by Court of Session."

Observations on the expression "approved by the Court of Session" with reference to the investments authorised as trust investments by the Trusts Act, 1884.

Observed (per Lord Adam) that stocks approved of in a particular application for approval were not thereby pronounced to be eligible in all cases or in any other case than that before the Court.

Accountant of Court v Crumpton's Curator Bonis, 1886, 14 R. 55; 24 S.L.R. 38.

(204)

Colonial government stocks.

Selected colonial government stocks approved as an investment for certain trust funds.

Maclean's Trustee, 1884, 12 R. 529; 22 S.L.R. 295.

(205)

Lists of trust investments approved of—Trusts Act, 1884, sec. 3.

Shand, (O.H.) 1893, 1 S.L.T. 145.

Brotherston, (O.H.) 1893, 1 S.L.T. 174.

Cunliffe's Trustees, (O.H.) 1893, 1 S.L.T. 371.

Blackwood's Trustees, (O.H.) 1894, 2 S.L.T. 169.

Milson v Musgrave's Trustees, (O.H.) 1898, 6 S.L.T. 117.

(206)

Railway debentures.

Held that the debentures of railway companies are securities which the Accountant of Court may sanction as investments for funds in the hands of a curator bonis, provided he is satisfied that the special investment is a good and safe one of its class.

Lloyd's Curator, 1877, 5 R. 289.

(207)

Investments in which trust title cannot be registered.

A curator bonis, being a trustee in the meaning of the Trusts Amendment Act, 1884, is entitled to invest the funds in his hands as curator in the purchase of the stocks and in the loans authorised as trust investments by that Act, notwithstanding that the registration of his name as holder of these stocks cannot by the practice of the Bank of England, where a large number of these stocks are transferable, be qualified by any entry to show the character in which he holds them, the Bank of England declining to take cognisance of trusts.

Accountant of Court v Crumpton's Curator Bonis, 1886, 14 R. 55; 24 S.L.R. 38.

See also Brodie v London and North-Western Railway Co., (O.H.) 1912, 50 S.L.R. 162; 1912, 2 S.L.T. 447, No. 171, *supra*.

(208)

Investment on security of harbour rates—Real or heritable security.

The Trusts Amendment Act, 1884, authorised trustees (including judicial factors) to invest in loans (10) "on real or heritable securities," (12) "on debentures secured on rates or taxes levied" under statutory powers by "municipal corporations." A curator bonis lent a sum to Greenock Harbour Trustees, a corporation consisting of the magistrates and council, and nine elected trustees, on a debenture, in which they assigned to the creditor "the rates, duties, and other revenues of the trust." Held that the investment was not on real security nor on a debenture granted by a municipal corporation in the sense of the Act.

Held, further, that it was not a proper

investment, in respect that the revenue of the trust from dues, &c., was precarious.

Hutton v Annan, 1898, 25 R. (H.L.) 23; [1898] A.C. 289; 35 S.L.R. 416.

(209)

A curator bonis lent a sum to Greenock Harbour Trustees, a corporation consisting of the magistrates and council, and nine elected trustees, on a debenture, in which they assigned to the creditor "the rates, duties, and other revenues of the trust." Held that the investment was not on real security nor on a debenture granted by a municipal corporation in the sense of the Act. Held further that it was not a proper investment at common law in respect that the revenue of the trust from dues, &c., was precarious.

Cowan's Trustees v Ferrie's Curator Bonis, 1897, 24 R. 590; 34 S.L.R. 449; 4 S.L.T. 317.

(210)

Investment on security of local rates.

Investments by a curator bonis, secured respectively (1) on rates leviable under the Aberdeen County and Municipal Buildings Act, 1866, and the Sheriff Court Houses Act, 1860, or (2) on rates leviable under the Aberdeenshire Road Act, 1865, approved of. Grainger's Curator, 1876, 3 R. 479; 13 S.L.R. 308.

(211)

Town council lending trust funds to themselves as trustees of statutory undertaking—Security of statutory undertaking.

A town council held a fund in trust for the purpose of rebuilding a bridge. By statute the town council was empowered to borrow money for drainage and tramway purposes, and as trustees of the bridge rebuilding trust the town council lent to themselves as trustees of the statutory undertaking part of the bridge rebuilding trust funds. The loan was duly and well secured and of a class which the law permits to trustees, and the interest was at a rate which is usual in the case of proper trust investments. Held that the loan was not *ultra vires*.

Templeton v Magistrates of Ayr, (O.H.) 1912, 1 S.L.T. 421.

(212)

Local Authorities Loans stock—Purchase at premium—Local Authorities Loans (Scotland) Act, 1891, sec. 44 (2)—Liability of trustees for loss on redemption.

Testamentary trustees, who held funds for behoof of different persons as liferenter and fiar respectively, in 1897 invested part of these funds in a redeemable stock issued under the Local Authorities Loans (Scotland) Act, 1891, at the price of £102 per cent., being £2 per cent. more than the redemption value. They at the same time entered into an arrangement with the liferenter whereby he undertook to repay to the trust this £2 per cent. of excess cost. On the death of the liferenter this £2 per cent. of excess cost had been paid back to the trustees, but at

that time the stock stood in the market at 10 per cent. below its redemption value. **Held** that as the stock had been purchased at a price beyond its redemption value, contrary to sec. 44 (2) of the Local Authorities Loans Act, 1891, the investment was ultra vires of the trustees, and that the arrangement whereby the excess cost was to be repaid to the trust by the liferenter did not make the investment lawful. **Held**, further, that as the investment was ultra vires the trustees were personally liable to restore to the trust the difference between the redemption value of the stock and the amount which it might yield on being realised.

Beveridge's Trustee v Beveridge, 1908 S.C. 791; 45 S.L.R. 585; 15 S.L.T. 1008.

(b) Directions in Trust Deed.

(213)

Power of investment limited by trust deed—Application to nobile officium of the Court for enlarged power.

A testator, by his trust settlement, after directing that a hospital should be endowed with the residue of his estate, stated it to be his "particular desire" that the money devoted to this purpose should be, and remain, invested in landed property, and provided that if any portion of such property should be sold, the proceeds should be invested in the purchase of other land. The trustees presented a petition to the nobile officium of the Court for power to sell a portion of the estate, and to invest the proceeds in "approved trust securities," by which method of investment they stated that a considerably larger income would be obtained than by the purchase of land. The Court refused the petition, **holding** that they had no power to grant a relaxation of the specific restrictions on investment contained in the trust deed.

Scott's Hospital Trustees, 1913 S.C. 289; 50 S.L.R. 199; 1912, 2 S.L.T. 443.

(214)

Wide general powers conferred later in deed—Repugnancy.

A testator by his will provided, *inter alia*, "in addition to the usual powers . . . conferred by law on gratuitous trustees in Scotland, all of which are conferred on my said trustees, I confer upon them full power . . . to invest the trust funds only in the purchase of feu-duties, ground annuals, consols or the preference stock of any dividend paying railway company in the United Kingdom." By the same clause he conferred a number of other powers, some of which were wider than those which gratuitous trustees enjoy either at common law or under statute. **Held** that there was no repugnancy between the part of the clause dealing with investment and the part conferring all powers conferred by law, and that accordingly the trustees had no power of investment beyond that expressed in the deed.

McMillan's Trustees v Children's Catholic Refuge, Glasgow, (O.H.) 1908, 16 S.L.T. 236.

(215)

Power to invest in such securities as the trustees might think proper—Investment in heritable security company and in fully paid-up shares of a limited trading company.

Testamentary trustees who had power to invest the trust funds "in any of the Government securities, or upon heritable security in Scotland, or in such other way, or on such other securities as my trustees shall think proper," and who were declared not to be liable "for loss or depreciation in the investments of the trust funds," (1) lent part of the trust funds on deposit receipt to a heritable security company; and (2) with another portion purchased fully paid-up stock of a limited company. There was a loss on both transactions. **Held** that the first was an investment within the powers of the trustees, and that they were not liable for loss upon it, but that the second was not an investment but the employment of the trust funds in a trading company of which the trustees thereby became partners, and that they were liable for the loss of funds so employed.

Ritchie v Ritchie's Trustees, 1888, 15 R. 1086; 25 S.L.R. 514.

(216)

Loan on heritable security—Buildings in occupation of owner—Investment of funds for alimentary provision—Personal liability of trustees.

Circumstances in which a gratuitous trustee was found personally liable for trust funds lent by him on the security of heritable subjects.

Observed that where trust moneys are lent on the security of heritable subjects, if any part thereof is in the occupation of the owner, the trustee ought to take that fact into consideration in estimating the amount of the rental available for payment of interest on the loan.

Observed that where the primary purpose of a trust is to secure an alimentary provision, the trustee is bound to be specially careful that the security is sufficient to ensure payment of the interest on the loan.

Maclean v Soady's Trustee, 1888, 15 R. 966; 25 S.L.R. 696.

(217)

Buildings in course of erection.

A marriage contract empowered the trustees acting under it (two of whom were the spouses) to lend on, *inter alia*, heritable securities, or personal securities or obligations, and declared that the trustees should not be answerable "for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." The greater part of the trust funds was lent by the trustees on the security of buildings in the course of erection, the rents of which, after their completion, turned out to be insufficient to meet the interest on the loan, and the borrower became bankrupt. While both spouses were alive the children of the marriage, whose interest under the contract

was during the marriage contingent merely, brought an action against the trustees and the law agent to the trust, concluding to have them ordained, "conjunctly and severally, or severally," to restore the money to the trust. The law agent and one of the trustees lodged defences. It appeared from a proof that the buildings were of the nature of a speculation in the particular locality, and that the trustees obtained no separate valuation, nor did their law agent suggest the propriety of obtaining one. **Held** (1) that the trustee, in making the investment, had failed to show the reasonable care that a man of ordinary prudence would exercise in the management of his own business, and therefore (2) that he was personally liable for the trust funds so invested. **Held**, further, that the pursuers had no title to sue the law agent, because he had not been employed by them.

Raes v Meek, 1889, 16 R. (H.L.) 31; 14 App.Cas. 558; 27 S.L.R. 8.

(218)

—Buildings in course of erection are not a security on which a judicial factor is entitled to lend trust funds.

Guild v Glasgow Educational Endowments Board, 1887, 14 R. 944; 24 S.L.R. 676.

(219)

A curator bonis lent funds belonging to his ward on the security of a tenement of houses and shops in a new street which was then in the course of formation in Dundee. When the loan was arranged the buildings were not nearly completed, but when the money was advanced the houses and shops were finished, and were for the most part let, but some workshops, of which the tenement also consisted, were unlet. The loan was made on a valuation by an architect of professional standing in Dundee, employed by the borrower. The valuation was made from plans, the buildings themselves not being examined. The security proved wholly inadequate to meet the loan. In an action by the executor of the ward against the curator bonis, **held** that the security was not such as a trustee ought to have accepted, and that the defender was personally bound to replace the sum lent.

Crabbe v Whyte, 1891, 18 R. 1065; 28 S.L.R. 806.

(220)

"Real security"—Railway mortgage.

Held that an English will authorising investments on "real security" authorised investment on a railway mortgage.

Breatcliff v Bransby's Trustees, 1887, 14 R. 307; 24 S.L.R. 233.

(221)

"Stocks."

By a trust constituted in 1855, the trustees were empowered to invest the trust funds in heritable or moveable securities "or in Government funds, debentures, or purchases of stocks." In March and July, 1881, they invested certain of the funds in fully paid shares of the British Canadian Lumber-

ing and Timber Co., a company incorporated in August, 1880, in Scotland under the Companies Acts to acquire and work timber rights over large tracts of country in different parts of Canada. Evidence on a consideration of which **held** that even if the investment was not ultra vires it was imprudent and hazardous, and that the trustees were liable for the loss.

Henderson v Henderson's Trustees, 1900, 2 F. 1295; 37 S.L.R. 976; 8 S.L.T. 222.

(222)

"Bank stock"—What Scottish banks included.

Trustees under a Scottish marriage contract were empowered to invest the trust funds "on such heritable security, or in such public and Government stock of Great Britain, in bank stock, railway debentures, or in such other security as they may consider eligible and expedient." **Held** (1) that the words "bank stock" must be held to include stock in any of the Scottish banks in good repute at the time of investment, and (2) that the trustees, having purchased stock of the City of Glasgow Bank, were entitled upon the failure of that bank to full and immediate relief from the trust estate from all payments and liabilities arising from the stock so acquired without reference to their own actual payments or ability to pay.

Cuninghame, &c. v Montgomerie, 1879, 6 R. 1333; 16 S.L.R. 801.

(223)

"Any chartered bank"—Registered joint stock bank.

Trustees were empowered by the trust deed to invest the trust funds in the stock of "any chartered bank." **Held** that they were not entitled to invest in the purchase of stock of a joint stock bank with unlimited liability registered under the Companies Act, 1862, and so incorporated by force of that statute.

Sanders v Sanders' Trustees, 1879, 7 R. 157; 17 S.L.R. 75.

(224)

Whether "heritable or good personal security" covers bank stock—Profit on unauthorised investment.

Under a marriage contract a sum of money was conveyed to trustees, who were directed to invest it on "heritable or good personal security." The trustees invested a portion of the sum in the purchase of bank stock, which afterwards rose greatly in value. The husband and wife then raised an action of declarator that the increased value belonged to them. **Held** (1) that the investment was contrary to the provisions of the contract; (2) that any increase in the value of the trust estate in consequence of the investment fell to be added to the capital sum; (3) that the trustees were bound immediately to realise the bank stock and to invest the money according to the provisions of the marriage contract.

Grant v Baillie, 1869, 8 M. 77; 42 J. 38; 7 S.L.R. 37.

(225)

"Debentures granted by any responsible joint stock company"—Deposit receipt.

Terms of a trust settlement which held not to authorise investment in a deposit receipt with the City of Melbourne Bank, Limited.

Roy v Roy's Trustees, (O.H.) 1895, 3 S.L.T. 209.

(226)

Personal security—Loan to persons reputed solvent.

Held that trustees authorised to lend on "personal security" are entitled to lend on personal bond to a person reputed solvent at the time of the transaction.

Lamb v Cochran, (O.H.) 1883, 20 S.L.R. 575.

(227)

—Deposit receipt.

The trustees under an antenuptial contract had power "to invest the trust funds on heritable or good personal security." Held that "personal security" included bonds, &c., depending only on personal obligation, and consequently that investments by the trustees of part of the trust funds on bank deposit receipts were *intra vires*.

Sim v Muir's Trustees, 1906, 8 F. 1091; 43 S.L.R. 795; 14 S.L.T. 291.

(228)

—Loan to member of truster's family on personal security and postponed bonds—Personal liability of trustees.

Circumstances in which testamentary trustees, with the fullest powers of investment on such securities, heritable or personal, as they should think proper, were made personally liable for the loss of a sum lent on insufficient security to a son of the truster, one of the beneficiaries, to enable him to carry on the truster's late business.

Per Lord Watson:—"The power to lend trust money on personal credit may prove very useful to trustees who are in search of a permanent investment, but trustees who make a permanent loan on that footing must, in my opinion, if any loss results from it, justify their action by showing that no safer investment was open to them."

Knox v Mackinnon, 1888, 15 R. (H.L.) 83; 13 App.Cas. 753; 25 S.L.R. 752.

(229)

"Good heritable, moveable, or personal security"—Investment in debentures of a securities company.

A truster authorised his trustees to invest "in good heritable, moveable, or personal security in the government or parliamentary funds in the stock of any chartered or incorporated bank or on debentures or mortgages by railway or other joint stock companies or trusts or corporations of a public nature." The trustees invested in debenture stock of the Mexican Central Railways Securities Co. Held that the words "good heritable, moveable, or personal security" were separable and defined by

themselves a class of authorised investment, and that the investment was therefore within the powers of the trustees.

Cathcart v Baxter's Trustees, 1920, 58 S.L.R. 233; 1921, 1 S.L.T. 150.

(230)

Purchase of heritage—Power not given in trust deed—Power conferred by Court.

Where a trust deed did not give the trustees power to purchase heritage, the Lord Ordinary, after a remit to a man of skill, granted the power.

Wardlaw's Trustees, (O.H.) 1902, 10 S.L.T. 349.

(231)

Foreign investments—Deposit of security writs in foreign country.

By her trust disposition and settlement a testatrix directed her trustees, on the death of a liferenter, to convey her whole estate to A, an American citizen, and gave them special powers of investment in American securities, desiring them to act in this matter under the advice of a New York trust company. The trust funds were invested by the trustees in American securities, which were deposited with this company.

In an action against the trustees by an American creditor of the fiar who had obtained a decree in the Scottish courts adjudging to her the whole interest in the fee, the pursuer sought to interdict the defenders from returning the security writs to America, whence they had been brought. The Court assailed the defenders, holding that the trustees were entitled, under the trust deed, to deposit the securities in New York.

Brower's Executor v Ramsay's Trustees, 1912 S.C. 1374; 49 S.L.R. 962; 1912, 2 S.L.T. 215.

(232)

Prohibited investment—Stocks or shares involving unlimited liability—Implied authority to invest in shares with limited liability.

By the investment clause in a trust disposition and settlement trustees were given power to invest the trust funds "in the guaranteed or preference railway stock or shares, or on mortgages or bonds of any company, commissioners, or corporation in Great Britain, established by or under Act of Parliament; it being my express wish and direction that no part of my trust funds shall be applied in the purchase of stocks or shares of any company or corporation involving unlimited liability on the part of the shareholders." The trustees continued to hold shares in a limited liability oil company which depreciated in value. Held that (1) the word "shares" in the first branch of the investment clause referred to railway shares only and not to shares in any company incorporated by Act of Parliament, and (2) that the express prohibition in the second branch of the clause of investment in stock or shares of an unlimited company did not imply authority to invest in the stock or shares of limited companies, and (3) accordingly that the trustees were liable to rein-

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deed, might have held the investment to be ultra vires.

Warren's Judicial Factor v Warren's Executrix, 1903, 5 F. 890; 40 S.L.R. 653; 11 S.L.T. 93.

(242)

Liability of representatives of deceased trustee—Surviving trustees continuing to hold unauthorised investment.

Testamentary trustees retained and increased without special authority the investments of the truster in a bank which afterwards became insolvent and stopped payment. Three years before the stoppage of the bank one of the trustees died, and the surviving trustee retained the investments which had been made by the trustees jointly. **Held** that the representative of the predeceasing trustee was liable for the loss to the estate by the illegal investment, notwithstanding it had been retained by the surviving trustee during that period.

Hay's Factor v Newlands's Executrix, (O.H.) 1882, 20 S.L.R. 8.

(243)

Illegal investment—Liability for interest—Town council as trustees lending trust funds to themselves as council without security.

A town council held a fund in trust for the purpose of rebuilding a bridge. As trustees of the bridge rebuilding fund the town council lent, by way of temporary loan, part of the trust funds to themselves as a corporation at common law and as owner of the common good. The loan, which was made without security, was repayable at a week's notice with interest at 3 per cent. **Held** that the loan was absolutely illegal, and that the town council must account for interest at 5 per cent.

Templeton v Magistrates of Ayr, (O.H.) 1912, 1 S.L.T. 421.

(244)

Liability for interest.

Circumstances in which the representatives of a trustee, who were found liable to refund to the trust estate a sum of money which had been lost through his negligence, were ordained to pay interest thereon at the rate of 3½ per cent.

Lee's Trustees v Dun, 1913 S.C. (H.L.) 12; [1913] A.C. 213; 50 S.L.R. 520; 1913, 1 S.L.T. 259.

Liability for interest—Rate.

[See also INTEREST IX.]

(245)

Profits on illegal investment.

Trustees who had guaranteed an issue of debenture stock in a colonial bank received as commission a bonus of £80, with which they credited the trust. Under this guarantee they ultimately became liable to take up debenture stock to the value of £1285. They paid for this stock with trust funds, thereby committing a breach of trust. **Held** that the

trustees, in accounting with the beneficiaries for a loss arising from the debenture stock, were entitled to take credit for the bonus of £80.

Henderson v Henderson's Trustees, 1900, 2 F. 1295; 37 S.L.R. 976; 8 S.L.T. 222.

(246)

Right of trustees to deduct expenses of realisation.

In a petition by trustees for authority to sell a house which they had in ignorance purchased ultra vires, the deed under which they acted containing no power to purchase heritable property, though it had appreciated in value, the prayer of the petition asked that the expenses of the application and of the procedure following thereon should be chargeable against the trust estate. The Lord Ordinary authorised the trustees to charge the expenses in question against the trust estate, indicating it as his opinion that when an unauthorised investment yielded a profit, the trust estate was only entitled to the net profit after deducting the expenses of earning the profit.

Lamb's Trustees, (O.H.) 1901, 9 S.L.T. 170.

(ii.) Immunity Clause.

(247)

Observations on the effect of an immunity clause.

Observed (per Lord Macnaghten) that an immunity clause affords no protection against a positive breach of law.

Observed (per Lord Davey) that the immunity from liability for the intromissions of a factor or agent extends only to the acts of a factor or agent properly appointed and acting within the legitimate scope of his agency.

Ferguson v Paterson, 1900, 2 F. (H.L.) 37; [1900] A.C. 271; 37 S.L.R. 635; 7 S.L.T. 472.

(248)

Investment not reasonably safe.

Testamentary trustees, who had power to invest the trust funds in the debenture bonds of Parliamentary trusts, in October, 1880, invested £2000 in a debenture bond for seven years of the Greenock Harbour Trust, the bonds of which were at the time in good repute as a sound investment for trust funds. In 1887 the harbour trust became insolvent, and the investment depreciated to the extent of £1300. In an action by the beneficiaries against the surviving trustee for the loss, **held** that the investment was not a reasonably safe one, that an indemnity clause did not protect the defender, and that he was personally liable for the loss which had accrued.

Opinion (per Lord Adam) that it was immaterial what inquiries the trustees had made before investing, if, in fact, the investment was not a prudent investment.

Alexander v Johnstone, 1899, 1 F. 639; 36 S.L.R. 453; 6 S.L.T. 358.

(249)

Immunity from omissions or neglects of agents, factors, or managers—Liability for “wilful default.”

The tenant of a farm under a current lease died in 1881 leaving a trust settlement, which specially provided that the trustees were not to be “liable singuli in solidum, or for any omissions or neglects of their agents, factors, or managers . . . but they shall be liable for wilful default, and no further.” The trust was accepted by two of the trustees, one of whom had been the truster’s law agent, and continued to act as agent and factor on the trust estate. The trustees renounced the lease, and the incoming tenant took over the waygoing crop, manure, &c., at a valuation, and also made purchases at the dispenishing sale, the articles of roup requiring payment either in ready money or by secured bills. His liability to the trust, after paying part of the price, amounted to about £900. The trustees took no steps to recover this debt beyond taking a personal bond from the debtor, and an assignation to an insurance policy on his life for £500, and eventually in the beginning of 1887 the debtor became bankrupt. The beneficiaries thereafter brought a personal action against the trustees to have them found liable to the trust estate for the loss thereby incurred.

One of the defenders founded on the fact that he had left the management of the estate in the hands of his co-trustee, the law agent for the trust, and on the clause of immunity in the trust deed.

Held, after a proof, that there had been gross neglect of duty on the part of both trustees, amounting to “wilful default,” for which they were liable.

Carruthers v Cairns, 1890, 17 R. 769; 27 S.L.R. 640.

(250)

Liability for “wilful and intentional misdoing.”

A trust deed for the bondholders of a company contained a clause of indemnity in favour of the trustees that none of them should become “liable or responsible for any cause, matter or thing except his own wilful and intentional misdoing.” **Held** that the trustees were liable for gross neglect although they had no sinister motive for what they did.

Wilson v Guthrie Smith, (O.H.) 1894, 2 S.L.T. 338.

(251)

Immunity from liability for “omissions, errors, or neglect of management” — Liability of each trustee for his own actual intromissions only.

In an action by a beneficiary against a body of trustees, the Court, in finding the trustees personally liable for an investment which was not reasonably safe, **held** that the defenders were not protected by an indemnity clause declaring that the trustees should not be liable for omissions, errors, or neglect of management, nor singuli in solidum, but each for his own actual intromissions.

Alexander v Johnstone, 1899, 1 F. 639; 36 S.L.R. 453; 6 S.L.T. 358.

(252)

“Omissions in management.”

A trust deed provided that the trustees “shall no ways be liable for any omissions in management.” Trustees who had allowed the trust funds to remain on deposit receipt for nineteen years **held** liable, notwithstanding the immunity clause, to make good the difference between the rate of interest on deposits and 3 per cent. which would have been earned on safe investments during the period in question.

Melville v Noble’s Trustees, 1896, 24 R. 243; 34 S.L.R. 210; 4 S.L.T. 198.

(253)

“Errors, omissions, or neglect of diligence.”

A trust disposition and settlement provided that the trustees “shall not be liable for omissions, errors, or neglect of management, nor singuli in solidum, but each shall be liable for his own actual intromissions only.” Circumstances in which trustees, who had invested on unsubstantial and insufficient security, were found personally liable, notwithstanding the immunity clause.

Knox v Mackinnon, 1888, 15 R. (H.L.) 83; 13 App.Cas. 753; 25 S.L.R. 752.

(254)

“Errors, omissions, or neglect of diligence” — “Insufficiency of securities.”

A marriage contract provided that the trustees should not be answerable “for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases.”

Held that trustees who, without obtaining a separate valuation, had invested on the security of buildings in the course of erection, were guilty of such negligence that the immunity clause afforded them no protection against personal liability for the loss on the investment.

Raes v Meek, 1889, 16 R. (H.L.) 31; 14 App.Cas. 558; 27 S.L.R. 8.

(255)

Statutory immunity—Independent valuation—Trusts (Scotland) Amendment Act, 1891, sec. 4 (1).

In making loans over heritable property trustees, in order to have the benefit of this section, must prove that they reasonably believed the valuation to have been made by an able practical valuator employed independently of the proprietor.

Boyd v Greig, (O.H.) 1913, 1 S.L.T. 398.

See also *Wood*, (O.H.) 1893, 1 S.L.T. 309, No. 270, *infra*.

(iii.) Relief.

(256)

Claim of indemnity against beneficiary—Act 1891, sec. 6.

Circumstances in which trustees who had invested trust funds in breach of trust, and were held liable for the consequent loss, **held** not entitled at common law or under sec. 6

of the Trusts (Scotland) Amendment Act, 1891, to be indemnified by a beneficiary against this liability.

Henderson v Henderson's Trustees, 1900, 2 F. 1295; 37 S.L.R. 976; 8 S.L.T. 222.

(257)

Improper investment—Marriage trust—Consent by spouses—Liability to make good income and capital—Income payable to husband—Income payable to wife—Act 1891, sec. 6—"Breach of trust."

Part of the trust estate under a marriage contract trust was lost through a former trustee making an improper investment of the trust funds. The trust purposes were that the trustees should pay the income of the estate to the wife for her sole and separate use without power of anticipation, and on her death to her husband, the fee being destined to the children. The trustee, having been found personally liable to replace the sum which had been lost, maintained that the spouses, in respect that they had consented to the investment, were barred from taking any benefit from the money replaced, and that accordingly any part of the sum lost which represented income payable to them or any income which should accrue during their lifetime on the portion of the amount lost which represented capital should be retained by or repaid to him. **Held** that the contention was well founded quoad income payable to the husband but not quoad income payable to the wife, as the trustee was there for her protection and it had not been shown that in consenting to the investment she had acted for herself and was fully informed of the circumstances.

Opinion (per Lord Mackenzie) that the words "breach of trust" contained in sec. 6 of the Trusts (Scotland) Amendment Act, 1891, meant some act of omission which was itself a breach of trust and not one that merely became so by reason of want of care on the part of the trustee.

Cathcart's Trustees v Cathcart, (O.H.) 1907, 15 S.L.T. 646.

(258)

Approval of beneficiaries—Homologation—Alimentary right.

Trustees were directed, *inter alia*, to pay the annual proceeds of trust funds to a lady for her alimentary use. The trustees, with the lady's knowledge and express approval, made an investment which they had no power under the trust deed to make. In an action in which she sought to make them liable for loss on the investment, **held** that she had no power to homologate their acts, so as to affect her alimentary right.

Sanders v Sanders' Trustees, 1879, 7 R. 157; 17 S.L.R. 75.

(259)

Beneficiaries also trustees.

In a case where a trustee was found liable to restore to a trust a sum lost through an improper investment his liability was limited by order of the House of Lords so that no benefit should arise therefrom to beneficiaries

who, being also trustees, had taken part in the breach of trust.

Raes v Meek, 1889, 16 R. (H.L.) 31; 14 App.Cas. 558; 27 S.L.R. 8.

(260)

Calls on ultra vires investment.

When a trustee improperly invests trust funds in a trading company, and thereby incurs personal liability to third parties, the approval of the investment by beneficiaries after it has been made does not imply an obligation on their part to relieve him of loss which he may thereby incur.

Trustees under a marriage contract improperly invested funds of the trust in the purchase of stock in an unlimited joint stock banking company. The liferentrix of the fund afterwards approved of the investment. The company having gone into liquidation, **held** that a trustee had no claim of relief against the liferentrix even to the extent of her interest in the trust funds.

City of Glasgow Bank v Parkhurst, &c., 1880, 7 R. 749; 17 S.L.R. 554.

(261)

Trust to hold particular stock.

Circumstances in which trustees under a latent trust, who were registered as holders of stock of a bank which failed, **held** entitled to relief of calls by the persons truly interested in the stock.

Currer v Loudon, 1879, 7 R. 289; 17 S.L.R. 149.

(262)

Recourse against law agent.

Trustees, who had been found liable to repay to the trust a sum lost owing to an imprudent investment, brought an action of relief against the law agent of the trust. **Held** (after a proof) that the trustees had not relied on the agent's recommendation but on their own independent inquiries, and that accordingly the agent was not liable.

Opinion (per curiam) that it was not the duty of the law agent, without express instructions, to make inquiries in regard to the propriety of the investment.

Johnstone v Thorburn, 1901, 3 F. 497; 38 S.L.R. 343; 8 S.L.T. 422.

(263)

Recourse against trust estate—Calls.

Trustees had, in excess of their powers, invested trust funds in the purchase of stock of a company which went into liquidation. **Held** that they were not entitled to apply the other trust funds in payment of calls, and were bound to re-invest a sum equivalent to that which they had spent in the purchase of the stock.

Sanders v Sanders' Trustees, 1879, 7 R. 157; 17 S.L.R. 75.

(264)

Calls—Investment within powers conferred by trust deed—Stock of bank in good repute.

Cunningham v Montgomerie, 1879, 6 R. 1333; 16 S.L.R. 801, No. 222, *supra*.

(b) As Partner or Shareholder.

(265)

Trustees as partners—Trustee predeceasing a liquidation—Heir of last surviving trustee.

Though trustees are partners, and therefore liable as contributories in a liquidation for calls on shares of a joint stock company registered in their names (*Muir, &c. v City of Glasgow Bank*, 1879, 6 R. (H.L.) 21; 4 App.Cas. 337; 16 S.L.R. 483), the representatives of one of them who has predeceased the liquidation, though his name still stands on the register, are not so liable (*Oswald's Trustees v City of Glasgow Bank*, 1879, 6 R. 461; 16 S.L.R. 221), but the representatives of a trustee, who was himself the last surviving trustee, are.

Low's Executors v City of Glasgow Bank, 1879, 6 R. 830; 17 S.L.R. 3.

(266)

Failure to consult co-trustee in accepting investment—Subsequent acceptance of investment by trustee—Letter "declining" office of trustee—Resignation not intimated to company.

In a marriage contract one of the spouses conveyed to the trustees certain stocks in a joint stock bank. Shortly after the marriage the agent in the trust, without consulting one of the trustees, sent the contract to the bank for the shares to be registered in name of the trustees. The trustee in question accepted transfers of other investments transferred to the trust and signed a dividend warrant on the bank stock, adding the word "trustee" to his name. He did not formally accept the trust, and never attended a meeting of trustees. He left the neighbourhood within a year of the marriage, and on the death of one of the spouses twelve years later wrote to the agent "declining" the office of trustee. This letter was not intimated to the bank.

In the liquidation of the bank eleven years later, **held** (1) that he had accepted the office of trustee; (2) that he had by his actings sanctioned the transfer of the bank stock into his name; and (3) that he had done nothing to denude himself of the same, and was therefore liable as a contributory.

Ker v City of Glasgow Bank, 1879, 6 R. (H.L.) 52; 4 App.Cas. 549, 598; 16 S.L.R. 285, 507.

(267)

Divestiture of stock in a company.

Question, whether a sole surviving trustee can divest himself of stock of a joint stock company standing in his name, without investing some one else by an executed transfer.

Question, whether by resignation merely, without a transfer, a trustee can divest himself of stock in a joint stock company.

Shaw v City of Glasgow Bank, 1878, 6 R. 332; 16 S.L.R. 134.

Tochetti v City of Glasgow Bank, 1879, 6 R. 789; 16 S.L.R. 415.

(c) Under Warrandice Clause.

(268)

Bond and disposition in security by trustee with consent of trustee "as trustee"—Liability of trustee under warrandice clause.

A person infet as trustee in certain heritable subjects, after consenting to certain bonds being granted over them by his author, which were duly recorded, granted a bond and disposition in security for a new loan which he acknowledged to have received, and bound himself to repay "as trustee." In security of the personal obligation he disposed the subjects "as trustee," and the bond further contained this clause—"I grant warrandice." In an action by the last bondholder upon the clause of warrandice against the representative of the trustee, **held** that the trustee was personally bound in warrandice from fact and deed, and was liable for loss arising from the prior bonds to which he was a consenter.

Question, whether he was not personally liable in absolute warrandice.

Horsburgh's Trustees v Welch, 1886, 14 R. 67; 24 S.L.R. 40.

(d) For intra vires Investment.

(269)

Partial assignation of heritable bond—Postponed security—Absence of independent valuation.

The judicial factor upon a marriage contract trust estate brought an action to recover a sum of money from the trustees in consequence of an investment of the trust funds said to have been negligently made. The investment took the form of a loan over heritable property which was postponed to other loans of large amount, and the security taken was a partial assignation of a bond securing a loan of much larger amount. The loan was made on the strength of a valuation by an experienced valuator. There was no evidence to show that the valuator had been instructed for the trust independently of any owner of the property. **Held** that the trustees were bound to repay the sum sued for with interest from the date when the last payment of interest was made.

Boyd v Greig, (O.H.) 1913, 1 S.L.T. 398.

(270)

Prospective loss on investment—Loan on heritable security—Failure to obtain valuation.

In a petition by the representative of a deceased curator bonis the new curator lodged answers objecting to a bond and disposition in security for £24,000 taken by the curator bonis nineteen years previously over an estate which had recently been exposed for sale at £20,000 and had brought no offer. The objector stated that the subjects were from the first of insufficient value as a security and that neither at the time of the loan nor subsequently had he obtained a valuation. The petitioners replied that the subjects had just before the loan been

bought at a public sale for £35,000, and that the rents had always been sufficient to meet the interest. **Held** that there was no clear averment of breach of duty, and no definite claim of loss to the estate; and accordingly that the petitioners were entitled to exoneration and discharge.

Wood, (O.H.) 1893, 1 S.L.T. 309.

(271)

Loss on realisation—Judicial factor.

A judicial factor on a trust estate in 1880 invested £3250 of the trust funds on a bond over house property which was valued at £4150. Interest on the bond having ceased to be paid at Martinmas, 1890, the judicial factor entered into possession of the security subjects and ultimately sold them at a loss to the trust estate of £902. Evidence upon which it was **held** that the judicial factor was not liable for this loss.

Manners v Strong's Judicial Factor, 1902, 4 F. 829; 39 S.L.R. 709; 10 S.L.T. 66.

(272)

Investment authorised by trust deed.

Circumstances in which **held** that a trustee was personally liable to make good the loss incurred on an investment of the trust funds notwithstanding the investment was within the class authorised by the trust deed.

Cathcart's Trustees v Cathcart, (O.H.) 1907, 14 S.L.T. 925.

(273)

Heritable bond by limited company in good repute.

Trustees who were directed to invest a trust estate "on such security, heritable or personal, or in such stocks as they shall think best," invested it by taking an assignment to a bond granted by a heritable security company of limited liability which was in good credit at the date of the investment. The company having afterwards gone into liquidation, **held** that the trustees were not personally liable to the beneficiary in the trust for the loss caused by the failure of the company to pay its debts in full.

Lamb v Cochran, (O.H.) 1883, 20 S.L.R. 575.

9. DUTIES AND LIABILITIES OF TRUSTEES INTER SE.

(274)

Administration—Duty of majority.

Observations on the duty of a majority of trustees towards a dissentient minority in regard to the conduct of the trust affairs.

Darling v Darling, 1898, 25 R. 747; 35 S.L.R. 572; 5 S.L.T. 377.

(275)

Duty of majority to consult minority—Exercise of discretionary power.

A power to trustees to postpone payment of children's shares, which was held to be a power to restrict their interest to a liferent, was exercised by two out of three trustees without notice to the third trustee that the

question was to be considered. **Held** that the exercise of the power was invalid.

Slimon v Slimon's Trustees, (O.H.) 1915, 2 S.L.T. 19.

(276)

Assumption of new trustee by quorum—No notice to co-trustees.

Wyse v Abbott, 1881, 8 R. 983; 19 S.L.R. 77, No. 70, supra.

Malcolm v Goldie, 1895, 22 R. 968; 32 S.L.R. 711; 3 S.L.T. 101, No. 62, supra.

(277)

Appointment of new trustees by Court—Nobile officium—Disagreement among existing trustees.

Aikman, 1881, 9 R. 213; 19 S.L.R. 160, No. 82, supra.

Dick, 1899, 2 F. 316; 37 S.L.R. 232; 7 S.L.T. 276, No. 83, supra.

(278)

Petition for removal of co-trustee—Disagreement between trustees.

Hope v Hope, 1884, 12 R. 27; 22 S.L.R. 33, No. 107, supra.

Stewart v Chalmers, 1904, 7 F. 163; 42 S.L.R. 135; 12 S.L.T. 486, No. 108, supra.

(279)

Petition for removal of absent trustees at instance of co-trustees.

Walker, 1868, 6 M. 973; 5 S.L.R. 543, No. 110, supra.

(280)

Petition for appointment of judicial factor—Disagreement between trustees.

Yuill v Ross, 1900, 3 F. 96; 8 S.L.T. 254. JUDICIAL FACTOR, No. 51.

(281)

Intimation of resignation to co-trustees—Effect of failure to intimate.

Sinclair v City of Glasgow Bank, 1879, 6 R. 571; 16 S.L.R. 235, No. 93, supra.

(282)

Reliance on advice of co-trustee—Investment of funds.

Gratuitous trustees are personally liable only for losses occasioned by the want of such diligence on their part as a man of ordinary prudence uses in his own affairs.

Circumstances in which a trustee resident in England who, relying on the advice of one of his co-trustees, who was also law agent, and on the consent of the other trustee and the approval of the liferenter, had concurred in an investment which turned out to be worthless, was assuolized.

Kennedy, &c. v Kennedy, 1884, 12 R. 275; 22 S.L.R. 181.

(283)

Forgery by one of two trustees—Negligence of trustee and beneficiaries—Personal objection.

A, one of two trustees, who was also the law agent to the trust, forged the signature of the other to a transfer of a bond, part of the trust estate, and embezzled the proceeds. A judicial factor, appointed on the trust

estate, raised an action of reduction of the transfer against the purchasers, who pleaded that the pursuer was barred by the neglect of the co-trustee and of the beneficiaries, in respect that they had left the entire management of the estate to A, although they had good grounds for distrusting him. **Held** (1) that even if negligence on the part of the co-trustee had been proved, it would have been no bar to the action; and (2) that there was no proof of negligence on the part of the beneficiaries.

Adair's Factor v Connell's Trustees, 1894, 22 R. 116; 32 S.L.R. 102; 2 S.L.T. 336.

(284)

Culpa lata — Failure to sue co-trustee for trust funds misappropriated by him—Defence that no loss resulted from failure.

In February, 1895, A, a trustee, discovered that B, his co-trustee, who acted as agent for the trust, had retained in his own hands trust money amounting to £150 which he had been instructed to place on deposit receipt with a bank. A at once applied to B for repayment of the amount, and continued at intervals to press for repayment, but he took no legal proceedings against B, although about midsummer he became suspicious that B was in pecuniary difficulties. A also took no steps to prevent B intrmitting further with the trust funds, and at Whitsunday, 1895, B collected the rent of a heritable property belonging to the trust estate, and retained it for his own purposes. In November, 1895, A was preparing to take legal proceedings against B when B became bankrupt. **Held** (1) that A was guilty of culpa lata in not taking legal proceedings against B without delay for recovery of the £150, but that he was not liable to repay that sum to the trust estates in respect that it was proved that nothing would have been recovered from B if proceedings had been taken against him; (2) that A was guilty of culpa lata in not taking immediate steps, on discovering B's misconduct, to prevent him intrmitting further with the trust funds, and that he was liable to repay to the trust estate the amount of the Whitsunday rent which B had appropriated.

Millar's Trustees v Polson, 1897, 24 R. 1038; 34 S.L.R. 798; 5 S.L.T. 94.

(285)

Negligence of original trustee — Action by assumed trustees — Alleged delay and contributory negligence of pursuers—Right to maintain action for behoof of beneficiaries—Mora.

One of the original trustees acting under a trust disposition and settlement died in 1887, and in the same year two new trustees were assumed, one of whom was also a beneficiary under the trust. In 1909 these new trustees, suing in their capacity as trustees, brought an action against the representatives of the deceased trustee for recovery of the funds which they alleged had been lost to the trust estate through his negligence. The defenders pleaded that the pursuers were barred by mora, and by the fact that they

had themselves been guilty of negligence which had contributed to the loss. **Held** that, as the pursuers were suing as trustees for behoof of the beneficiaries whom they represented, the plea of bar stated against them was unavailing.

Lees's Trustees v Dun, 1913 S.C. (H.L.) 12; [1913] A.C. 213; 50 S.L.R. 520; 1913, 1 S.L.T. 259.

(286)

"All parties not called" — Action ex delicto against one of several trustees.

Beneficiaries in a trust brought an action against one of the trustees to enforce personal liability against him for alleged loss to the trust estate through the trustees having illegally lent trust funds to one of their own number. The Court repelled a plea of "all parties not called" on the ground that the action was founded on delict, involving joint and several liability.

Croskery v Gilmour's Trustees, 1890, 17 R. 697; 27 S.L.R. 490.

[See also PROCESS IV. 6 (4) (e).]

(287)

Representatives of deceased trustee not called in action against trustees for breach of trust.

In an action by a beneficiary against trustees concluding for the restoration of trust funds alleged to have been lost by improper investment, the defenders pleaded "all parties not called," in respect that the representatives of a deceased trustee, who had been a party to the transaction challenged, were not called as defenders. **Held** that the action being for breach of trust it was competent to sue one or more of the trustees without calling all the trustees, and plea repelled.

Observed that any right of relief as between the trustees would not be affected by the action being allowed to proceed.

Observation per curiam on the nature of an action for breach of trust.

Allen v McCombie's Trustees, 1909 S.C. 710; 46 S.L.R. 485; 1909, 1 S.L.T. 296.

10. TRUSTEE AS AUCTIONER IN REM SUAM.

(288)

Company—Director.

Observed that, wherever it can be shown that a trustee has so arranged matters as to obtain an advantage, whether in money or in money's worth, to himself personally, through the execution of his trust, he will not be allowed to retain it, but will be compelled to make it over to his constituent.

Huntington Copper and Sulphur Co. v Henderson, 1877, 4 R. 294; 14 S.L.R. 219; affirmed, 1877, 5 R. (H.L.) 1; 15 S.L.R. 217.

(289)

Purchase of beneficiary's interest by trustee.

When a trustee enters into a transaction with a beneficiary for the purchase of his interest in the trust, it is the duty of the

trustee to give to the beneficiary all the information he possesses as to its value.

Dougan v Macpherson, 1902, 4 F. (H.L.) 7; [1902] A.C. 197; 39 S.L.R. 383; 9 S.L.T. 439.

(290)

Conversion of truster's business into company—Allotment of shares to trustees as individuals.

A business carried on by trustees was turned by them into a limited liability company. Held that as individuals they were not entitled to apply for an allotment of shares.

Taylor v Hillhouse's Trustees, (O.H.) 1901, 9 S.L.T. 31.

(291)

Adverse title made up by accepting trustee.

Thain v Thain, 1891, 18 R. 1196; 28 S.L.R. 902, No. 169, *supra*.

(292)

Purchase of trust property by wife of trustee—Husband and wife.

There is no absolute rule of law that the purchase of trust property by the wife of a trustee is illegal. Circumstances in which held that the purchase of shipping shares belonging to a trust estate by the wife of one of the trustees, on her own initiative, out of her separate estate, and for an adequate price, was valid.

Burrell v Burrell's Trustees, 1915 S.C. 333; 52 S.L.R. 312; 1915, 1 S.L.T. 101.

(293)

Authority to trustee to purchase trust subjects at public roup—Nobile officium.

Circumstances in which testamentary trustees were authorised to sell pictures, forming part of the trust estate, by public roup at prices not less than those put upon them in a valuation, under the express condition that one of the trustees as an individual should be entitled to bid for them as he might desire.

Coats's Trustees, 1914 S.C. 723; 51 S.L.R. 642; 1914, 1 S.L.T. 504.

(294)

Right of beneficiaries to bid.

Shiell v Guthrie's Trustees, 1874, 1 R. 1083; 11 S.L.R. 625, No. 373, *infra*.

(295)

Authority to trustees to purchase trust property—Nobile officium.

By his trust disposition and settlement a factory owner, who had been carrying on business in partnership with his two sons, appointed trustees, of whom two were his two sons, and directed them to dispose of his estate among certain beneficiaries in life-rent and fee. He granted the trustees a general power of sale by public roup or private bargain; and he also authorised them, in the event of his sons continuing to carry on the business, to sell to them the factory and plant at such price as might be fixed by the trustees or determined by arbitration. The sons having offered to purchase

other heritable subjects belonging to the trust which were adjacent to the factory, the trustees presented a petition craving the Court, in the exercise of its nobile officium, to authorise the sale of these subjects to the sons at a fixed price, or otherwise to authorise their exposure at public roup with leave to the sons to bid for them. The Court refused the prayer of the petition.

Hall's Trustees v M'Arthur, 1918 S.C. 646; 55 S.L.R. 609; 1918, 2 S.L.T. 25.

(296)

Trustee taking lease of house to which truster had spes successionis.

A lady's marriage contract conveyed to the trustees her spes successionis to an entailed estate then possessed by her father. One of the trustees who had accepted office obtained from her father a lease of a house on the entailed estate. Held that there was no breach of duty on the part of the trustee in taking the lease, and that it was not reducible on that ground.

Question, whether the tenant's right under the lease was affected on the lady succeeding to the entailed estate.

Montgomerie v Vernon, 1895, 22 R. 465; 32 S.L.R. 393; 2 S.L.T. 548.

(297)

Proprietor of premises refusing new lease to trustees—Trustee resigning trust and taking lease as an individual.

The trustees of a testator were carrying on the testator's business. One of the trustees, who managed the business, ascertained that the proprietor of the premises in which it was carried on was not willing to renew the lease to the trustees. He proposed to take a lease for himself as an individual, and resigned from the trust. In a note of suspension and interdict presented by the other trustees, held that the trustee who had resigned was not entitled to enter into the lease.

Halley's Trustees v Halley, (O.H.) 1920, 2 S.L.T. 343.

(298)

Heritable bond assigned to trustee on payment of full amount.

A widow paid to her husband's testamentary trustees the full amount of a heritable bond in which they were creditors, and before obtaining from them an assignation she was assumed as a trustee. Held that the assignation subsequently granted to her was unobjectionable.

Opinion (per Lord Justice-Clerk Patton) that there is no inherent nullity, nor even anything suspicious, in a trustee obtaining an assignation of a bond due to the trust on his paying the full amount.

Fleming v Imrie, 1868, 6 M. 363; 40 J. 191; 5 S.L.R. 242.

(299)

Curator bonis—Sale of shares belonging to ward to a company of which the curator was director—Right of pre-emption in company—Approval of Accountant of Court.

Held that the sale by a curator bonis to a

company, of which he was a shareholder and the managing director, of shares in the company belonging to his ward, was reducible, notwithstanding that the Accountant of Court had declined to sanction the retention of the shares by the curator, that the company had a right of pre-emption, and that the Accountant had approved of the price.

Dunn v Chambers, 1897, 25 R. 247; 35 S.L.R. 203; 5 S.L.T. 345.

(300)

One trustee partner of trust—Payments of trust funds to trustee as partner—Power of trustees to transact with co-trustee.

Circumstances in which a partnership between testamentary trustees and one of their number was held to be valid.

Question, whether the trustees would have been entitled to enter into a compromise of their co-trustee's claims.

Lawrie v Lawrie's Trustees, 1892, 19 R. 675; 29 S.L.R. 525.

(301)

Power to transact.

Held that the trustees of a deceased partner, who had become entitled under the contract of copartnership to his share in the business, could not transact with the surviving partner, who was also one of the trustees, to the effect of giving him an increased share of profits in consideration of his continuing to act as managing partner, on the ground that he, as one of the trustees, could not be auctor in rem suam.

Mackie's Trustees v Mackie, 1875, 2 R. 312; 12 S.L.R. 222.

(302)

Loan of trust funds to trustee.

Trustees advanced part of the trust funds to the liferenter—one of their number—on the security of a house which he was erecting for his occupation. Held that the transaction was ultra vires, and that the trustees were bound to replace the funds so lent.

Ritchie v Ritchie's Trustees, 1888, 15 R. 1086; 25 S.L.R. 514.

(303)

Trustee also a creditor—Transaction for his own benefit with reference to the subject of the trust.

A proprietor granted to E a bond and disposition in security over his lands, and then conveyed his whole estates to E and others as trustees, to be held and applied by them in payment of the debts due to E and certain other specified creditors. An agreement was afterwards entered into by E as an individual, the trustees, and the debtor, by which it was provided that E should not be bound to accept payment of his bond, which was for £20,000, with interest at 10 per cent., otherwise than by annual instalments of £2000. The truster, having subsequently obtained a large advance to enable him to liquidate his debts, executed a second conveyance of his

estates to another set of trustees, to be held and applied by them, together with the sum so advanced, in payment of the debts due to E and the specified creditors. These trustees accordingly paid all the creditors except E, who declined to accept payment otherwise than by instalments. Held that as no one whose interests E as trustee was bound to protect had been prejudicially affected by the agreement, he was entitled to stand on it, and therefore to refuse to accept immediate payment of his debt.

Lord Ashburton v Escombe, 1892, 20 R. 187; 30 S.L.R. 194.

(304)

Trustees who had, in breach of their trust, purchased trust property, bound to communicate benefit subsequently acquired—Right to perpetuate a breach of trust cannot be acquired by prescription.

By deed of mortification the granter assigned certain sums to the town council of a burgh, to be invested and the proceeds applied towards the maintenance of two professors in a university. The funds were invested in lands, which were managed for many years by the master of mortifications, an officer of the corporation, in whose name the title was taken. Afterwards the town council appointed a portion of the lands, including a strip of land on the sea coast, to be exposed for sale by public roup. The subjects were sold for payment of a feu-duty, and to a person who afterwards declared that he had purchased on behalf of the treasurer of the town, and the latter was infeft upon a charter in his favour for behoof of the magistrates, council, and community. Soon afterwards the town council, upon a representation that they were proprietors of the ground, obtained from the Crown a grant of the salmon fishings ex adverso of the strip of land. Held (1) that the town council still held the lands in trust for the mortification, and that they could plead no prescriptive right against the trust; and (2) that having acquired the fishings in the character of proprietors of the trust property they were bound to communicate the benefit to the trust and hold them for behoof of the trust.

Magistrates of Aberdeen v University of Aberdeen, 1877, 4 R. (H.L.) 48; 2 App.Cas. 544; 14 S.L.R. 490.

(305)

Truster transacting business with trust—Duty to communicate profits.

A trust estate included two public-house businesses, which the trustees continued to carry on. One of the trustees was a wholesale dealer, who before the testator's death had been in the habit of supplying him with whisky and beer. After the testator's death and his acceptance of office as trustee he continued to supply whisky and beer, and he also looked after the management of the businesses, for which he made a charge. Circumstances in which held that the trustee

was liable to communicate to the trust estate the benefit which he had received.

Cherry's Trustees v Patrick, (O.H.) 1911, 2 S.L.T. 313.

Trustee acting as law agent.

[See 2 (1), *supra*.]

11. EXPENSES OF ADMINISTRATION.

(1) GENERALLY.

(306)

Expenses connected with examination and change of investments—Capital or income.

In a trust settlement the testator directed his trustees "in the first place," "to pay all my just and lawful debts . . . and the expenses of every kind connected with the execution of the trust hereby created. . . . In the seventh place, I direct my trustees after fulfilling the foregoing purposes, to hold the residue of my estate for behoof of my said wife in liferent, . . . and . . . to pay to my said wife the free annual produce of the said residue as and when the same is received by my trustees." The testator then gave directions as to the disposal of the residue on his wife's death. **Held** that all expenses connected with the examination of investments from time to time and changes in them fell to be paid out of capital and not out of income.

Smith v Bennie, 1890, 18 R. 44; 28 S.L.R. 32.

(307)

Annual payment to trustees—Retention of capital sum as security, or charge against income.

By his trust disposition and settlement a testator directed his trustees to set aside £16,000 and hold it for the alimentary liferent use of certain liferenters and for certain other beneficiaries in fee, and to divide the residue of his estate among his residuary legatees. He also directed his trustees to pay to themselves annually the sum of twenty-five guineas. **Held** that the trustees were not entitled, before distributing the residue, to retain a capital sum to meet the annual payment to themselves, but were entitled to charge that payment against the revenue of the £16,000 which they continued to hold for the liferenters.

Kirkwood v Kirkwood's Trustees, 1912 S.C. 613; 49 S.L.R. 458; 1912, 1 S.L.T. 251.

(308)

Premiums of insurance—Capital or income.

Held that payments of premiums of insurance against fire are a proper charge against the revenue of trust property.

Brown v Soutar and Meacher, 1870, 8 M. 702; 42 J. 359; 7 S.L.R. 405.

(309)

Premiums of insurance paid by one trustee

—Right of recovery against trust—Policy not matured.

A trustee who has made advances for the preservation of the trust estate can recover from the estate only to the extent to which

it was lucratus by his action. A trustee, who had paid premiums on a policy of insurance forming part of the trust estate, before the policy matured sued the trustees for the amount of his advances. Action dismissed as premature.

Brown v Meek's Trustees, (O.H.) 1896, 4 S.L.T. 46.

(310)

Repairs, renewal and depreciation of plant—Manufactory carried on by testamentary trustees for liferenter and fiar.

An iron manufacturer, by his trust disposition and settlement, directed his trustees to pay to his widow the whole free income or annual produce of the residue of his estate as the same should arise, and authorised his trustees, with his widow's consent, to carry on his iron business "in such way and manner as to my trustees shall seem in their discretion best for the interest of my trust estate." The trustees, with the widow's consent, carried on the business. In an action brought by the widow against the trustees, **held** that the defenders were not entitled to set off against the pursuer, as charges against income, any sums by way of depreciation on buildings or plant other than sums actually expended by the said trustees in the reasonable maintenance, repair and renewal of buildings and plant forming part of the residue of the said estate.

Ellis v Ellis' Trustees, 1895, 22 R. 764; 32 S.L.R. 611; 3 S.L.T. 64.

(311)

Extraordinary repairs to heritable property—Capital or income—Power to charge estate.

Pottie, 1902, 4 F. 876; 39 S.L.R. 654; 10 S.L.T. 107, No. 395, *infra*.

(312)

Deduction of expenses in ascertaining "yearly value"—Factor's remuneration.

Held that in ascertaining the yearly value of a landed estate within the meaning of a trust disposition and settlement the factor's remuneration was not a good deduction from the gross rental.

Earl of Wharncliffe's Trustees v Earl of Wharncliffe's Trustees, (O.H.) 1904, 12 S.L.T. 287.

(313)

Death duties—Expenses of "this trust"—Estate duty—Legacy duty.

A testator directed the residue after payment of debts to be divided into five shares, and after disposing of three and three-fourths of these shares directed that the remaining one and one-fourth share should be devoted to certain purposes, and *inter alia*, "discharging the necessary expenses connected with this trust." **Held** that the whole expenses of administering the will were chargeable against the one and one-fourth share, but that such expenses did not include estate duty and legacy duty.

Michie's Executors v Michie, 1905, 7 F. 509; 42 S.L.R. 386; 12 S.L.T. 738.

(314)

—Estate duty—Settlement estate duty
—Succession duty—Debt chargeable on fee of estate—Bond and disposition in security
—Expenses of settling duties—Petition to charge expenses of petition—Finance Act, 1894, sec. 9 (5)—Succession Duty Act, 1853, sec. 44.

Trustees acting under a will, who had made up a title to heritage comprised in the trust and paid the estate, settlement estate, and succession duties due in respect thereof on the death of the truster, presented a petition for authority, under sec. 9 (5) of the Finance Act, 1894, and sec. 44 of the Succession Duty Act, 1853, to grant a bond and disposition in security over the property for the amount of the duties so paid and the expenses of settling the same and of the petition. The will contained no power to borrow, and it was stated for the petitioners that no person could be found willing to lend the amount on the security of the estate without the sanction of the Court. **Held** that the trustees were entitled to authority to charge the property by way of bond and disposition in security for the duties paid, and also for the expenses incurred in settling the duties, but not for the expenses of the petition. **Opinions** that but for the circumstances that the trustees had no power to borrow, and that no lender could be found willing to advance the amount without the authority of the Court, the petition, looking to the statutory powers of the trustees, would have been unnecessary.

Harris' Trustees v Harris, 1904, 6 F. 470; 41 S.L.R. 357; 11 S.L.T. 726.

(315)

Income tax—Deductions—Expense of distributing profits under trust deed—Income Tax Act, 1842, sec. 100, sched. D, case 5.

Testamentary trustees were assessed for income tax under case 5, sched. D, of the Income Tax Act, 1842, on the full amount received by them in Great Britain of trade profits made in India. The trustees claimed deduction of the expense of the trust administration in Great Britain, on the ground that the beneficiaries on whom the income tax fell could only receive the profits subject to this deduction. **Held** that the deduction could not be allowed, as the trust administration was not an expenditure for trade purposes.

Inland Revenue v Macdonald's Trustees, 1894, 22 R. 88; 32 S.L.R. 85; 2 S.L.T. 317.

(316)

Public burdens—Incidence as between trustees and liferenter of furnished house.

Held that a widow, who under her husband's settlement had the use of a furnished house, was liable in rates payable in respect of occupancy, but not for feu-duty, nor rates payable in respect of property, nor for repairs of pavement and roof.

Clark, &c., 1871, 9 M. 435; 43 J. 213; 8 S.L.R. 314.

(317)

A B executed a settlement in which he directed his trustees, "in respect Miss E D has arranged with me to take entire charge of my children in the event of my decease, I direct my trustees to make over to her" his house, with the furniture therein, and "that during all the days of her natural life, and so long as she shall not enter into any marriage after my decease," and to pay her an alimentary annuity of £500, it being declared that "the foresaid liferent and alimentary provisions shall be subject to the burden of maintaining" and educating his children so long as they should not be able to support themselves. A B subsequently married E D. In a question between A B's trustees and his widow in regard to the incidence of burdens connected with the house, **held** (1) upon the construction of the deed that the widow had merely a right of occupancy, and therefore (2) that the trustees were liable for feu-duty, assessments in respect of property, and landlord's repairs, but that the widow was liable for assessments in respect of occupancy and for tenant's repairs.

Bayne's Trustees v Bayne, 1894, 22 R. 26; 32 S.L.R. 31; 2 S.L.T. 276.

(318)

—Gas and water rates.

A truster provided that his widow should have the liferent use of his house "free of rent, feu-duty, ground annual, taxes, and all other deductions." **Held** that the trustees were not bound to pay gas and water rates for the widow.

Rodger's Trustees v Rodger, 1875, 2 R. 294; 12 S.L.R. 204.

(319)

Liability to put house in tenantable repair—Incidence as between trustees and liferenter.

A testator directed that his wife should be entitled to occupy during her life a house belonging to him at such rent as appeared as the annual value in the valuation roll. **Held** that the trustees were bound to put the house into proper tenantable condition and repair, and maintain it in the like condition during the widow's lifetime, and pay all expenses of doing so except the expenses of repairs proper to a tenant.

Kinloch's Trustees v Kinloch, 1880, 7 R. 596; 17 S.L.R. 444.

(320)

Right of retention.

Per Lord M'Laren—"If a private trust be superseded by sequestration or by the appointment of a judicial factor, the private trustee does not lose his right of retention of the trust estate for his necessary outlay in the fair administration of the trust."

MacGregor v MacLennan's Trustee, 1898, 25 R. 482; 35 S.L.R. 388; 5 S.L.T. 287.

(321)

Statutory trust—Expenses of applying for statutory powers.

Trustees are not entitled to expend trust funds in applying to Parliament for additional powers, unless authority has been given them to do so either expressly or by implication.

Cowan v Law, 1872, 10 M. 578; 44 J. 281; 9 S.L.R. 341.

(322)

—The trustees acting under the Edinburgh and District Waterworks Act applied to Parliament for powers to bring in an additional supply of water. This application was opposed by a number of rate-payers. The bill was passed by the House of Commons, but was thrown out by the House of Lords. Great expense had been incurred in promoting the bill, and the trustees proposed to defray these out of the trust funds. **Held** that the statutes under which they acted did not authorise the trustees to apply to Parliament for the additional powers sought, and interdict granted against paying the costs out of the trust funds.

Cowan v Law, 1872, 10 M. 578; 44 J. 281; 9 S.L.R. 341.

(323)

—Commissioners of supply **held** not entitled to apply the county general assessments to paying costs of opposing the Roads and Bridges Bill, 1878.

Wakefield v Commissioners of Supply of Renfrewshire, 1878, 6 R. 259; 16 S.L.R. 183.

(324)

—**Held** that costs incurred by the water commissioners of a burgh in unsuccessfully opposing a bill in Parliament promoted by certain inhabitants of the burgh for the purpose of extending the water supply and the area of distribution could not be charged against the trust funds.

Observations (per Lord Justice-Clerk Moncreiff) on the cases in which the promotion or opposition to bills in Parliament can be regarded as proper acts of administration on the part of statutory trustees.

Perth Water Commissioners v M'Donald, &c., 1879, 6 R. 1050; 16 S.L.R. 619.

(325)

Municipal Corporation (Burgh Funds) Act, 1872.

Opinion per curiam, that the Municipal Corporation (Burgh Funds) Act, 1872, enabling governing bodies in certain cases to apply the funds or rates under their charge in promoting or opposing local or personal bills in Parliament, applies to Scotland.

Perth Water Commissioners v M'Donald, 1879, 6 R. 1050; 16 S.L.R. 619.

(2) LITIGATION.

(326)

Action to reduce trust deed—Curator ad litem appointed to beneficiary—Duty of

trustee to supply curator with funds to defend the action.

In an action to reduce a trust deed a curator ad litem was appointed to the beneficiaries who were all in minority or pupilarity. The trustee withdrew his defences, leaving the curator to defend the action if so advised. **Held** that the trustee was bound to put the curator in funds to enable him to take legal advice as to the advisability of defending the action, and if he decided to defend, that the trustee was bound to supply him with the necessary funds.

Smith v Smith's Trustee, (O.H.) 1900, 8 S.L.T. 226.

See also Cathcart v Cathcart's Trustees, (O.H.) 1906, 13 S.L.T. 909. **EXPENSES**, No. 493.

(327)

Unsuccessful defence of action of reduction of trust deed.

It is a question of circumstances whether testamentary trustees who have unsuccessfully defended the trust deed in an action of reduction will be allowed their expenses out of the estate.

Watson v Watson's Trustees, 1875, 2 R. 344; 12 S.L.R. 266.

(328)

—Circumstances in which testamentary trustees who had unsuccessfully defended a trust disposition in an action of reduction were allowed their expenses out of the trust estate.

Crichton v Henderson's Trustees, 1898, 1 F. 24; 36 S.L.R. 22; 6 S.L.T. 165.

(329)

Defence of character.

Circumstances in which testamentary trustees, who had unsuccessfully defended a trust deed in an action of reduction in which they were charged with impetrating the deed and received a special finding of the jury exonerating them, were allowed their expenses out of the trust estate.

Ross v Ross's Trustees, 1898, 25 R. 897; 35 S.L.R. 699; 6 S.L.T. 21.

(330)

Delay in raising action.

In an action of count, reckoning, and payment and of reduction of the trust deed which had been bona fide acted on for fifteen years the Court reduced the deed, but **held** that the trustee acting thereunder was not bound to denude without taking the judgment of the Court, and that he was entitled to full expenses.

Allan v M'Donald, 1871, 8 S.L.R. 512.

(331)

Motion for new trial.

Circumstances in which a body of testamentary trustees—who had unsuccessfully defended an action for reduction of the trust deed, and had, along with the trust estate, been found liable in expenses—were allowed expenses out of the trust estate, to be taxed

as between agent and client; but not the expenses of an unsuccessful motion for a new trial.

Merrilees v Leckie's Trustees, 1908 S.C. 576; 45 S.L.R. 449; 15 S.L.T. 912.

(332)

———**Trustees defending along with next of kin.**

In an action of reduction of a testamentary trust deed, on the ground of facility and fraud and circumvention, directed against the trustees under the deed and the next of kin, whose interest it was to support the deed, the pursuers were successful in a jury trial, and in resisting a motion to set aside the verdict. The defenders were held entitled to the expenses of one defence, up to the date of the verdict, out of the trust funds.

Munro v Strain, 1874, 1 R. 1039; 11 S.L.R. 583.

(333)

———**Law agents of trustees.**

In an action against the sole trustee under a testamentary trust, the final interlocutor decreed against the trustee for payment of a sum of money, and found "that in all questions with the pursuer in this action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust estate." The trust estate having subsequently been sequestrated on the petition of the successful pursuer of the action, the law agents who had acted for the testamentary trustee claimed to be ranked on the sequestrated estate for their expenses. Held that as the law agents for the trustee were presumably acquainted with the whole circumstances of the trust, and took the risk of the contingency that, as a result of the litigation, the trust estate might not be available for their costs, they were not entitled to rank for their account.

Ferne, Ferne & Williamson v Stephenson's Trustee, 1905, 7 F. 902; 42 S.L.R. 703; 13 S.L.T. 236.

(334)

———**Defence of trust estate.**

In an action against trustees, the sheriff, although of opinion that the trustees had acted in good faith, and for the benefit of the property the fee of which they held in trust, found that they acted illegally, and gave decree for £5 of damages. He also found the trustees jointly and severally liable in expenses, which he modified to one-half. The trustees paid the expenses out of the trust estate. A beneficiary then brought an action against them on the ground, *inter alia*, that the expenses of the previous action had been illegally paid out of the trust funds. Held that the trustees had acted in good faith and reasonably, and that they were entitled to charge their expenses against the trust estate.

Gibson v Caddall's Trustees, 1895, 22 R. 889; 32 S.L.R. 668; 3 S.L.T. 81.

(335)

———**Liability of share of party interested in estate and litigating with trustees—Unsuccessful action by trustees against a residuary legatee.**

In an action by testamentary trustees for recovery of a sum of money alleged to form part of the trust estate the Court held that the defender fell to be assoldied, and that she was entitled to expenses. The defender, who was one of the residuary legatees under the trust settlement, moved for a finding that no part of the expenses of the litigation should be paid out of her share of the residue. The Court granted the motion.

Easson's Trustees v Mailer, 1901, 3 F. 778; 38 S.L.R. 700; 9 S.L.T. 84.

(336)

———**Objection to unauthorised payments out of estate.**

In an action of multiplepounding raised in name of a trustee, a claimant objected to the condescendence of the fund in medio, in so far as the trustee took credit for a payment he had made to C, on the ground that C had no valid claim. The trustee maintained that C had a valid claim. The Court sustained the objection. Held that the trustee was personally liable in expenses to the objector in respect of his mistaken and precipitate action, and that he was not entitled to charge his own expenses against the objector's share of the fund in medio.

Buttercase & Geddie's Trustee v Geddie, 1897, 24 R. 1128; 34 S.L.R. 844; 5 S.L.T. 108.

(337)

———**Beneficiary's trustee in bankruptcy.**

The question as to whether the legal expenses incurred in defending a trust estate against the claims of a trustee in bankruptcy should be charged against the general trust estate or against the share of one of the beneficiaries depends upon whether the litigation has been conducted solely in the interests of the beneficiary or also in the interests of the trust estate generally. Circumstances in which the expenses were held to form a good charge against the trust funds.

Paton v Paton's Trustees, 1903, 5 F. 528; 40 S.L.R. 402; 10 S.L.T. 707.

(338)

———**Widow successful in claiming *jus relictæ*.**

In an action by a widow against the husband's testamentary trustee, in which she was successful in claiming, *inter alia*, *jus relictæ*, she was found entitled to expenses as against the defender personally. Held that the defender was not entitled to deduct the expenses which he had incurred in the action, or those in which he had been found liable to the pursuer, from the trust estate in computing the amount of her *jus relictæ*; quoad ultra reserving the defender's right of relief against the trust estate.

Anderson v Anderson's Trustee, 1901, 4 F. 96; 39 S.L.R. 94; 9 S.L.T. 245.

(339)

Personal liability of trustees—Reduction of ultra vires resolution.

In an action of reduction of a resolution of certain testamentary trustees, **held** that the resolution was incompetent and the trustees found liable in expenses as individuals.

Adam v Forsyth's Trustees, 1867, 6 M. 31; 40 J. 23; 5 S.L.R. 26.

(340)

Incompetent multipointing.

Circumstances in which trustees, who had raised for their exoneration and discharge an action of multipointing which was found to be incompetent, were **held** personally liable in expenses.

Mackenzie's Trustees v Sutherland, 1895, 22 R. 233; 32 S.L.R. 172; 2 S.L.T. 422.

(341)

Unsuccessful defence.

Trustees having raised an action of multipointing, one of the claimants brought a supplementary action which the trustees unsuccessfully opposed as incompetent. **Held** that they were not entitled to debit the trust funds with any part of the expenses incurred by them in resisting the supplementary action.

Bonar's Trustees v Cowan, 1868, 41 J. 38.

(342)

Opposition to appointment of judicial factor.

Circumstances in which certain testamentary trustees, who had unsuccessfully opposed the appointment of a judicial factor, were found liable in expenses.

Stewart v Morrison, 1892, 19 R. 1009; 29 S.L.R. 846.

(343)

Opposition to appointment of judicial factor—Petition for removal of trustees—Petition at instance of one trustee—Compromise.

One of a body of trustees presented a petition for the removal of the others and the appointment of a judicial factor; the other trustees resisted, but finally compromised upon the footing that the trust should be continued under the supervision of the Accountant of Court. **Held** that the petitioner was entitled to his expenses, taxed as between agent and client, out of the trust estate, and that the respondents were not entitled to charge the trust estate with any of the expenses of their opposition.

Neilson v Stewart's Trustees, 1905, 42 S.L.R. 434; 12 S.L.T. 785.

(344)

Relief of judicial expenses decerned for against trustee—Statutory trustees—Trustees sued as navigation commissioners and not as individuals—Reservation of question of personal liability.

Young v Nith Commissioners, 1876, 3 R. 991; 13 S.L.R. 636. EXPENSES, No. 267.

(345)

Possible exhaustion of estate.

Bonner's Trustee v Bonner, 1902, 4 F. 429; 39 S.L.R. 532; 9 S.L.T. 361. EXPENSES, No. 266.

(346)

Action against trustees personally—Extra-judicial expenses.

Circumstances in which a body of trustees who successfully defended an action brought against them at the instance of a beneficiary were **held** to be entitled to their expenses taxed as between agent and client, and also to charge the trust estate before accounting to the pursuer with all extrajudicial charges incurred by them in their controversy with him.

Peat v Peat's Trustees, 1901, 38 S.L.R. 269.

(347)

Extrajudicial expenses incurred in defending an action after resigning office.

Trustees under a marriage contract, after they had been allowed to resign and a judicial factor had been appointed on the trust estate, but before they had been discharged, were sued as individuals by the judicial factor to account for their intrusions as trustees. They were assailed and found entitled to expenses. In a petition by the trustees for discharge, **held** that they were entitled to retain their extrajudicial expenses incurred by them in the action out of trust funds which were still in their hands.

Erentz's Trustees v Erentz's Judicial Factor, 1897, 25 R. 53; 35 S.L.R. 93; 5 S.L.T. 180.

(348)

Unauthorised defence by individual trustee—Right to indemnification out of trust funds—Recompense.

If an individual trustee, without authority from his co-trustees, take upon himself the defence of an action directed against the trust, he cannot recover his expenditure from the trust estate, unless he show that his intervention has resulted in benefit to the trust estate.

Stewart v Dobie's Trustees, 1899, 1 F. 1183; 36 S.L.R. 917; 7 S.L.T. 125.

12. POWERS TO DEAL WITH HERITAGE.**(1) POWER TO SELL OR PURCHASE.**

(349)

Express power of sale—Appointment of judicial factor—Special powers—"Expedient for the execution of the trust"—Act 1884, sec. 2.

A trust deed conferred upon the trustees a power of sale, either by public roup or by private bargain. A judicial factor, who had been appointed on the estate, applied, under the Trusts Acts, 1867 and 1884, for authority to sell privately for £2100 certain feuing ground belonging to the estate, which at that time yielded £18 a year. The liferenter approved of the proposed sale, but the fir

objected, and urged delay until the demand for building ground improved. The reporter obtained opinions from men of skill that the offer should be accepted. The Court refused the petition, on the ground that the proposed sale might be prejudicial to the interests of the far, and that it was therefore not "expedient for the execution of the trust."

Molleson v Hope, 1888, 15 R. 665; 25 S.L.R. 506.

(350)

Interdict by residuary trustees.

Where the residuary legatees sought to interdict the trustees from exercising a power conferred on them by the trust deed of selling the heritable property belonging to the trust, on the ground that they were entitled to a conveyance to them of the property on their providing the trustees with funds sufficient to meet the legacies and liabilities of the testator, the Lord Ordinary dismissed the note, **holding** that the matter was one for the discretion of the trustees.

Brown v Elder's Trustees, (O.H.) 1906, 13 S.L.T. 837.

(351)

Power to sell materials of residence

—Heirlooms.

Testamentary trustees, upon whom powers of sale had been conferred by the testator, proposed to sell the materials of a residence, together with certain pictures and pieces of plate which were in the nature of heirlooms. They had, however, doubt as to the powers of sale covering their proposed action, and accordingly presented a petition to the Court for authority. **Held** that the petitioners already possessed the special power they craved, and accordingly that the petition fell to be dismissed as unnecessary.

The Hamilton Trustees, 1919, 56 S.L.R. 555; 1919, 2 S.L.T. 81.

(352)

Implied power.

By a trust settlement trustees were directed to divide the residue among certain beneficiaries. **Held** (1) that this direction conferred by implication power to sell heritage which the truster had acquired after the date of the trust deed; and (2) that the beneficiaries' share of the heritage was moveable.

Boag v Walkinshaw, 1872, 10 M. 872; 9 S.L.R. 554.

(353)

—A testator, who was the proprietor of certain engineering works and other heritable property, directed his trustees to pay to his wife during her lifetime "the free rents, interests, and profits arising from my means and estate, heritable and moveable, or from the proceeds thereof," and after her death "to divide my means and estate, heritable and moveable, or the proceeds thereof," into three equal parts, and to hold one share for behoof of each of his son and two daughters in liferent, and his or her children in fee. The trust deed did not give the trustees express power either to sell heritage or to carry on the truster's engineering business. The truster was survived by his wife and by his three children. **Held**, in a question be-

tween the trustees and the widow and children, that a power to sell the engineering works and other heritable subjects was to be implied from the terms of the deed.

Thomson's Trustees v Thomson, 1897, 25 R. 19; 35 S.L.R. 16; 5 S.L.T. 140.

(354)

Trust including heritage in England and Scotland—Powers conferred on trustees to sell under English Settled Lands Acts—Application of principle to Scottish heritage.

A domiciled Englishman died, leaving certain heritable property both in England and Scotland. Under his will, executed in England, he devised his heritable estate in England, and all his other real estate whatsoever, wheresoever, to the use of his wife during her life or until she married again, and after her to his son in liferent, and also appointed trustees for the purposes of the Settled Lands Acts. On the death of the widow the son became tenant for life. Under the Settled Lands Acts he had a power of sale, which power could be exercised by his trustees during his minority. **Held**, on a construction of the will, that the trustees had the same power to sell the Scottish heritage as they had to sell the heritable estate in England.

Phipps v Phipps' Trustee, (O.H.) 1914, 1 S.L.T. 239.

(355)

Question whether power conferred—Competency of special case.

Mitchell Innes' Trustees v Mitchell Innes, 1912 S.C. 228; 49 S.L.R. 241; 1912, 1 S.L.T. 85, No. 636, *infra*.

(356)

Conditional direction to sell heritage—Condition that bond called up within certain time—Whether contingency purified by part of bond being called up.

A truster directed his trustees "twelve months after the death of my said wife and myself," to convey certain heritable subjects, "if not sold as after-mentioned," to a certain series of heirs. The subjects were burdened with a bond for £2000. He then directed his trustees that, should the holders of the bond "resolve to call up their money, and intimate such resolution prior to the expiry of twelve months prior to the expiry of the longest liver of my said wife and me," the property should be sold and the price divided, after payment of the bond, among a slightly different set of heirs. Prior to the death of the testator's widow, a person who had right to one-half of the bond gave notice to the trustees that he wished payment. The trustees arranged for payment to this creditor on his granting an assignation to another lender, and the property was not sold. **Held** that the calling up of a part of the bond was not in the circumstances the event contemplated by the testator, and that the trustees were not then bound to sell the property.

Bryson's Trustees v Clark, 1880, 8 R. 142; 18 S.L.R. 103.

(357)

Power to sell on expiry of liferent—Depreciating property—Authority to sell during liferent.

A tenement of houses formed part of a trust estate. The testator had authorised his trustees to sell, if that was in their opinion expedient, when the property came to be divided after the expiry of a liferent, but the only reason for his postponing the power of sale apparently was that he considered that the money could not be better invested. Before the expiry of the liferent the property rapidly depreciated, and the trustee petitioned the Court for power to sell. The petition was opposed by one of the beneficiaries. **Held** that the petition was competent, and a remit made to a man of skill to report on the expediency of sale.

Robison's Trustee, (O.H.) 1898, 6 S.L.T. 241.

(358)

No power of sale—Act 1867, sec. 3.

Circumstances in which trustees under a trust settlement which gave no power to sell were authorised, under sec. 3 of the Trusts Act, 1867, to sell heritable property, and under sec. 7 of the same Act to advance the price obtained for the maintenance and education of beneficiaries who were minors.

Weir's Trustees, 1877, 4 R. 876; 14 S.L.R. 564.

(359)

Sale expedient and not inconsistent with trust purposes—Act 1867, sec. 3.

A truster who died in 1810 directed that the residue of his estate should be invested in the public funds till a suitable investment in land in the neighbourhood of the town of Perth should be found, and that the rents and profits of such land when acquired should be applied in the promotion of education in Perth. There was no power of sale. A suitable investment was not found until 1851. In 1881 the trustees, on the representation that it was expedient that the land so purchased should be sold, applied to the Court for authority to carry out a contract of sale into which they had provisionally entered. They suggested no new purchase of land near Perth to which to apply the money, but proposed with part of it to pay off a heritable debt on the property they proposed to sell, and to invest the rest in heritable security. The petition was opposed by a dissenting trustee, but only on the ground that the debt had been illegally entered into, and that the other trustees were not entitled to pay it off out of the trust funds. **Held**, after a report by a man of business in favour of the application, that the sale fell to be granted as being expedient and not inconsistent with the purposes of the trust. **Question** (per Lord Young), whether the trustees had not power, irrespective of the Trust Acts of 1867, to sell the lands without the necessity of applying to the Court.

Deacons of the Incorporated Trades of Perth v Hunt, 1881, 18 S.L.R. 585.

(360)

Depreciating property—Intention of trust.

Trustees presented a petition for power to sell two heritable properties which were in a decaying and ruinous state, which it would entail great expense to repair. The trustees had no funds to meet the expense, and the trust deed contained no express prohibition of sale. All the beneficiaries concurred in the petition, and the man of skill to whom a remit was made reported that in the circumstances the sale was expedient in the interests of the trust. The Lord Ordinary granted the power sought, **holding** that it was not inconsistent with the main purpose or intention of the trust, and in view of the report of the man of skill that it was expedient.

Fiddes' Trustees, (O.H.) 1899, 7 S.L.T. 67.

(361)

Petition for authority to sell house liferented by widow of truster—Widow as trustee one of the petitioners—Unnecessary petition.

Trustees held a house for the liferent use of the testator's widow, the trust deed declaring that all the provisions thereunder were alimentary. The trustees deemed it expedient to sell the house, which represented nearly one-half of the testator's estate, on the ground that the widow was quite unable to maintain herself and her family therein. The widow was willing to give her consent to the sale, but the trustees, who included the widow amongst their number, along with the widow as an individual petitioned the Court for power to sell. The Lord Ordinary refused the petition as unnecessary, on the ground that the trustees had power to sell the house with the consent and concurrence of the widow, whose consent was evidenced by her being a party to the petition.

Charlton's Trustees, (O.H.) 1901, 9 S.L.T. 130.

(362)

Expediency—Intention of truster.

Petition for power to sell a trust estate consisting of heritage refused as not being expedient for the execution of the trust and being inconsistent with the intention thereof.

Hiddleston's Trustees, (O.H.) 1906, 13 S.L.T. 705.

(363)

County hall held by trustees—Transference of trust property to County Council—Local Government (Scotland) Act, 1889, sec. 25, sub-sec. (2).

A petition by trustees who represented the different public interests of a county, and who held as trust property for various county purposes a county hall erected about 1819, to be allowed to transfer the said hall to the County Council, and for exoneration and discharge, was granted.

Earl of Rosebery, 1892, 29 S.L.R. 865.

(364)

—Sale of heritage by trustee without authority of the Court—Confirmation of sale—Nobile officium.

A trustee acting under a trust disposition and settlement which contained no power to sell heritage sold a part of the trust estate without having first obtained the authority of the Court. The purchaser having objected to the title offered by the trustee, the latter presented a petition craving the Court "to approve, ratify, and confirm" the sale. The Court refused the petition.

Clyne, 1894, 21 R. 849; 31 S.L.R. 692; 2 S.L.T. 53.

(365)

Prohibition of sale—Intention of trust—Act 1867, sec. 3.

A truster directed his trustees to hold certain estates for payment of his debts, and in any event for 21 years, and for payment of an annuity, also secured by a separate bond, to his nephew, upon whom and a series of heirs they were directed to entail the estates when the debt should all be paid off. The trustees were expressly forbidden to sell any part of the landed estates in question. At the truster's death the annual burdens and interest of debts exceeded the rental by £106. Held that the Trusts Act, 1867, sec. 3, did not authorise the Court to grant authority to sell any part of the estate.

Hay's Trustees v Hay Miln, 1873, 11 M. 694; 45 J. 430; 10 S.L.R. 473.

(366)

—General power and prohibition against selling a particular subject — Act 1867, sec. 3.

A truster in his settlement gave his trustees general power of sale. In a codicil he directed—"As I consider that the value of property in B will improve, I direct and appoint my trustees to hold and retain the property known as K . . . and not to sell or dispose of the same before the youngest of my sons attains 21 years of age." In a petition brought by the trustees before the youngest child had attained majority, under the 3rd section of the Trusts Act, 1867, for power to sell the property dealt with in the codicil in the interests of the trust estate, the Court refused the petition on the ground that, assuming that a sale was "expedient for the execution of the trust," it was "inconsistent with the intention thereof."

Marshall's Trustees, 1897, 24 R. 478; 34 S.L.R. 343; 4 S.L.T. 249.

(367)

Implied prohibition of sale.

Held that a power given by a testator to his trustees to sell his heritable estate, with the exception of certain lands, implied a prohibition against selling the excepted lands.

Whyte's Factor v Whyte, 1891, 18 R. 376; 28 S.L.R. 78.

(368)

—Circumstances rendering sale necessary for preservation of trust estate.

A truster directed his trustees to sell his whole heritable estate, excepting his heritable estate in L and T. Held that that did not prevent the trustees being authorised to sell the heritable estate in L and T when that had become necessary in the interests of the beneficiaries, and for the preservation of the trust estate against the diligence of creditors.

Sutherland's Trustees, 1892, 29 S.L.R. 903.

(369)

Application for directions of Court—Judicial Factors (Scotland) Act, 1889, sec. 18.

Held that it was not competent for the Court, upon a report by the Accountant under sec. 18 of the Judicial Factors Act, 1889, to give directions as to whether trustees should or should not delay to sell heritable estate; which the testator had directed them to sell at such time as they thought advantageous or expedient, that not being a question which related to the investment or to the distribution of the estate.

Earl of Stair's Trustees, 1896, 23 R. 1070; 33 S.L.R. 777; 4 S.L.T. 92.

(370)

English trust—Scottish heritage—Act 1867, sec. 3.

Trustees under an English trust which embraced a heritable property in Scotland presented a petition to the Court under sec. 3 of the Trusts (Scotland) Act, 1867, for authority to sell the Scots property. The Court refused the petition on the ground that the Act did not apply to English trusts.

Carruthers' Trustees—Allan's Trustees, 1896, 24 R. 238; 34 S.L.R. 166; 4 S.L.T. 193.

(371)

Trustees under an English trust, having obtained the sanction of the High Court of Justice in England, petitioned the Court, in the exercise of its nobile officium, to authorise the sale of certain heritable subjects belonging to the trust estate, which were situated in Scotland. The Court granted the petition.

Allan's Trustees, 1897, 24 R. 718; 34 S.L.R. 532; 4 S.L.T. 361.

(372)

Sale authorised by Court—No bid at upset price authorised—Authority of Court for sale without reserve.

Certain heritable subjects were exposed to roup at the price recommended by a man of business to whom the matter was remitted, but no bid was made. The Lord Ordinary, without further remit, granted authority to sell "at the best price which can be obtained."

Jamieson's Trustees, (O.H.) 1909, 1 S.L.T. 36.

(373)

Right of beneficiary to bid for trust property.

Held that when trust property in which several beneficiaries are interested is exposed for sale by public roup, one of the beneficiaries may lawfully purchase.

Shiell v Guthrie's Trustees, 1874, 1 R. 1083; 11 S.L.R. 625.

Authority to trustees to bid.

[See IV. 10, supra.]

(374)

Delay in selling—Liability of trustees.

Circumstances in which trustees under a family settlement were held not chargeable with undue delay in selling heritage which had belonged to the trustor.

Scott v Handyside's Trustees, 1868, 6 M. 753; 40 J. 387; 5 S.L.R. 195.

(375)

Authority to purchase heritage—Heritage accessory to property already held.

Circumstances in which on a remit to men of skill power to purchase heritable property adjacent to property already held was granted to testamentary trustees where the power was not conferred by the trust deed, in respect that the acquisition would be beneficial to the estate, and that the price was reasonable.

Wardlaw's Trustees, (O.H.) 1902, 10 S.L.T. 349.

(376)

Defective machinery in trust deed—Nobile officium.

A farmer, who was tenant of a farm which had been in his family for some time and on which was maintained a well-known herd of shorthorns, died without issue. He left a trust disposition and settlement in which he expressed the desire that his nephew should succeed to the farm and should carry on the herd of shorthorns, and directed his trustees to convey to his nephew, on his attaining the age of 21, the whole residue of his estate, including the lease of the farm with its plenishing and the stock thereon. After the testator's death, the landlord decided to sell the farm (which by that time was held merely by tacit relocation), but gave the testator's trustees the option of purchasing it at a certain price. At that time the nephew was aged 17, and was qualifying himself as an agriculturist with a view to taking up the farm. The funds in the hands of the trustees were sufficient to meet the greater part, but not the whole, of the price demanded. The trust disposition and settlement, however, conferred on them no power to purchase heritage, or to borrow on the security of the estate. The trustees thereupon presented a petition craving the Court, in the exercise of its nobile officium, to authorise them to purchase the farm, and to borrow the sum required to make up the price on the security of the

farm when purchased. The Court granted the authority craved.

Anderson's Trustees, 1921 S.C. 315; 58 S.L.R. 245; 1921, 1 S.L.T. 186.

(2) POWER TO EXCAMP.

(377)

A power to sell heritage does not imply a power to excamp.

Bruce v Stewart, 1900, 2 F. 948; 37 S.L.R. 739; 8 S.L.T. 61.

(3) POWER TO FEU.

(378)

Ultra vires—Reduction by vassal of the feu contract in favour of his predecessor on the ground that it was ultra vires of the trustees who had granted it.

A feu granted by trustees in 1867 was sold by the vassal in 1888 to A, who recorded the disposition in his favour in the Register of Sasines, and thereby obtained an implied entry. In 1895 A raised an action against the trustees for reduction of the feu charter, on the ground that it was ultra vires of the trustees. Held that the ground of reduction stated was not relevant, in respect (1) that the pursuer, if prejudiced, was not prejudiced by the feu charter, but by the contract he had made with the original vassal, to which the trustees were not parties; and (2) that the pursuer, being an entered vassal, was not entitled to reduce the feu contract without clearing the record of the disposition in his favour.

Tayport Land Co. v Dougall's Trustees, 1895, 23 R. 287; 33 S.L.R. 214.

(379)

Prescription.

Question, whether a feu charter granted by trustees in 1867, and bearing to be granted in the exercise of powers conferred by a private Act of Parliament (which was mentioned), and only in so far as consistent with the Act, could be validated by prescriptive possession, so as to exclude the plea that it was ultra vires of the trustees in respect that the conditions of the Act had not been complied with.

Tayport Land Co. v Dougall's Trustees, 1895, 23 R. 287; 33 S.L.R. 214.

(380)

Act 1867, sec. 3—Intention of trust—Prohibition against sale or disposal.

A trustor who died in 1825 left the residue of his estate to be applied for behoof of a grammar school, and directed his trustees to let a park belonging to the trust estate annually or on lease for a period not exceeding seven years, "declaring that my said park shall never be sold or disposed of." In a petition by the trustees for authority to feu the park, held that the Court could not grant authority to feu, as that was contrary to the trustor's intention as expressed in the trust deed.

Oliver's Trustees, 1876, 3 R. 639; 13 S.L.R. 421.

(381)

Application by fiars or fiduciary fiars.

Pottie, 1902, 4 F. 876; 39 S.L.R. 654; 10 S.L.T. 107, No. 395, *infra*.

(382)

Noble officium — English trust — Order of English court.

Trustees in an English trust holding lands in Scotland obtained an order of the High Court of Justice in England setting forth that it was expedient in the interests of the beneficiaries that the trustees should have power to deal with the lands of the truster situated in Scotland by granting mineral leases and feus, and empowering the trustees to apply at any time, or from time to time, to the courts in Scotland for authority to grant such leases or feus. Subsequently the trustees presented a petition to the Court of Session for, *inter alia*, a general authority to grant leases of the minerals and feus of the lands in Scotland. The Court—in respect the duty of supervising the administration of the trustees lay with the English court—in the exercise of an auxiliary jurisdiction, without further inquiry granted the general authority.

Pender's Trustees, 1907 S.C. 207; 44 S.L.R. 196; 14 S.L.T. 555.

(4) POWER TO GRANT LEASES.

(383)

Prohibition against selling or disposing of subject—Lease for ninety-nine years.

The trustees of a charitable foundation were directed by the trust deed "not to sell or dispose of" a warehouse, part of the trust estate, but to keep it in good repair for all time coming. After the lapse of some years it required extensive repairs, and the occupant of the adjoining premises offered to take it on lease for ninety-nine years on terms advantageous to the trust. Held that the trustees had no power in themselves to enter into such a contract, which was struck at by the prohibition against disposing of the subject.

Petrie's Trustees v Ramsay, 1868, 7 M. 64; 41 J. 38.

(384)

Act 1867, sec. 3 — Power to grant long leases — 999 years — Power not inconsistent with intention of deed.

A trust deed directed that after the death of the truster's widow (who was to have a *lifereit* of the whole estate), the trustees were to enter into possession of the whole lands thereby disposed, and to divide and pay over the proceeds half-yearly among his children as an alimentary provision, and, upon the death of the last survivor of the said children, to sell and dispose of the whole lands so conveyed, and to divide the proceeds among his grandchildren then alive. The trustees, during the life of the truster's widow, presented a petition to the Court for leave to grant a lease of part of the said subjects for 999 years, the expediency of

which course was beyond dispute. Held that the proposed lease was not contrary to the truster's intention as expressed in the trust deed, and authority granted as craved.

Birkmyre, 1881, 8 R. 477.

(385)

Power to let mansion-house for such space as the trustees should think proper—Lease granted to continue till tenant gave notice—Ultra vires.

A testator by his trust disposition and settlement empowered his trustees to let the mansion-house of W. from year to year, or, if they should think fit, to permit the heir of entail entitled to succeed to his lands under a deed of entail which he had executed to possess the mansion-house rent free, but only for such space as they should think proper. The trustees subsequently granted a "lease" whereby, on the narrative of the powers conferred upon them by the testator, they let the mansion-house to the heir of entail for the space of one year from the term of Whitsunday, 1879, "but renewable from year to year as after-mentioned." It was further provided that, in the event of said heir "not giving notice to the trustees six months before the term of Whitsunday" in any year "of his intention to remove from the subjects let at said term . . . this lease shall be held to be renewed for another year."

In an action at the instance of the trustees, held (1) that by the terms of the "lease" the trustees divested themselves of all power to terminate the heir of entail's occupancy of the mansion-house; and (2) that in doing so they had exceeded the powers given them by the testator, and therefore reduced the lease, and ordained the heir of entail to remove.

Elliott's Trustees v Elliott, 1893, 31 S.L.R. 36; 1 S.L.T. 269.

(386)

Power to let new mineral fields—Act 1867, sec. 2 (3).

Question, whether sec. 2, sub-sec. (3), of the Trusts Act, 1867, which gives a power to trustees to let minerals upon long leases, includes a power to open up and let new mineral fields.

Observed (per Lord Blackburn) that, whether it does or does not give this additional administrative power, it does not change the beneficial enjoyment of the property.

Campbell v Wardlaw, 1883, 10 R. (H.L.) 65; 8 App.Cas. 641; 20 S.L.R. 748.

(387)

—Act 1867, sec. 2.

A testator by his settlement directed his trustees to hold the residue of his estate for his son in *lifereit* and the son's children in fee, and, failing the son leaving children, or in the event of the children dying before the period of vesting, for his daughter in *lifereit* and her children in fee. "All requisite powers" to enable his trustees to carry out the purposes of the settlement, in-

cluding a power "to sell and dispose of the trust estate," were conferred on the trustees, but no express power to grant mineral or other leases. Part of the estate consisted of a small portion of land containing minerals, which could only be advantageously worked by letting them to an owner of adjoining minerals. **Held** that the trustees had power to grant a lease of these minerals.

Naismith's Trustees v Naismith, 1909 S.C. 1380; 46 S.L.R. 844; 1909, 2 S.L.T. 127.

(388)

Mineral field let but unworked during testator's lifetime—New lease by trustees.

A testator, by his settlement, directed his trustees to hold the residue of his estate for his children in liferent and their issue in fee. The trustees had power to sell the estate, but the settlement was silent as to powers of leasing minerals. Part of the residue consisted of a mineral field, which the testator, who died in 1871, had let in 1868 for a term of thirty years, with breaks. The minerals were never worked by the lessees, who in 1878 took advantage of a break in the lease to end it. **Held** that the trustees had power to enter into a new lease of the subjects in 1900.

Dick's Trustees v Robertson, 1901, 3 F. 1021; 38 S.L.R. 744; 9 S.L.T. 115.

(389)

Nobile officium—English trust—Petition to grant mineral leases of lands situated in Scotland—Process.

The trustees under an English testamentary trust obtained an order from the High Court of Justice in England, which set forth that in the judge's opinion it was expedient in the interests of the beneficiaries that the trustees should have power to deal with lands of the truster situated in Scotland by granting mineral leases and feus thereof, and of consent empowered the trustees to apply at any time, or from time to time, to the courts in Scotland for authority to grant such leases or feus. The trustees presented a petition to the Court, "in conformity with the proceedings taken in the English court and as an appeal to the nobile officium of the Court," for a general authority to grant leases of the minerals and feus of the lands, or otherwise to grant a particular lease of a specified mineral subject, and a particular feu of a specified portion of ground. The Court granted the latter alternative prayer of the petition, and quoad ultra continued the petition.

Pender's Trustees, 1903, 5 F. 504; 40 S.L.R. 382; 10 S.L.T. 644.

(390)

Power to accept renunciation of lease—Discretion of trustees.

A petition (not under the Trusts Act) by testamentary trustees for power, not given by the trust deed, to accept the renunciation of a lease dismissed as incompetent, the matter being one for exercise of the trustees' own discretion.

Observed that in the case of tutors-nominate the Court has occasionally granted powers which they would not give to trustees. *Berwick*, 1874, 2 R. 90; 12 S.L.R. 58.

(391)

Power to grant lease of urban property.

Noble's Trustees, 1912 S.C. 1230; 49 S.L.R. 888; 1912, 2 S.L.T. 211, No. 392, *infra*.

(5) POWER TO EXPEND MONEY ON REPAIRS.

(392)

Power to expend trust funds on, and grant lease of, urban tenement—Nobile officium—Discretion of trustees.

The trustees under a testamentary settlement (the purposes of which involved separate interests of liferenters and fiars) presented a petition to the nobile officium of the Court for authority to expend a portion of the capital of the trust estate in altering and repairing an urban tenement, and for power thereafter to lease the tenement for twenty-one years, which, in their opinion, would be to the advantage of all the beneficiaries. The Court dismissed the petition, **holding** that the questions were matters of administration upon which the trustees must exercise their own discretion. **Opinion** (per Lord Kinneir) that the power to lease carried with it the power to spend money on the subjects so as to put them into a tenable condition.

Noble's Trustees, 1912 S.C. 1230; 49 S.L.R. 888; 1912, 2 S.L.T. 211.

(393)

Rebuilding heritable property—No express power to rebuild—Personal liability of trustees.

Circumstances in which **held** that trustees who had expended trust funds in rebuilding and improving heritable subjects belonging to the estate, which twenty-one years after the rebuilding realised £100 less than the sum expended upon them, had not acted imprudently or negligently, and that loss had not been caused by their fault.

Armstrong v Wilson's Trustees, 1904, 7 F. 353; 42 S.L.R. 286; 12 S.L.T. 581.

(394)

Power to complete mansion-house in course of erection implied from terms of deed.

A proprietor commenced the erection of a mansion-house on his estate, but died when the walls were a few feet high. The deceased's settlement contained a direction to his trustees "that the new mansion-house which I am about to erect shall be kept in a state of thorough repair" "at the expense of the trust." The truster further directed the trustees to allow the liferenter to occupy the mansion-house during his lifetime. The liferenter having required the trustees to complete the mansion-house at the expense of the trust, **held** that the trustees had power to do so, the truster's intention being sufficiently indicated by the terms of the deed.

Brochie v Stewart, 1869, 7 M. 1031; 41 J. 583; 6 S.L.R. 673.

(395)

Cost of extraordinary repairs—Capital or income—Power to charge estate—Trusts (Scotland) Act, 1867, sec. 3.

In terms of a destination in a trust disposition and settlement lands were conveyed to A and B, a brother and sister equally "in liferent, for their liferent use alienarily, and to their heirs and assignees in fee." In a petition at common law and under the Trusts Act, 1867, by A and B, each of whom had children, power granted (1) to charge the lands with the cost of extraordinary repairs which had become necessary, and (2) to feu certain portions, A and B being either fiars under the destination, or entitled, as fiduciary fiars for their heirs and assignees, to reasonable powers of administration.

Pottie, 1902, 4 F. 876; 39 S.L.R. 654; 10 S.L.T. 107.

(6) POWER TO MANAGE FARM.

(396)

Power of trustees to take farm into their own hands—Nobile officium.

A heritable estate was held by testamentary trustees under a settlement, which conferred power upon them to grant leases and to borrow money for the purposes of the trust. The trustees were unable to obtain any offer for the tenancy of a farm on the estate except at an entirely inadequate rent, and accordingly they presented a petition to the Court to authorise them, in the exercise of its nobile officium, to take the farm into their own hands and to manage it for the trust, and for that purpose to borrow money on the security of the trust estate. The Court dismissed the petition as unnecessary, holding that to take the farm into their own hands was, in the circumstances, an ordinary act of administration on the part of the trustees, for which they did not require to obtain the authority of the Court.

Dunbar's Trustees, 1915 S.C. 860; 52 S.L.R. 656; 1915, 1 S.L.T. 461.

13. POWER TO BORROW.

(397)

No express power to borrow—Whether sum borrowed in rem versum of trust estate.

A testator appointed A and B trustees, directing that A should manage a farm, the lease of which formed part of the trust estate. A managed the farm for upwards of two years. After A and B had been superseded by a judicial factor an action was brought against the factor for payment of £300, the pursuer alleging that A being in need of money to meet rent, taxes, and other charges in connection with the farm, the pursuer, at his request, accepted a bill to him, as trustee foresaid, for £300 sterling, which bill was discounted, and the proceeds applied by A for the benefit of the farm or trust estate, and that the pursuer had paid the bill. Held (1) that as the trust deed did not expressly empower A to borrow money for behoof of

the trust estate, he was not entitled to do so; and (2) that the averments that the estate had been benefited by the sum borrowed were not sufficiently specific to let in proof that the proceeds of the bill were in rem versum of the trust estate.

Ralston v M'Intyre's Factor, 1882, 10 R. 72; 20 S.L.R. 49.

(398)

Borrowing in order to pay out beneficiary's share—Act 1867, sec. 3.

A trustor gave his trustees no power to borrow. On the death of one of his daughters a valuation was made, and her children agreed to accept a certain sum in full of their claims on the trust. The time was, in the judgment of the trustees, unfavourable for selling any part of the heritage, and it was not, in their opinion, capable of division for the purposes of the settlement. Authority granted to borrow a sum sufficient to meet the claim of the children of the daughter who had died.

Lochhead's Trustees, 1883, 21 S.L.R. 168.

(399)

Replacement of existing bonds.

Where a trust deed conferred no power on the trustees to borrow money on the security of the trust estate, but the trustees wished to replace two bonds which existed at the time of the testator's death by a new bond at a lower rate of interest, the Lord Ordinary granted the trustees power to do so, although a man of skill to whom the application had been remitted reported that in his opinion no judicial authority was necessary, as the act proposed was not one of alienation but merely of administration.

Henderson's Trustees, (O.H.) 1901, 8 S.L.T. 431.

(400)

Liability for death-bed and funeral expenses of trustor—No available trust funds—Power to borrow on security of heritage held by trustees in fee—Power to create charge on reversionary interest.

The husband of a deceased lady obtained a decree against her testamentary trustees for the amount of her death-bed and funeral expenses. There were no trust funds available to meet the debt, but it was possible for the trustees to borrow the money on the security of a villa, which was held by them subject to a liferent. It was also possible for the trustees to raise the money by borrowing on the security of a reversionary interest in the lady's marriage contract trust estate, which would fall to the testamentary trustees on the death of her husband, but this method of raising the money would entail the payment of a higher rate of interest on the loan. The trustees proposed to borrow the money on the security of the villa and to make the sum so borrowed a charge on the reversionary interest when it should become available to them on the death of the husband. The liferenter objected. The Court authorised the trustees to borrow the money on the security of the

reversionary interest, but not on the security of the villa.

Paris v Sturrock's Trustees, (O.H.) 1896, 4 S.L.T. 74.

Sturrock's Trustees, (O.H.) 1897, 4 S.L.T. 228.

(401)

—Extraordinary repairs.

The beneficiaries holding a heritable property under a will presented a petition under sec. 3 of the Trusts (Scotland) Act, 1867, for authority to charge the estate with extraordinary expenditure incurred through municipal assessments for paving, and through the reconstruction of drainage and repairs to a tenement damaged in a gale, and also for authority to feu the estate. It was doubtful whether the petitioners were fiars or merely liferenters with a fiduciary fee. The Court, without deciding the question as to the nature of the petitioners' right to the estate, granted the authority craved.

Pottie, 1902, 4 F. 876; 39 S.L.R. 654; 10 S.L.T. 107.

(402)

Express power to borrow for trust purposes — Exercise of power ultra vires — Immunity clause in favour of lenders.

The University Court of Glasgow lent money on a bond and disposition in security to a body of testamentary trustees, who had power to borrow, for trust purposes, on security of the trust estate. The trust deed contained an immunity clause to the effect that "parties paying moneys to my trustees . . . shall not be entitled to inquire into or see to the application of the same." The testamentary trustees applied the borrowed money in paying off the claims of certain of the testator's children who claimed legit and threatened to reduce the will. Two of the beneficiaries, who had right to annuities from the trust funds, raised an action for reduction of the bond against the trustees and the University Court, averring that borrowing money for the purpose for which the money was borrowed was ultra vires of the trustees. The action was defended by the University Court. Held that in the absence of any relevant averment of fraud, the immunity clause, coupled with the trustees' power to borrow, was a sufficient protection to the lenders, and defenders assoltied.

Buchanan v Glasgow University Court, 1909 S.C. 47; 46 S.L.R. 49; 16 S.L.T. 421.

(403)

Power to borrow for purchase of heritage.

Anderson's Trustees, 1921 S.C. 315; 58 S.L.R. 245; 1921, 1 S.L.T. 186, No. 376, infra.

(404)

—"Equitable mortgage"—Act 1867, sec. 3—"Not inconsistent with the intention" of trust.

A testator, who resided and carried on business in England, but died domiciled in Scotland, by a trust disposition and settlement in Scottish form directed his trustees

from his moveable estate to pay his debts "excepting any bonds or mortgages on" his "heritable properties," and gave them "express power to borrow . . . for repaying bonds or mortgages on" his "heritable property which may be called up, and to grant bonds or mortgages over said heritable property for that purpose." The testator had constituted an "equitable mortgage" over his heritage in Scotland in favour of a bank in England by depositing the title deeds with them, and undertaking to execute a formal "mortgage" over the property. The bank having called up the loan, the trustees presented a petition under sec. 3 of the Trusts (Scotland) Act, 1867, for power to borrow on the security of the heritage to pay off the loan. Held that the power craved was not "inconsistent with the intention" of the trust, and power granted to borrow to the extent of the sum due at the testator's death.

Kerr's Trustees v Kerr's Curator ad litem, 1907 S.C. 678; 44 S.L.R. 510; 14 S.L.R. 857.

(405)

Power to charge heritage with death duties —English trust — Scottish heritage—Nobile officium.

Held that a petition by trustees under an English will to charge heritage in Scotland belonging to the trust with the amount of estate and succession duties paid by them in respect thereof, was properly presented to the Inner House, as being an appeal to the nobile officium.

Harris's Trustees v Harris, 1904, 6 F. 470; 41 S.L.R. 357; 11 S.L.T. 726.

(406)

Personal liability of trustees borrowing on security of trust estate.

Opinions (per Lord Herschell, Lord Watson, and Lord Fitzgerald) that the fact that trustees in the exercise of an express or implied power have borrowed money for trust purposes on the security of the trust estate does not necessarily involve personal liability in the event of loss resulting to the estate from the transaction, their liability depending on whether the transaction was a prudent one in the circumstances.

Binnie v Binnie's Trustees, 1889, 16 R. (H.L.) 23; 14 App.Cas. 576; 26 S.L.R. 794.

V. DISTRIBUTION OF ESTATE.

1. PAYMENT OF PROVISIONS.

(1) GENERALLY.

(407)

Intimation by trustees to beneficiaries.

Observations on the duties of trustees with regard to intimation of bequests to beneficiaries.

Rodger's Trustees v Allfrey, 1910 S.C. 1015; 47 S.L.R. 869; 1910, 2 S.L.T. 157.

(408)

Vested right to pro indiviso share of residue—Ascertainment of amount—Postponement of payment.

Held that a legatee who had a vested right to a definite pro indiviso share of residue was not entitled to payment thereof before the date fixed by the testator for realising the estate, as the amount of residue could not be ascertained before that date.

Macculloch v M'Culloch's Trustees, 1903, 6 F. (H.L.) 3; [1904] A.C. 55; 41 S.L.R. 88; 11 S.L.T. 429.

(409)

Division of trust estate—Valuation of shares—Interest of liferenter—Deduction from estate before division.

By trust disposition and settlement the truster's wife was liferented in the truster's house, and the furniture and plenishings therein. The trustees were further directed after certain payments, as mentioned in the deed, "to make up a state and valuation of any trust estate, heritable and moveable, wherever situated, including that part thereof in which my said wife is liferented as afore-said . . . and on a valuation and corresponding state being so made out, showing the free amount or balance of my said trust estate, to convey, assign, or pay over one just and equal third part or share of such free amount or balance of my said trust estate to and in favour of my wife." Held that the value of the widow's liferent interest in the house, furniture, &c., was a proper deduction from the trust estate preparatory to a division thereof among the beneficiaries.

Munro's Trustees, 1878, 16 S.L.R. 211.

(410)

Delay in payment of money—Personal liability of trustee—Interest.

A widow raised an action against testamentary trustees for payment of £11,000 as damages, on the ground that heritable properties belonging to her had been brought to a forced sale through the fault of the defenders in withholding payment of sums due to her. Held (1) that the action was not relevant, as the pursuer had not set forth circumstances inferring liability on the part of the defenders for damages for delay other than interest; and (2) that the pursuer's acceptance of interest excluded the claim for damages.

Roissard v Scott's Trustees, 1897, 24 R. 861; 34 S.L.R. 637; 5 S.L.T. 18.

(411)

Depreciation in value of estate before actual payment—Personal liability of trustees.

A beneficiary was entitled to payment from trust funds in 1909. The trustees did not inform him of his right, but retained the money until 1911, when they induced him to discharge them of their intromissions and reconvey the money to them under a new trust. In 1917 the beneficiary obtained decree of reduction of the discharge and new trust deed. The trust funds had greatly depreciated. Held that the trustees

were bound to make good the depreciation from 1909.

Cross v Cross's Trustees, (O.H.) 1919, 1 S.L.T. 167.

(412)

Transaction between trustees and beneficiaries—Mora.

A testator who died in 1844 left legacies to the amount of £17,000, and liferent annuities amounting to £100 per annum, but died intestate quoad residue. His heritable and moveable estates were large, but he had extensive liabilities undertaken for three trading and manufacturing concerns. In the years 1846 and 1847 the trustees made payment to the legatees of one-half of their legacies, but delayed payment of the remainder. In 1851 the trustees, being pressed for payment by the legatees and having been advised by an accountant that the estate would probably be insufficient to meet the legacies in full, offered to compromise the claims of the legatees by payment of the legacies in full without interest, on condition that they obtained from the legatees an assignation of their claims and a discharge from the next of kin. In February, 1852, a deed was executed by the legatees and next of kin, who were advised by independent agents, by which, in consideration of the legacies having been paid in full, they assigned their whole claims against the trust to a person as trustee for J & S, the law agents for the trustees. J, one of the partners of J & S, was one of the trustees. In 1886 the representatives of one of the legatees raised a reduction of the deed of assignation and discharge against the representatives of the trustees, based on general averments of fraud, misrepresentation, and concealment, and an averment that the pursuers had been greatly prejudiced by the deed, and on the plea that, as the transaction involved the purchase of the trust estate by one of the trustees, it was illegal. At the date of the action nearly all those who had taken part in bringing about the arrangement were dead. The Court assoilzied the defenders, holding that fraud had not been proved, and that, quoad ultra, the action had not been timeously raised. Lord Young and Lord Craighill further holding that no relevant ground of action had been stated.

Buckner v Jopp's Trustees, 1887, 14 R. 1006; 24 S.L.R. 680.

(413)

Right to income of estate—Estate under superintendence of Accountant of Court—Payment on simple receipt.

Held that a beneficiary under a trust which was under the superintendence of the Accountant of Court was entitled to payment of the sum brought out as due to him on the trust accounts as audited each year by the Accountant on granting a simple receipt, and that it should not be a condition of payment that he annually examine the accounts and acknowledge that they are correct.

Wales's Trustee, (O.H.) 1893, 1 S.L.T. 57.

Compensation—Set-off.

[See COMPENSATION II.]

(2) UNAUTHORISED PAYMENTS.

(414)

Payments to beneficiary under error as to legal rights—Liability of beneficiary to repay—Bona fide percepta et consumpta.

In an antenuptial contract of marriage the husband bound himself to make such contributions as were necessary to secure to his widow the usual annuity from the Bombay Civil Fund, and in the event of his widow not being entitled from any cause to such annuity he bound himself and his heirs to pay to her an annuity of £300. The husband predeceased his wife, and left a trust disposition and settlement by which he, *inter alia*, directed his trustees to pay to his widow an annuity of £300 "in addition to what she is entitled to under" the contract of marriage, "my intention being that" she "shall have a free annuity of £600 under the said marriage contract and these presents, any annuity she may receive from the Bombay Civil Fund being imputed to account thereof." In 1882 the Bombay Civil Fund annuity was by Act of Parliament increased by a pension of £60 a year, but the husband's representatives continued to pay her an additional £300 a year until 1894. In a special case presented by the widow and her husband's representatives, **held** (1) that from the time she became entitled to the additional annuity of £60 she was only entitled to receive an annuity of £240 from her husband's estate, but (2) that she was not bound to repay the over-payments, these having been made in bona fide ignorance of any doubt as to her right to receive them.

Hunter's Trustees v Hunter, 1894, 21 R. 949; 31 S.L.R. 337; 2 S.L.T. 134.

(415)

Payment of liferent made in error—Bona fide percepta et consumpta.

Held that the doctrine of bona fide percepta et consumpta applies only to the fruits of a subject, and not to a subject itself, and therefore does not apply to payments of a liferent made in error when the liferent itself is the subject.

Darling's Trustees v Darling's Trustees, 1909 S.C. 445; 46 S.L.R. 394; 1909, 1 S.L.T. 207.

(416)

Objecting beneficiary also a trustee—Claim for repetition—Personal bar.

A husband by trust disposition and settlement gave his widow a liferent of the residue of the testamentary trust fund, and in respect thereof "recommended" and "enjoined" her "to discharge or abstain from exacting" from a son of the marriage her liferent rights in certain lands under a previous *inter vivos* trust deed. This deed gave to the son, on his surviving his mother, an alimentary liferent of the lands, protected from the diligence of his creditors, of which lands the son was in possession as

tenant. The son was a trustee both under the testamentary and under the *inter vivos* trust deed. The husband died in 1867, and the widow was allowed to enjoy both the liferent of the residue and the rents of the lands until 1872, when, for the first time, the son challenged her right to draw both provisions, and it was found, in an action at his instance, that she was bound to make her election. She thereupon elected to take the liferent of the lands.

In a second action at his instance, **held** that though the plea of bona fide perception and consumption did not apply in a case of election, yet, as the son had, as trustee on both trusts concurred in the payments made to his mother, he was barred from claiming repetition of the payments of the produce of the residue down to the date of his judicial challenge of her right to draw both provisions.

Johnston v Johnston, 1875, 2 R. 986.

(417)

Discharge granted by legatees—Claim by legatees as heirs ab intestato—Personal bar.

A testator bequeathed certain legacies in favour of his grandchildren, who were also his heirs ab intestato, and directed his trustees to divide the residue of his estate among "such purposes of a religious, charitable, or educational character, or partly among my own relatives" as his wife might specify. After his death his wife, by deed of directions, instructed the trustees to pay out of the residue a legacy to an infirmary, and also made provisions in favour of the grandchildren. On her death the trustees paid the legacy to the infirmary, and also paid to the grandchildren, who granted discharges therefore, the amounts then payable to them under the settlement and deed of directions. Thereafter the grandchildren raised an action against the infirmary and the trustees, for declarator that the bequest of residue was void from uncertainty, and that the residue fell into intestacy, and that the legacy should be repaid by the infirmary to the pursuers or to the trustees. The defenders pleaded that the action could not proceed until after reduction of the discharges granted by the pursuers for the legacies paid to them under the bequest of residue and deed of directions which were now impugned.

Held that the pursuers were not prevented by these discharges from demanding repetition of the payment which was made in error to the infirmary.

Armour v Glasgow Royal Infirmary, 1909 S.C. 916; 46 S.L.R. 740; 1909, 1 S.L.T. 503.

(418)

Bona fide perception.

For some years a residuary legatee received payment without challenge of certain dividends. It was then found that the dividend bearing securities belonged to the next of kin. **Held** that the rule of bona fide percep-

tion applied to the dividends paid to the residuary legatee.

Ferguson v Lord Advocate, (O.H.) 1906, 14 S.L.T. 52.

(419)

Illegal payments to beneficiaries—Interest due by beneficiaries.

Where trustees had acted *ultra vires* in paying an annual allowance to a daughter of the trust as an advance to account of her share of residue, **held** that the amounts so paid, with interest to the date of division of residue, were to be imputed to her share, and that the interest was to be calculated at the rate which the rest of the trust fund was yielding.

Baird's Trustees v Duncanson, 1892, 19 R. 1045; 29 S.L.R. 862.

(420)

Assignment of share of trust estate—Illegal payment of share to assignor—Rights of assignee—Compensation.

Macpherson's Judicial Factor v Mackay, 1915 S.C. 1011; 52 S.L.R. 778; 1915, 2 S.L.T. 110, No. 520, *infra*.

(421)

Payment of capital to liferenter—Trust conveyance by spouses for themselves in liferent and children of wife by former marriage in fee—Fee declared not to vest till payment—Delivery—Advances by trustee to husband out of capital—Liability to account.

A husband and wife executed a joint trust deed, whereby they conveyed an estate to the husband in liferent, for his liferent use *allenerly*, and to A, and such others as might be assumed as trustees, "in fee, heritably and irredeemably," for these purposes:—First, for payment of the trust expenses; second, for payment to the wife, if she should survive her husband, of the free rents during her life; third, that the trustees should, on the death of the longest liver of the spouses, sell the estate, and divide the free residue among the wife's children by her first marriage: Declaring "that the whole provisions herein shall not become vested interests in the said G M, A M," &c., naming the wife's children, "until the term of payment thereof; but on the death of any of them before said term of payment the provision to any of them so dying, leaving lawful issue, shall be divided equally among his or her issue alive at the time of payment, and failing such issue, shall belong to" the surviving children or their issue equally per stirpes. At the date of the trust deed the wife was *fiar* of the estate. The deed was immediately registered in the Register of Sasines on behalf of the husband and the trustee for their respective rights of liferent and fee, and was immediately delivered to A, who accepted, and began at once to act under the trust. During the lifetime of the spouses A made advances to them out of the capital of the trust. **Held**, in an action against him at the instance of the children of the wife, that by the trust deed the spouses had divested themselves of

the fee of the estate, and that therefore A was bound to account to the pursuers for the capital of the trust estate advanced by him to the trustees.

Morrison v Allan, 1886, 13 R. 1156; 23 S.L.R. 846.

(422)

Liferent due to wife applied for behoof of husband with her assent—Transaction between wife and trustees.

By antenuptial contract of marriage the wife conveyed to trustees certain funds for behoof of herself in liferent, exclusive of her husband's rights, and of the children in fee. The husband conveyed nothing to the trustees, but he bound himself, *inter alia*, to insure his life in the trustees' names for a certain sum, and to pay the annual premium, and in the event of the trustees finding it necessary at any time "to pay to the company any sum or sums on account of the premium" he bound himself to repay them. He failed to pay the premium, and the trustees for many years, with the wife's knowledge, paid the premium out of the liferent of the wife, both they and she being in the belief that they were entitled to do so. Thereafter the wife being desirous that her income should be free of the burden of keeping up the policy, and a doubt having been raised as to the power of the trustees to keep it up out of her income, the two spouses and the trustees entered into an agreement for the sale of the policy, on the footing that the proceeds should be added to the trust funds. Nine years afterwards the spouses raised an action against the trustees for repayment, with interest, of the sums expended in paying the premiums, on the ground that the payments were *ultra vires* of the trustees. **Held** that, even assuming the payments to have been *ultra vires* of the trustees, the action was barred by the fact that the wife had been a party to the agreement which embodied a settlement of the whole transaction.

Opinion (per Lord Justice-Clerk Moncreiff) that the question was one not between beneficiary and trustee, but between trustor and trustee, and that the wife, being in the position of a trustor, and having been in the knowledge of the action of the trustees, was not entitled to dispute it afterwards.

Spence v Boyd, 1888, 15 R. 376; 25 S.L.R. 283.

(423)

Annuity discharged by payments to another person with assent of annuitant—Proof—Parole.

A widow was entitled under her marriage contract to an annuity from her husband's estate. In an action by her for payment of arrears her husband's trustees admitted that during the period in question she had not received the annuity directly, but stated that she was residing with her husband's mother, that the money had been paid to the latter, and that the pursuer had agreed to her maintenance during that period being set against the annuity. They produced a minute of the meeting of the husband's trus-

tees, of whom she was one, and at which she was present. The minute, which was not signed by the pursuer, bore:—"This annuity, Mrs. Panton stated, had not been paid directly to her, but as she just lived in family with the late" mother-in-law "out of whose funds, and the rents of Mr. Panton's property, the house expenses were defrayed, she was willing to let the annuity be set off against her maintenance." The pursuer deposed that she did not understand what "took place at the meeting, and that she never agreed to give up her claim to the annuity during the time she resided with her mother-in-law." Parole evidence was led to show that the pursuer acquiesced in and approved of the manner in which the annuity had been applied. The trustees also produced eleven receipts for half-yearly payments of the annuity subsequent to the death of the husband's mother. **Held** that no intention to discharge the trustees had been proved.

Question as to the competency of parole evidence to prove the discharge.

Cameron v Panton's Trustees, 1891, 18 R. 728; 28 S.L.R. 490.

(424)

Rate of interest due by trustees who were in breach of trust.

Where trustees had improperly paid away trust funds, but had not made, or attempted to make, any profit for themselves, it was **held** that they were liable in interest on the sums so paid away at 3 per cent., as being the average rate of trust interest.

Heritable Securities Investment Association v Miller's Trustees, 1892, 20 R. 675; 30 S.L.R. 354.

(425)

—A, who was a trustee under B's settlement, appointed C a trustee under his own settlement. C, who was a law agent, managed both the trust estates, and paid away funds belonging to A's trust estate to legatees under B's settlement. **Held** that C was not entitled to business charges on these intromissions, and that his bona fides did not prevent his being liable in repayment with interest to the beneficiaries under A's settlement. Interest allowed at the rate of 3 per cent. to the date of the action and of 4 per cent. thereafter.

Pursell's Trustees v Newbigging, &c., 1871, 8 S.L.R. 710.

(426)

Specific bequest handed over to beneficiary—Insolvent estate—Liability of trustees to creditors.

Testamentary trustees handed over a piano, the subject of a specific bequest, to the beneficiary. The trust estate having turned out to be insolvent, **held** that the trustees were liable to account to the creditors of the trust for the value of the piano.

Murray's Trustees v Murray, (O.H.) 1905, 13 S.L.T. 274.

2. DISCRETIONARY POWERS OF TRUSTEES.

(1) GENERALLY.

(427)

Authority given by testator—Authority equivalent to direction—Failure to exercise—Intestacy.

Opinion (per Lord Stormonth-Darling, Ordinary): "When a testator 'authorises and empowers' his trustees to do a certain thing in such circumstances that failure to do it will result in intestacy, the power is to all intents and purposes a direction."

Brown's Trustees v Young, (O.H.) 1898, 6 S.L.T. 32.

(428)

Division by trustees of money undivided by trust.

A sum of money was given to a person to divide among his children. After his death his trustees were informed of the fact, and were told that the sum was still undivided, and a jotting by the donor of the amount to be given to each child was shown to them, and they thereupon gave to each his share. **Held** that the trustees in the circumstances were entitled to take credit in their accounts for the sums so paid.

Robertson v Taylor, 1868, 6 M. 917; 40 J. 526; 5 S.L.R. 597.

(429)

Discretionary power to continue trust till estate cleared of debt—No reasonable prospect of debt being paid—Right of fiar to terminate trust.

Sinclair's Trustees v Sinclair, 1913 S.C. 178; 50 S.L.R. 296; 1913, 1 S.L.T. 81, No. 544, *infra*.

(2) UNCERTAINTY.

[See SUCCESSION IV. 10.]

(3) TIME, MODE, AND AMOUNT OF PAYMENTS.

[See also VESTING VII. 2.]

(430)

Discretion as to time and mode of payment of legacies.

A testator left legacies to each of his nieces, to be paid "when my trustees shall find it suitable and convenient to pay the same." **Held** that although the trust estate was in a condition conveniently to pay the legacies, the trustees were not bound to make immediate payment to the daughters of the sums bequeathed.

Cuninghame's Trustees v Duke, 1873, 11 M. 543; 45 J. 348; 10 S.L.R. 357.

(431)

Trust for benefit of truster's relations—Application to Court to fix payments.

A testator directed his trustee, in the third place, to pay an annuity of £20 to his brother, and further, in the fifth place, to hold his estates, which were heritable, and apply the free yearly revenue thereof "for

preserving the aged and infirm among the descendants of my father from want or from the necessity of applying for public relief, and for obtaining for the young among the said descendants, both boys and girls, such a good, sound, plain, and useful education as will enable them to earn a livelihood for themselves, . . . with power . . . to maintain the young among the said descendants either in family with their parents or otherwise, while at their education," declaring that the trustees should not be entitled "to apply any sum beyond £20 sterling per annum for the benefit or relief of any one, either young or old, of said descendants, and that only while, in the judgment of my trustees, he or she stands in need of it in supplement of his or her own exertions." The revenue of the trust was about £580, only about £200 being expended in charitable objects, the rest being divided among the trustor's next of kin. (1) A petition by the annuitant for an additional grant under the fifth purpose of £10 per annum granted, notwithstanding the limitation of £20 per annum, which was held to be confined in its application to the fifth purpose. (2) In a petition by a relative of the testator for a grant towards the support of her children the Court fixed the sum to be paid by the trustees at £2 per month.

Ritchie v Davidson's Trustees, 1890, 17 R. 673; 27 S.L.R. 530.

See also *Thomson v Davidson's Trustees*, 1888, 15 R. 719; 25 S.L.R. 547.

CHARITABLE TRUSTS, No. 35.

(432)

Power to withhold payment—Exercise of power.

A trustor, after directing his trustees to divide the residue of his estate amongst his sons on their attaining majority, provided that the capital of one-half of their shares should not be payable to them until the age of twenty-five; "declaring, nevertheless, that my trustees shall have power to pay to any of my sons the capital of the said half, in whole or in part, as soon after he shall have attained majority as they shall deem advisable, and that, on the other hand, my said trustees, if they shall consider it for the interest of any of my sons, shall have power to withhold payment of the capital of such half . . . even after he shall have attained the age of twenty-five, . . . and that either during the remainder of his life or for such shorter period or periods as my said trustees shall from time to time determine," meantime paying him the interest. One of the sons survived his father, and died two years after attaining the age of twenty-five, without having received payment of the whole of his one-half share of the residue. The trustees had not recorded any minute determining to exercise their power to withhold payment, but they had in point of fact not paid, without protest on the part of the son. **Held** that in retaining the portion of the one-half share the trustees were to be presumed to have

acted in the exercise of the power conferred on them, and there being no evidence to the contrary, that there had been a valid exercise of the power.

White's Trustees v White, 1896, 23 R. 836; 33 S.L.R. 660; 4 S.L.T. 59.

(433)

Power to restrict interest to alimentary liferent—Partial payment without exercise of power—Arrestment by beneficiary's creditor—Subsequent exercise of power.

Chambers' Trustees v Smith, 1878, 5 R. (H.L.) 151; 3 App.Cas. 795; 15 S.L.R. 541. SUCCESSION, No. 735.

(434)

Power to limit interest to liferent—Heritage—Whether beneficiary entitled to conveyance in liferent.

A trustor directed his trustees, upon his eldest son attaining the age of twenty-five years, "forthwith to convey and make over to" him the residue of his estate; "and in particular to convey to" him the estate of A. The deed contained a declaration that if any of the trustor's children conducted themselves so as not to merit the approbation of the trustees, the latter should execute a minute stating this, and that then the provisions in favour of such children should "belong to them only in liferent, for their liferent use alienably, and to their issue or heirs" (named in the settlement) "in fee." Before the eldest son reached the age of twenty-five years the trustees by minute restricted his right to a liferent. After the son reached the age of twenty-five he and his assignee claimed from the trustees a conveyance to the estate of A in liferent. **Held** that neither the son's assignee nor the son was entitled to a conveyance in liferent.

Ker's Trustees v Justice, 1868, 6 M. 627; 40 J. 324; 5 S.L.R. 382.

(435)

Duty of majority of trustees proposing to exercise power to consult minority.

Slimon v Slimon's Trustees, (O.H.) 1915, 2 S.L.T. 19, No. 275, supra.

(436)

Power to render share alimentary—Time within which it must be exercised.

A trustor conferred on his testamentary trustees "a discretionary power to render any child's share alimentary and inalienable." By the trust deed the period of division of the trust funds was declared to be the death of the trustor's widow. The trustees delayed to realise the trust estate, and four years afterwards resolved to exercise the discretionary power, and declared the share of the son "alimentary and inalienable." The assignee of a son's share raised an action of reduction of this resolution. Resolution reduced, on the ground that the discretionary power could not be exercised later than a reasonable time after the death of the liferentrix.

Adam v Forsyth's Trustees, 1867, 6 M. 31; 40 J. 23; 5 S.L.R. 26.

(437)

Exercise of power ultra vires.

Testamentary trustees were directed to fix and determine whether, in their opinion, it would be prudent or expedient to give to a son of the testator the uncontrolled command and disposal of the understood or expected interest of the son in the succession. In the event of their determining that it was not expedient, the trustees were directed to set aside the son's share and to place it under such restrictions as they might deem advisable, giving to the son an alimentary life-rent; but should they resolve that the share should be unrestricted, they were directed to pay it over unconditionally. There was a destination over in the event of the son dying without issue and without having received his share. The trustees by deed of conveyance and assignation, on the narrative that they considered that the share of the son should be placed under restriction, but that a curator bonis having been appointed to him the further interference of the trustees was unnecessary, assigned and conveyed the son's share to him absolutely. **Held** that the trustees had acted ultra vires, in respect that having determined that the share should be placed under restrictions, they were not entitled to convey it to him.

M'Nicol's Executrix v M'Nicol, 1893, 20 R. 386; 30 S.L.R. 428.

(438)

Valid exercise of power.

Testamentary trustees were given a discretionary power to "lay out and invest the shares of any of my said children in trust for behoof of any of them or their issue in such manner as my trustees shall think proper, so as to secure the shares of any of my said children as an alimentary provision for themselves or their issue." **Held** that the trustees had validly exercised the power by creating a trust in themselves for behoof of one of the children, for his life-rent use alienably, and of his issue, equally among them in fee.

Cox's Trustees v Rainie, (O.H.) 1899, 6 S.L.T. 370.

(439)

Gift of whole or portion of annual income according to trustees' discretion.

A testator directed his trustees to invest in their own names, as trustees, a sum of £5000, and to pay to A B during his life-time "either the whole or only a portion of the annual revenue thereof, and that subject to such conditions and restrictions, all as my trustees in their sole and absolute discretion think fit," and, on the decease of A B, to pay "said sum of £5000, with any revenue accrued thereon that has not been paid to" A B, to A B's children, declaring that in the event of A B dying without children, "said sum of £5000 and accumulations of revenue, if any," should form part of the residue of his estate. The testator died in June, 1899. A B was the testator's sole next of kin, and in 1903 he assigned to X, in security of a debt of £650, his interest

in the deceased's estate as next of kin and as a legatee. In August, 1904, an action was raised by X as assignee of A B against the trustees concluding for payment of the income of the £5000. The pursuer maintained that the defenders—who had since the testator's death paid only certain trifling sums to A B from time to time—were bound to have exercised their discretion annually as to the amount of the income of the £5000 to be paid to A B, and, in respect that they had failed to do so, were bound to make payment of the whole income thereof that had accrued since the date of the testator's death, under deduction of the sums paid to A B. **Held** that the payments to be made to A B were left by the testator entirely in the discretion of the trustees, and that in the circumstances the trustees had done nothing to entitle the Court to interfere with their discretion, and defenders absolved.

Train v Clapperton, 1908 S.C. (H.L.) 26; [1908] A.C. 342; 45 S.L.R. 682; 16 S.L.T. 45.

(440)

Bankruptcy of liferenter.

Trustees, who had a discretionary power to limit the interest of a liferenter and add the balance of the income to the capital, **held** entitled on the bankruptcy of the liferenter to reduce the sum payable to him from the trust to a reasonable alimentary allowance and add the balance to capital.

White's Trustee v White's Trustees, (O.H.) 1917, 1 S.L.T. 272.

(441)

Retention of income.

Held that in the absence of a definite averment of mala fides the Court would not enquire into the motives of testamentary trustees in exercising a discretion conferred upon them by the trustor to withhold payment of part of the income of the estate destined to a beneficiary.

MacTavish v Reid's Trustees, (O.H.) 1904, 12 S.L.T. 404.

(442)

Creation of sinking fund—Redemption at par of securities bought at premium.

Held that trustees were not entitled to use part of the income of a trust estate to form a sinking fund for the purpose of covering loss of capital which might arise from the redemption at par of redeemable securities which they or the trustor acquired at a premium and which they properly held as part of the residue of the trust estate, because the liferenters of the residue were entitled to the actual income of the residue and not to a constructive income reached by making deductions and allowances which were not authorised by the trust deed. **Opinion** that if the capital of the estate was prejudiced, it was prejudiced by virtue of the scheme of the deed.

Heath v Baxter's Trustees, (O.H.) 1902, 10 S.L.T. 462.

(4) APPORTIONMENT BETWEEN CAPITAL AND INCOME.

(443)

Distribution of revenue between capital and income.

A testator made his trustees the sole competent judges of the fair proportion to be placed to capital and income respectively of the trust estate, which included a freestone quarry and plantations on a considerable scale. **Held** that it was competent for him to do so, and that neither the trustees nor any party taking benefit under the trust deed could come to the Court with a special case to obtain the opinion of the Court upon those points.

Low's Trustees, 1871, 8 S.L.R. 638.

(444)

Apportionment of dividends from ships between income and capital—Finality of apportionment—Unexpected increase in capital value—Right to re-apportion.

A testator died in 1907 leaving a trust disposition and settlement in which he, *inter alia*, provided:—"In the event of any part of my said estate being at the date of my decease invested . . . in wasting securities the proportion of the return from such wasting investments which shall be treated as income or whether the whole or any part of such return shall be treated as income for the purposes of these presents shall be matters entirely in the discretion of my trustees and as to which they shall be the sole judges." For a number of years after the testator's death the trustees, treating certain shares in steamships as wasting securities, apportioned the annual dividends from these shares between income and capital, the amounts determined to be income being paid by them to the liferenters of these shares, and the amounts determined to be capital being carried to the capital account of the trust. In 1917, when the shares were ultimately realised, the sum obtained for them, owing to the effect of the war, largely exceeded their value at the date of the testator's death. In a question between the liferenters and the fiars, **held** that the allocations of the dividends between income and capital were final, and could not be reconsidered by the trustees with the object of making further payments to the liferenters out of the portions of the dividends which had been credited to capital.

Warrack's Trustees v Warrack, 1919 S.C. 522; 56 S.L.R. 472; 1919, 2 S.L.T. 37.

(5) EXERCISE OF DISCRETIONARY POWERS BY ASSUMED TRUSTEES.

(445)

Power to select objects of bequest conferred on nominated trustees—No express power to assume—Failure of trustees.

A testatrix conveyed her whole means and estate to trustees (whom she also appointed her executors), for certain purposes, and with regard to the residue of her estate she "ordained the same to be paid by my said

executors to such charitable or religious purposes, and in such proportions as they or the acceptor or survivor of them may think proper according to their or his discretion." The testament conferred no power of assuming new trustees. The trustees named accepted office but died after only a small portion of the residue had been distributed by them. A judicial factor was then appointed on the trust estate. **Held** that the discretionary powers committed to the trustees were personal to them, and could not be exercised by the Court, and that the residue undisposed of fell to be distributed among the testatrix's heirs in mobilis as intestate succession.

Robbie's Judicial Factor v Macrae, 1893, 20 R. 358; 30 S.L.R. 411.

(446)

Right of assumed trustees to exercise power.

A testator authorised and empowered his trustees and executors on the death of his wife to donate the residue of his estate amongst certain institutions. **Held** that the power could validly be exercised by assumed trustees as well as by the original trustees nominated by himself.

Brown's Trustees v Young, (O.H.) 1898, 6 S.L.T. 32.

(447)

Assumed trustees **held** entitled to exercise discretionary powers conferred by a testator on his trustees to select objects of a bequest, there being no indication in the settlement of a contrary intention on the part of the testator.

M'Credie's Trustees v M'Credie, (O.H.) 1915, 1 S.L.T. 410.

(448)

Express right given to assumed trustees.

A testator conferred a discretion to select beneficiaries upon his trustees "original or assumed or otherwise appointed." **Held** that the trust machinery was validly constituted, and that assumed trustees could exercise the discretionary powers.

Dick's Trustees v Dick, (O.H.) 1906, 14 S.L.T. 325.

(449)

Right of deceased trustee's executor to exercise power.

By a trust disposition and settlement a lady directed payment of a legacy to A "to be divided by him between foreign and home missions." A died before the legacy was paid over to him. But he had stated before his death that when the money came into his hands he intended to divide it in certain proportions among missions which he had named as recipients. He had, however, made no intimation of any division to the parties he intended should benefit. **Held** that on A's death, without having divided the legacy, it lapsed, and A's executrix could not exercise the power conferred upon him.

Landale's Trustee v Nicol, (O.H.) 1918, 2 S.L.T. 10.

(450)

Exercise of discretion by trustee appointed by Court.

A testator directed his trustees to pay and devote the residue of his estate to such charitable or benevolent purposes and at such time or from time to time as they in their own discretion should think fit. All the trustees having died, the Court appointed new trustees. **Held** that, as there was no delectus personæ by the testator indicated in his selection of trustees, the trustees appointed by the Court had power to select beneficiaries, even although there was no effectual gift unless and until the power was exercised.

Miln's Trustees v Drachenhauer, (O.H.) 1921, 1 S.L.T. 152.

(451)

Terms of testamentary writings on which **held** that a discretionary power conferred on trustees to distribute residue among a number of charities could be exercised by trustees appointed by the Court.

Grieve's Trustees v Wilson, (O.H.) 1904, 12 S.L.T. 347.

John Macfarlane's Trustee v Malcolm Macfarlane's Trustees, (O.H.) 1896, 4 S.L.T. 22.

Malcolm Macfarlane's Trustees v Helen Macfarlane's Trustees, (O.H.) 1896, 4 S.L.T. 23.

(452)

No express power to assume — Assumption of new trustee by surviving trustee.

A testatrix by her settlement appointed two persons to be her trustees and executors (the appointment of one of them being afterwards recalled by codicil), and conveyed to them her whole estate. The trust purposes included a direction to divide the residue among such charitable institutions in Glasgow, and in such proportions "as my trustees in their absolute and uncontrolled discretion shall decide." The deed was silent as to the assumption of new trustees. On the testatrix's death the sole nominated trustee accepted office, and, after assuming a new trustee in virtue of the statutory power to do so, died without having taken any steps to distribute the estate.

Held, on a construction of the terms of the settlement, that, as there was no indication that the testatrix intended to limit the exercise of the discretionary power as to the residue to the trustee nominated by her, that power could be validly exercised by the assumed trustee.

Shedden's Trustee v Dykes, 1914 S.C. 106; 51 S.L.R. 115; 1913, 2 S.L.T. 370.

(453)

Power of appointment vested in original trustee—Personal and not transmissible to assumed trustees—Mode of division upon supervening insanity of original trustee.

The sole trustee under a settlement was directed to hold a sum for behoof of a family of children, and was invested with the amplest discretionary powers as to the pro-

portions in which the sum should be paid and the times and manner of payment. The trustee, after making unequal payments to the beneficiaries to account of their shares, became hopelessly insane. She had previously assumed a co-trustee, who after her insanity assumed another trustee under the Trusts Act, 1867. **Held** that a valid bequest had been made to the children as a class, and that the powers conferred upon the trustee were a burden on that bequest; that since these powers could not be exercised by the trustee named in the settlement, the effect was, not that the powers were transferred to the assumed trustees, but that the burden flew off, and the bequest to the children as a class became unqualified, and accordingly that the fund fell to be divided in such proportions as, when added to the payments to account previously made, would produce equality among the beneficiaries.

Hill's Trustees v Thomson, 1874, 2 R. 68; 12 S.L.R. 20.

3. APPROPRIATION OF INVESTMENTS —SEVERANCE OF TRUST.

(454)

Whether appropriation authorised — Ultra vires—Depreciation of investments.

Testamentary trustees, who were directed to pay a legacy of £5000 at a postponed date, invested that sum in trust investments and appropriated them to the legacy. The trust deed contained no direction to appropriate, either express or implied, nor was appropriation necessary to facilitate the administration of the trust. When the term of payment of the legacy arrived the investments appropriated thereto had materially depreciated in value, and the legatee claimed payment of the legacy in full.

Held that the trustees were not entitled to appropriate investments to the legacy, and accordingly that the legatee was entitled to payment in full.

Colville's Trustees v Colville, 1914 S.C. 255; 51 S.L.R. 204; 1914, 1 S.L.T. 62.

(455)

Ultra vires.

Circumstances in which it was **held** that an appropriation of investments by trustees to particular legacies was ultra vires, and that loss which had accrued on certain investments fell upon residue.

Scott's Trustees v Scott, 1895, 23 R. 52; 33 S.L.R. 65; 3 S.L.T. 136.

(456)

Intra vires—Appreciation in value of investments appropriated.

A testator directed his trustee to hold a specified sum for a certain party in liferent, and his issue in fee, and to pay over the residue of his estate "as it accrues and becomes available" to his residuary legatees. On the death of the liferenter it was found that the stocks, in which the legacy had been invested, had considerably increased in value. In a competition between the fiars and the residuary legatees, **held** that the

trustee had an implied power under the terms of the trust deed to set aside and invest the specified sum for the satisfaction of the legacy, and, accordingly, that the fiars were entitled to the benefit of the appreciation in the value of the securities.

Vans Dunlop's Trustees v Pollok, 1912 S.C. 10; 49 S.L.R. 7; 1911, 2 S.L.T. 341.

(457)

Liability for calls on shares held for one beneficiary—Whether trustees entitled to relief against whole funds held.

A testatrix directed her trustees to pay to her daughter A "the interest or annual rent of £2000" during her life, and on her death to pay the fee of that sum to her children. She made a similar provision for her daughter B in liferent and her children in fee; and she directed her trustees, after making provision for the payment of these legacies, to divide the residue of her estate. The trustees allocated various stocks belonging to the testatrix and sums of money to meet the legacies of £2000 to A and B respectively. The residue was then divided. Among the stocks belonging to the testatrix was certain stock of the City of Glasgow Bank, a portion of which was, on the request of A, retained by the trustees as an investment of part of the legacy to her and her family. The City of Glasgow Bank afterwards suspended payment, and the trustees were subjected to heavy calls. They claimed relief out of the trust estate generally, which then consisted only of funds held for behoof of A and B and their respective families. **Held** that while the trustees were under the trust deed empowered to retain the City of Glasgow Bank stock, being stock held by the truster, as an investment of the special legacies bequeathed to A and B and their families, yet having appropriated certain investments for behoof of B and her family, they must be regarded as holding the same in trust for their behoof exclusively, and were not entitled to relief therefrom for liability arising from investments held for A and her family.

Observed that the liability incurred by the trustees in respect of the calls on the City of Glasgow Bank stock was in no sense a debt of the truster.

Robinson v Fraser's Trustee, 1881, 8 R. (H.L.) 127; 6 App.Cas. 855; 18 S.L.R. 740.

(458)

Whether appropriation made.

A testator in his settlement directed his trustees to divide the residue of his estate into two portions, the first of which was to be of such an amount as should be sufficient to yield a free annual income of £1500. The trustees by minute resolved "to set apart a portion of the trust estates of such an amount as should be sufficient to yield a free annual income of £1500 to the widow," and accordingly set apart certain shares and other property specified in the minute, "but declaring that should the annual income or

revenue of said portions of the trust estate exceed in any year the sum of £1500, the excess shall fall into the income of the remaining estates; and that should said annual income or revenue in any year be less than the sum of £1500, the deficiency shall be made up from the income or revenue of the said remaining estates." **Held** that the trustees had not made a final apportionment of the trust estate.

Smith's Trustees v Smith, 1900, 2 F. 713; 37 S.L.R. 509.

(459)

Liability of beneficiaries inter se for loss on investments.

A testator directed his trustees to divide the residue of his estate into equal shares corresponding to the number of his children, and to hold the shares destined for his sons for his widow in liferent and for them respectively in fee, with a discretion to the trustees to pay the shares to the sons on their giving security for payment of interest to the widow. They were directed to hold the daughters' shares after the widow's death for them in liferent and their children in fee. Most of the sons' shares were paid to them, "subject to rectification," after a valuation of the residue, some of the payments being made after it was known that there would be a considerable loss on some of the investments. In a special case presented after the death of the widow the sons contended that as they had received the bulk of their respective shares the residue in the hands of the trustees virtually consisted of the daughters' shares, which the trustees were bound to retain, and that the daughters' shares should bear losses arising on investments subsequent to the payment of the sons' shares, or at least that their shares should bear the losses proportionally with the undivided portions of the sons' shares. **Held** that in the final division of the residue the trustees were bound to equalise the payments to the children, as nothing had occurred in the way of appropriation of shares to sons or daughters to prevent an equal distribution of the losses arising on trust investments.

Teacher's Trustees v Teacher, 1890, 17 R. 303; 27 S.L.R. 250.

(460)

Severance of interests of beneficiaries—Appropriation of an investment to meet several legacies.

Testamentary trustees were directed "to invest, hold or set aside and retain and administer" a specific sum for each of the testator's six daughters by name, and to pay to each the income of "the sum so set aside for each of them" during their lives for their alimentary use alienably; and upon the respective deaths of the daughters to pay the capital of "the sums so held and set apart for each of my said daughters" to their children, vesting in the children being postponed till each daughter's death. The trustees were empowered to retain the truster's investments, or to realise them and

reinvest the proceeds. **Held** (1) that, under the terms of the settlement, the trustees were bound to set apart for each daughter the sum provided for her or securities representing that amount, and to administer the same for her behoof; and (2) that the allocation of investments, against the wish of one daughter, as a cumulo security for the provisions to her and three of her sisters, was not a valid fulfilment of this obligation.

Grosset v Birrell's Trustees, 1920 S.C. 231; 57 S.L.R. 187; 1920, 1 S.L.T. 123.

(461)

Incidence of gains and losses on investments.

Circumstances in which it was held that, as there had been no specific appropriation of the investments, the ordinary rule applied, whereby gains or losses on investments fell to be distributed among the beneficiaries in proportion to the amount of their respective bequests.

Lynch's Judicial Factor v Griffin, 1900, 2 F. 653; 37 S.L.R. 462.

(462)

Aggregation of separate trust funds—Right to appreciation in value of investments.

Magistrates of Edinburgh v M'Laren, 1879, 8 R. (H.L.) 140; 4 App.Cas. 823; 16 S.L.R. 828, No. 126, supra.

(463)

Appropriation of part of heritable bond to meet specific legacy—Payment of legacy in full out of general estate—Subsequent loss on realisation of bond.

Under a trust deed the trustees were directed to set aside £1000 for behoof of a legatee in life during her minority, with power to pay over the capital to her when she had attained majority. A judicial factor who had been appointed to manage the trust estate appropriated £1000 of a bond and disposition in security for £3250 as an investment for this legacy, and paid the legatee interest at the rate of $4\frac{1}{2}$ per cent. (being the rate in the bond) during her minority. In January, 1890, the legatee having attained majority, the factor paid over the capital of the legacy to her. The payment was made in full out of the general funds of the trust. Shortly afterwards the debtor in the bond having defaulted in payment of interest the judicial factor sold the security subjects at a loss of £902.

Held that, looking to the circumstances as to the value of the security subjects, known to the judicial factor at the time when he made payment to the legatee, he was entitled to pay her out of the general funds of the trust.

Manners v Strong's Judicial Factor, 1902, 4 F. 829; 39 S.L.R. 709; 10 S.L.T. 66.

(464)

Right to retain share of residue to meet depreciation in appropriated investments.

A testator directed his trustees to set apart or invest a specific sum for each of his daughters on their attaining a certain age,

to be held in trust for their life for use, and for their issue, if any, in fee, and to hold the whole residue in trust for the purchase of lands to be entailed in manner directed by him. **Held** that the trustees, after having set apart securities to the amount specified for all the daughters, were not bound or entitled to reserve a portion of the residue to meet any deficiency in the value of the securities for the daughters' provisions which might exist at the time when payment of the fee was to be made.

Gordon v Gordon's Trustees, 1868, 41 J. 43; 6 S.L.R. 74.

(465)

Amount falling to be set aside—Bequest of sum required to yield £120 per annum.

Circumstances in which the Court fixed the sum of £4000 as the amount which the trustees ought to have set aside as likely, one year with another, to produce £120.

Munro's Trustees v Munro, 1899, 1 F. 980; 36 S.L.R. 761.

(466)

Sum required to meet annuity—Discretion of trustees.

A testator directed his trustees to pay an annuity of £500 a year to his wife. The trustees set aside a sum which yielded £120 to £150 in excess of the amount of the annuity. **Held** that the sum retained was not so extravagant as to show that the trustees had not exercised a reasonable discretion.

Chivas' Trustees v Stewart, 1907 S.C. 701; 44 S.L.R. 15; 14 S.L.T. 357.

4. POWER TO MAKE ADVANCES OUT OF CAPITAL.

(467)

Express power—Extent of power.

By a testamentary settlement trustees were directed, on the death of two annuitants (who predeceased the testator), to hold a share of residue "for behoof of" J H and his family as follows, viz. :—For payment of the interest of said share to J H to the extent of one-half thereof, and the interest of the other half to his children, and if J H and his children "stand in need thereof" the trustees were directed "to expend the capital of said share for and in behalf of the said J H and his said children in such proportions as they may think proper." **Held** that the power to advance capital was a power to advance to the extent of one-half only to J H, and to the extent of the other half to the children.

Gillies' Trustees v Hodge, 1900, 3 F. 238; 38 S.L.R. 150; 8 S.L.T. 320.

(468)

Power to make advances on marriage—Annual allowance subsequent to marriage.

A trust left his estate to be divided among his family of four daughters, vesting being postponed till the period of payment, viz., the majority of the youngest daughter. He empowered his trustees "to make advances" to his daughters "on their

marriage," which advances were to be accounted as part of their shares, and to be deducted from their shares of the residue on the final division taking place. Three of the daughters were married during the subsistence of the trust. The trustees on the occasion of each marriage paid the daughter a sum of £1000, and made her an annual allowance of £300. None of the husbands of the daughters was unable to maintain his wife without assistance from the trust. **Held** (1) that the annual allowances were ultra vires of the trustees; (2) that the allowances so paid to each married daughter, with interest thereon to the date of division, were to be imputed to account of her share of residue; (3) that the interest was to be calculated at the rate which the rest of the trust fund was yielding; and (4) that no interest was chargeable on the sums of £1000.

Baird's Trustees v Duncanson, 1892, 19 R. 1045; 29 S.L.R. 862.

(469)

——— **Liferenters interfering as to exercise.**

A trustor left the life interest of the whole residue of his estate to his widow, and gave power to the trustees to make advances out of capital to one of two heirs during the currency of the life interest, the expediency of doing so being left "to the exclusive judgment" of the trustees, "without control or interference from any party whatever." **Held** that the widow had no power to veto the trustees in making advances out of capital.

Caithness's Trustees v Caithness, 1877, 4 R. 937; 14 S.L.R. 585.

(470)

——— **Power lost by acceleration of period of division.**

A testator by his settlement directed his trustees to hold his estate, first, for payment of an annuity to his widow, and upon her death to divide his estate equally among his children, directing them in the case of daughters either to hold or to settle their shares for behoof of the daughters in life interest alienably and their children in fee, the income of such shares being declared alimentary and exclusive of *jus mariti*. The trustees were empowered to make advances to a certain extent to the testator's children and grandchildren, such advances to be imputed to their shares at the period of division. The widow repudiated her conventional provisions, and claimed her legal rights, which repudiation and claim by a former judgment (*infra*, No. 567) was held to have accelerated the term of division, so as to make it the duty of the trustees to deal with the estate as if she were naturally dead. **Held** that the power of making advances out of the trust estate was applicable only to the period before division, and that the arrival of that period made it no longer legally possible for the trustees to exercise the powers conferred by the settlement.

Alexander's Trustees, 1873, 45 J. 515; 10 S.L.R. 535.

(471)

Discretionary power of trustees—Exercise by judicial factor—Special powers.

A testator conveyed to certain persons named and to such other persons as should be assumed in terms of law to act in the trust, as trustees for executing the trust, his heritable and moveable estates. He directed his trustees, *inter alia*, to retain and invest £4000 for behoof of his son D in life interest alienably and of his issue in fee, and on the death of D without issue to pay the sum to the testator's other sons, subject to the condition that "in case at any time my trustees may in the exercise of their judgment and discretion think it prudent and advisable to pay over" to D "the whole or any part of the principal of the said sum of £4000 as his own absolute property, they shall have, and they are hereby granted full power, authority, and liberty to do so, . . . it being my intention to give to my trustees the same full powers and discretion in giving the said principal sum" to D, "which I myself now possess." A judicial factor who had been appointed in room of the trustees, who had resigned, presented a petition, bearing to be at D's request, for power to invest a portion of the £4000 in the purchase of an annuity in favour of D and his wife, and the survivor of them. The Court, **holding** that the proposed investment, being at D's request, was virtually a payment to D himself, granted the prayer of the petition.

Howden v Simson, 1895, 23 R. 113; 33 S.L.R. 79; 3 S.L.T. 158.

(472)

——— **Exercise by assumed trustees—Judicial factor.**

Robbie's Judicial Factor v Macrae, 1893, 20 R. 358; 30 S.L.R. 411, No. 445, *supra*.

(473)

Act 1867, sec. 7—Advance to minor beneficiaries.

Circumstances in which the Court refused a petition for an advance of capital for the maintenance and education of minor beneficiaries, **holding** that even on the assumption that the proposed advances out of capital were not "expressly prohibited by the trust deed" in the sense of the Act, they were not such as the Court in the exercise of its discretion could in the circumstances authorise—*Lord Young* and *Lord Craighill* **holding** further that the proposed advances out of capital were expressly prohibited in the sense of the Act.

Thomson v Miller's Trustees, 1883, 11 R. 401; 21 S.L.R. 269.

(474)

Where a trustor leaves his estate to his widow in life interest and his children in fee, subject to provisions by which the vesting of the estate in the children is suspended, the children, if unable to support themselves, may have a claim for aliment against their father's estate, but this claim must be dealt with by the trustees on their own

responsibility, and the Court has no power, either at common law or under sec. 7 of the Trusts Act, 1867, to authorise them to make advances to the children out of capital during the lifetime of the widow.

Baillie's Trustees, (O.H.) 1896, 33 S.L.R. 589; 4 S.L.T. 30.

(475)

Authority given to make advances out of the price of heritage for the education and maintenance of minor beneficiaries.

Weir's Trustees, 1877, 4 R. 876; 14 S.L.R. 564.

(476)

———**Nobile officium.**

A truster directed his trustees to pay to his widow a certain annuity out of his estate, under burden of her maintaining and educating his children until they were able to support themselves. The annuity having proved insufficient for the maintenance and education of the children, the trustees presented a petition to the Court under sec. 7 of the Trusts (Scotland) Act, 1867, or alternatively as an appeal to the nobile officium, for authority to make an additional payment to the widow out of the capital of the estate. Circumstances in which the Court, in exercise of the nobile officium, having regard to the fact that the children were in law entitled to be alimented out of the estate of their father, granted authority to the trustees to make payment to the widow out of capital of an additional sum for two years, reserving right to the trustees to apply again.

Bett's Trustees, 1922 S.C. 21; 59 S.L.R. 70; 1921, 2 S.L.T. 246.

(477)

———**"Vested interest."**

Held that the words "vested interest" in sec. 7 of the Trusts Act, 1867, meant "primary interest," although it might be contingent on survivorship; and trustees authorised to advance from a fund liferented by a father, who consented, although the capital did not vest in his children till his death and that of certain annuitants.

Pattison v Pattison's Trustees, 1870, 8 M. 575; 42 J. 291; 7 S.L.R. 323.

(478)

———**Unappropriated income forming part of capital—Vesting in a class.**

Testamentary trustees held the residue of a trust estate for behoof of the testator's children, who were all minors, subject to a direction to divide it among the children or the survivors, when the youngest child should reach twenty-one years of age. The settlement contained a declaration that the provisions to the children should not become vested interests in them until the period of division, and there was no direction as to the application of the accruing income. There was no destination over in the event of the children all dying before the date of division. A petition was presented by the trustees for authority to apply the whole of the income, or such part thereof as they should think proper, for behoof of the chil-

dren, on the ground that this was necessary for their maintenance and education. Held that the petition might be granted under sec. 7 of the Trusts Act, 1867, in respect (1) that the unappropriated income formed part of the capital; (2) that although the interest of each child was contingent, and had not vested, the children as a class had a vested interest in the sense of the statute; (3) that no persons had an interest in the residue other than the children and their heirs or representatives.

Ross's Trustees, 1894, 21 R. 995; 31 S.L.R. 812; 2 S.L.T. 149.

See also Webster v Miller's Trustees, 1887, 14 R. 501; 24 S.L.R. 368, No. 509, *infra*.

(479)

Petition for power to encroach on capital—Petitioner not a trustee.

By holograph will a testator bequeathed "all I am possessed of . . . to my wife so long as she lives, subject to her not marrying again, and at her death the estate to be equally divided amongst the children." The widow, who had been decerned executrix-dative, presented a petition for authority under sec. 7 of the Trusts Act, 1867, to encroach on capital for the maintenance of herself and her children. The Lord Ordinary dismissed the petition as unnecessary, holding that the petitioner was not a trustee within the meaning of the Trusts Acts, and that under the will, subject to conditions, the whole estate was bequeathed to her, and that she was entitled to use both capital and income for support of herself and her children.

Rigg's Executrix, (O.H.) 1905, 13 S.L.T. 144.

5. POWER TO MAKE ALLOWANCES OUT OF INCOME FOR MAINTENANCE AND EDUCATION.

(1) **DISCRETION EXPRESSLY GIVEN TO TRUSTEES.**

(480)

Allowance to widow for maintenance of children.

A truster having provided that his widow should be permitted to occupy his mansion-house as a home for herself and their children, and that his trustees should pay to her such sums as they thought fit for the maintenance and education of the children, —circumstances in which held that they were authorised to pay her £2000 per annum in addition to her own jointure of £1000 per annum.

Ferguson's Trustees, 1869, 8 M. 155.

(481)

Averments of special requirements of children.

By a trust disposition and settlement trustees were empowered to make such allowance as they might think proper to the truster's children for their proper maintenance and education out of the free interest of their presumptive shares of the residue

of his estate. A petition at the instance of the trustor's widow craving increased allowances, which it was alleged were required on account of the very delicate health of the pupils, refused, the Court **holding** that there was no sufficient ground for interfering with the discretion of the trustees.

Opinion (per Lord Deas) that to justify such interference a gross case of dereliction or misconception of duty must be presented.

Douglas v Douglas's Trustees, 1872, 10 M. 943; 44 J. 522; 9 S.L.R. 600.

(482)

Advances out of surplus income for expenditure not expressly contemplated by testator.

A testator in his settlement provided an annuity and certain liferents to his widow, declaring that these provisions were intended for the behoof of herself and the children of the marriage, it being his wish that the children should remain in family with their mother "and be maintained and educated out of the said annuity." The testator directed that on the death of his widow the whole estate should be held for behoof of his children and their issue, and that during the widow's life the surplus income, after providing for the annuity, should "be held and applied by my trustees for behoof of my said child or children, and the survivors or survivor of them, and the issue of the deceasers as aforesaid; it being hereby declared that my trustees shall have power, as they are hereby authorised and empowered, either to accumulate said surplus from year to year . . . or in the option of my trustees, and if they in the exercise of their discretion shall see fit, to apply the said surplus, or any part thereof, to the outfit or establishment of such of them as shall be sons in business or professions, and such of them as shall be daughters in marriage." **Held** that during the widow's life the trustees were entitled out of surplus income to make such advances as they might think desirable either for the education of any of the children or for such change of residence as might be considered necessary for the health of any member of the family.

Christie v Christie's Trustees, 1877, 4 R. 620; 14 S.L.R. 399.

(483)

Discretion given by trustor to increase provision—Consent of fiars.

A testator, who died in 1821, provided to his daughter, who was then married, an annuity of £50, empowering his trustees, "if my funds will admit, and if they shall think she has occasion for it, eventually to make some addition to said annuity, according as their own good judgment and discretion shall suggest." The residue of his estate, with accumulation of interest, was to be paid to his daughter for behoof of her children in the event of her surviving her husband. In 1869, the estate being then under the management of a judicial factor, the daughter being nearly eighty years of age, her husband

nearly ninety, and they being in poor circumstances, the factor petitioned for authority to pay the daughter an additional annuity of £300 a year, stating the rental of the heritage at £515, and the accumulations at £6600. The principal beneficiaries consented. The Court granted the authority craved.

Allan, 1869, 8 M. 139; 42 J. 63; 7 S.L.R. 71.

(484)

Fund vested in testator's grandchildren—Interest payable to children "after the death of both parents"—Payment of allowance from income during mother's life.

A testator directed his trustees to hold the residue of his estate for his son in liferent and his children in fee, the children's shares to be payable on the majority of sons, and on majority or marriage of daughters. The trustees were further empowered "after the death of both parents" before the term of payment, to pay the interest of the estate to the children or to make advances to them out of capital for furthering their prospects in life. The son left a widow and two pupil children.

Held (1) that the son's widow was not entitled to a liferent of the residue of the testator's estate; and (2) that the trustees were entitled, but not bound, to make advances from income for the maintenance and support of the children during their mother's lifetime.

Spears' Trustees v Spears, 1873, 11 M. 731; 45 J. 450; 10 S.L.R. 509.

(485)

Power to "make advances" to daughters "on their marriage"—Whether annual allowance within power—Interest.

Baird's Trustees v Duncanson, 1892, 19 R. 1045; 29 S.L.R. 862, No. 468, supra.

(486)

Payment to be made to person charged with child's custody.

Circumstances in which **held** that where marriage contract trustees had, in the exercise of the discretion committed to them, made a certain allowance for the maintenance and education of a pupil, there was no ground for the interference of the Court; but that the allowance should not have been paid to the pupil's factor loco tutoris, but directly to the person charged with his custody.

Ferguson v Robertson, 1869, 41 J. 212; 6 S.L.R. 238.

(2) **FAILURE OF TRUSTER'S DIRECTIONS FOR MAINTENANCE.**

(487)

Testamentary provision to widow for maintenance of children—Forfeiture of provision on remarriage—Allowance fixed by Court.

A testator directed his trustees to allow his widow the liferent use of his house and to pay her an annuity of £120 until his youngest child reached majority, on con-

dition that she bound herself to maintain and upbring them. In the event of her re-marriage the annuity was to be reduced to £20, and she was to forfeit the liferent of the house. The testator was survived by his widow and three pupil children. The widow remarried while the children were still in pupillarity.

Held that the children were entitled to an allowance from the income of the estate for their maintenance and education until they were able to maintain themselves or until majority, and directed the sum of £20 for each child to be paid by the trustees.

Gilmour's Trustees, 1872, 44 J. 555; 9 S.L.R. 610.

(488)

Reputation by widow of testamentary provision—Acceleration of period of payment.

A testator directed his trustees to pay his widow the whole revenue of the residue of his estate during her life, subject to restriction to an annuity of £100 in the event of her second marriage. He then, in the seventh place, directed them "on the death of my said wife" to apply the residue to and for behoof of C, his adopted daughter, and to expend a part or the whole of the annual income, or part of the capital if they thought fit, in the maintenance, education, and upbringing of C until she should attain the age of twenty-one or be married, and that on either of these events happening the trustees should, as they considered it most for the advantage of C, either denude of the trust and make over the whole estate to her, or in the event of her marriage settle the same or part thereof on trustees for C in liferent alimentary and her children in fee, paying over the remainder to her absolutely, or, whether married or unmarried, allow her a liferent and postpone payment of the fee and retain it in their hands for such length of time as they deemed best, declaring that C, on attaining twenty-one years of age or being married, should have power to test on the fee of the residue, if settled on her issue, then among such issue in such proportions as she might fix, and if not settled on issue, or failing issue, then in favour of such persons as she might name by any writing under her hand, "declaring that it is my wish that my trustees should act towards my said adopted daughter as if she were my own child, and as they consider will be best at all times for her moral good and comfort and advancement in life." Then, in the last place, in the event of C dying before attaining twenty-one years of age or being married, or of her surviving that age or event but dying before receiving payment of the residue and having failed to test thereon, the truster directed his trustees to pay the residue, or what remained of it, equally to and among the then surviving children per stirpes of his brothers and sisters. The truster was survived by his wife and by C, who was in minority. The widow rejected the provisions in her favour in the settlement, and took her legal rights. On C

attaining twenty-one years of age, **held** that the trustees had power to make payments to C for her maintenance.

Cairns v Cairns' Trustees, 1901, 3 F. 545; 38 S.L.R. 364; 8 S.L.T. 474.

(489)

Supervening incapacity of widow—Casus improvisus.

A truster directed his trustees to pay an annuity of £200 a year to his widow, and £50 for the aliment of each of his children during their pupillarity, with power to the trustees to increase the allowance after they reached minority, or in the event of their mother's death or second marriage. The widow having become imbecile during the pupillarity of the children, an additional allowance for the children was considered necessary by the trustees in order to provide them with a governess. **Held** that the trustees had power to increase the allowance.

Briggs' Trustees v Cathcart, 1869, 8 M. 242; 42 J. 106.

(3) RIGHT OF CHILDREN TO INTEREST OF FUND OR TO A MAINTENANCE ALLOWANCE.

(490)

Fund not vested—Testator in loco parentis to children.

Where trustees were directed to hold £5000 and shares of residue for behoof of a mother in liferent and of such of her children as should reach the age of twenty-five years and the survivors in fee, and where these provisions had not at the death of the liferenter vested in any of the children by reason of none of them having reached that age, the Court **held** that the children as a class were entitled to the accruing income for their education and maintenance, it being admitted that the testator had placed himself in loco parentis to them, and that the advances were necessary.

Duncan's Trustees, &c., 1877, 4 R. 1093; 14 S.L.R. 650.

(491)

Fund vested but not payable—No direction to accumulate.

Held that advances made by testamentary trustees to minor beneficiaries out of the income of a fund which had vested in these beneficiaries, but which was not payable until their majority or marriage, and as to which there was no direction to accumulate, were properly made, although the settlement did not expressly confer any power upon the trustees to make advances.

Normand's Trustees v Normand, 1900, 2 F. 726; 37 S.L.R. 517; 7 S.L.T. 430.

(492)

Fund payable on majority—Right of children to payments for maintenance—Contract of separation—Father's obligation to maintain children.

A father, having bound himself in a voluntary contract of separation to make certain

provisions for his children, and to be at the expense of educating them, died leaving a trust settlement wherein he directed his trustees to pay the provisions on the children attaining majority. **Held** that the children were entitled to the expenses of their education after their father's death.

Meiklam's Trustees v Meiklam, 1868, 6 S.L.R. 2.

(493)

—Payment to father of sum necessary for children's maintenance.

Held that testamentary trustees who held a fund for children, to be paid on their attaining majority, were bound to pay to the children's father out of the income the sum necessary for their maintenance and education.

Mackintosh v Wood, 1872, 10 M. 933; 44 J. 512; 9 S.L.R. 591.

(494)

Posthumous child.

A father having divested himself of his whole estate—which was entirely heritable—during his life in favour of trustees, the income to be payable to him during his life, and after his death in an annuity to his widow and the aliment and education of his children nominatim till the youngest attained majority, when the estate was to be divided among the children. A posthumous child was born four months after his death. **Held** the posthumous child was entitled to aliment out of the trust estate.

Spalding v Spalding's Trustees, 1874, 2 R. 237; 12 S.L.R. 169.

(495)

Allowance to be paid to father as individual.

In a petition by a father domiciled in England for himself and as administrator-in-law for his pupil children, for an order upon Scottish testamentary trustees to make an annual payment to him, either as administrator in law or as an individual, for their maintenance and education, from the income of a fund held for them by the trustees, the Court authorised the trustees to make an annual payment to the petitioner as an individual for this purpose.

Edmiston v Miller's Trustees, 1871, 9 M. 987; 43 J. 545; 8 S.L.R. 645.

(496)

—Application by father for payment of whole income—Allowance granted for outlays.

Held that the father of a pupil was not entitled, as administrator-in-law, to claim payment of the whole annual income of a fund held by trustees for behoof of the pupil, but that he was entitled to such an allowance out of it as would relieve him of the pupil's maintenance and education, the amount being a question for the discretion of the trustees in the first instance.

Stewart's Trustees v Stewart, 1871, 8 S.L.R. 367.

(497)

Right of father to repayment of his expenditure for children out of fund.

A testator directed his trustees to pay the interest of £10,000 to his daughter, Mrs. H., and on her death to "hold and apply" the interest for the maintenance and education of her children. After the daughter's death her husband maintained and educated their children for five years without making any claim upon the trustees, who accumulated the interest. In an action brought by the husband against the trustees for payment of the amount expended by him in the aliment and education of the children during the five years, the pursuer explained that he had contemplated a reduction of his father-in-law's settlement, and on this account had previously abstained from making any claim. **Held** that H. was entitled to be reimbursed out of the accumulated income of the children's provision for his expenditure on their account during the five years in question.

Hutcheson v Hoggan's Trustees, 1904, 6 F. 594; 41 S.L.R. 408; 11 S.L.T. 731.

(498)

Specific allowance by Court—Amount of capital uncertain.

A petition was presented by a minor and her curators praying the Court to ordain the trustees of a trust under which she was a beneficiary to pay a specific sum as an annual allowance for her maintenance and education. The trustees were willing to pay all reasonable expenses, but objected to paying a specific sum, as the amount of the capital to which she would be ultimately entitled was uncertain, as it depended upon a question of accounting whether it would amount to £2000 or £3000 or to as much as £8000.

The Court fixed an allowance of £155 per annum.

Mackie, 1872, 10 S.L.R. 49.

(499)

—Heir to dukedom.

Circumstances in which the Court allowed the trustees holding a fund for the benefit of the heir to a dukedom, aged 17, to make payment of £1000 per annum for his maintenance and education, the income of the fund amounting to £2800 per annum.

Duke of Sutherland, 1905, 13 S.L.T. 104.

(4) APPLICATIONS UNDER THE TRUSTS ACT, 1867, SEC. 7.

(500)

Fund vested in a class.

Testamentary trustees held a fund of £100,000 for behoof of the children, nati and nascituri, of the testator's four daughters per stirpes. The fund was burdened with a life rent annuity, but yielded a surplus income of £2700, which was not disposed of, and fell to capital. The share of each grandchild did not vest till majority.

The trustees presented a petition to the Court under sec. 7 of the Trusts Act, 1867, for authority to make annual payments of £500 for the maintenance, education, and upbringing of the five pupil children of one of the testator's daughters, and of the six pupil children of another, on the ground that such payments were necessary to enable the children to be educated in a manner suitable to the fortune which they would inherit. The petition was not opposed by the testator's two unmarried daughters. The Court, **holding** that the residue had vested in the grandchildren as a class, and that the payments were necessary for the proper education of the grandchildren, considering their circumstances, authorised the trustees to make payments of not more than £500 annually for each family for two years.

Clark's Trustees, 1895, 22 R. 706; 32 S.L.R. 511; 3 S.L.T. 35.

(501)

Implied direction to accumulate.

Testamentary trustees held the residue of a trust estate for behoof of the testator's children, who were all minors, subject to a direction to divide it among the children or the survivors, when the youngest child should reach 21 years of age. The settlement contained a declaration that the provisions to the children should not become vested interests in them until the period of division, and there was no direction as to the application of the accruing income. There was no destination over in the event of the children all dying before the date of division. A petition was presented by the trustees for authority to apply the whole of the income, or such part thereof as they should think proper, for behoof of the children, on the ground that this was necessary for their maintenance and education. **Held** that the petition might be granted under sec. 7 of the Trusts Act, 1867, in respect (1) that the unappropriated income formed part of the capital; and (2) that although the interest of each child was contingent, and had not vested, the children as a class had a vested interest in the sense of the statute.

Ross's Trustees, 1894, 21 R. 995; 31 S.L.R. 812; 2 S.L.T. 149.

(502)

Fund not vested—No express power to make advances.

Circumstances in which trustees under a settlement were authorised to pay to a minor beneficiary, and to her father as her guardian, for five years (till she should come of age), a specified yearly allowance from the free income (which was being accumulated) of her prospective share of the trust estate under their charge, although the settlement declared that her share should not vest in her till majority, and did not expressly confer any power upon the trustees to make advances.

Martin, 1904, 6 F. 592; 41 S.L.R. 400; 11 S.L.T. 741.

(503)

Direction to make discretionary payments of income to children only after their father's death—Application by children for payment during father's life.

A trustee directed his trustees to accumulate the income of a fund for behoof of the children of a married daughter and to pay them their share of capital and accumulated income on respectively attaining majority; and further, in the event of the father's death, but in that event only, before all or any of the children reached majority, the trustees were empowered to pay to the mother or expend at their discretion such part of the income as they might think necessary for the children's maintenance and education. In an application by the children, who were all in pupillarity, under sec. 7 of the Trusts Act, 1867, for such payments out of the accumulated income as the Court might deem sufficient, **held** that the petition fell to be refused, in respect that the proposed advances were expressly prohibited by the trust deed.

Thomson v Miller's Trustees, 1883, 11 R. 401; 21 S.L.R. 269.

(504)

Fund divisible among children when youngest attained a certain age—Application of whole income for behoof of children.

A testator directed his trustees to divide a certain sum among the children of his daughter when the youngest of them reached the age of 21. The income of the said sum being the only fund available for the education and maintenance of the said children, who were all in minority or pupillarity, the Lord Ordinary, under sec. 7 of the Trust (Scotland) Act, 1867, granted the trustees authority to apply the whole of the income of the sum for behoof of the children until the youngest attained the age of 21.

Hodgson's Trustees, (O.H.) 1904, 12 S.L.T. 532.

(505)

Prohibition of advances from income—Direction to accumulate.

Advances for the maintenance and education of beneficiaries out of income directed to be accumulated, and out of capital, not allowed, on the grounds (1) that such advances out of income were prohibited by the trust deed, and (2) assuming that the advances out of capital were not expressly prohibited, that they were not such as the Court in the exercise of its discretion could in the circumstances authorise.

Thomson v Miller's Trustees, 1883, 11 R. 401; 21 S.L.R. 269.

(506)

Application for sanction of advances already made.

Sec. 7 of the Trusts Act, 1867, does not give the Court power to sanction advances already made by trustees for the education and maintenance of minors.

Young's Trustees, (O.H.) 1895, 3 S.L.T. 192.

(5) APPLICATIONS TO THE NOBILIS OFFICIUM.

(507)

Application by mother for increase of allowance made by trustees.

A testator placed his whole property, yielding £55,000 a year, "under the exclusive management and direction" of his trustees until his son, an only child, should attain twenty-five years of age. The trustees were appointed tutors and curators to the son, who was eight years old at his father's death. The deed contained no direction with regard to the allowance to be made for the education and maintenance of the minor. The trustees for some time made a certain allowance, but the mother applied to the Court for its increase. **Held** that, in the absence of any direction by the testator, the Court had a discretionary power to fix the amount of the allowance, and an increase granted.

Baird v Baird's Trustees, 1872, 10 M. 482; 44 J. 299; 9 S.L.R. 223.

(508)

Direction to accumulate.

A testator directed that the revenue of the residue of his estate should be accumulated with the principal during the lifetime of his widow, and that the whole should be divided at her death among his children alive at that date, and the issue of predeceasing. The judicial factor on the trust estate, with consent of the other beneficiaries, applied for authority to make advances during the widow's life for the maintenance of a daughter of the trustee and her children, who were in straitened circumstances. An advance for one year only out of the income of the accumulating funds, "to be administered and applied personally by the factor" in the education and clothing of the daughter's children, granted.

Latta, 1880, 7 R. 881; 17 S.L.R. 630.

(509)

Direction to accumulate.

Circumstances in which the Court authorised advances to be made out of the income of trust funds directed to be accumulated, being of opinion that it was highly expedient, if not necessary, for the maintenance and education of the beneficiaries that such advances should be made.

Webster v Miller's Trustees, 1887, 14 R. 501; 24 S.L.R. 368.

(510)

Circumstances in which the Court allowed trustees to make advances for the education of two minors for whose benefit the trustor had directed the accumulation of an annual sum of interest from a fund liferented by their mother, and, in the event of her death, until a certain capital sum had been reached; such sum having already been reached at the date of the application.

Colquhoun, 1894, 21 R. 671; 31 S.L.R. 557; 1 S.L.T. 591.

(511)

Authority to trustees to make advances for maintenance of beneficiaries —**Power to continue advances after Thellusson Act began to operate.**

Trustees were directed to accumulate the income of a trust estate for the benefit of the trustor's grandchildren, but received authority from the Court to make advances for the grandchildren's maintenance and education. **Held** that the trustees were entitled to continue to make advances to the grandchildren after the Thellusson Act came into operation and stopped further accumulation of income.

Muir's Trustees v Jameson, (O.H.) 1903, 10 S.L.T. 701.

(512)

Vesting postponed till death of liferenter — Allowance to child who had attained majority.

A testator executed a trust settlement six years before he died, at a time when his estate was much smaller than it was at his death. He left a small annuity to his widow, and directed that the residue should vest in his children on her death or second marriage, but payments should not be made to them until they attained majority. Power was given to the trustees to make advances for the education, maintenance, or advancement in life of any of the children who might be in minority at the date of vesting. In exercise of its nobilis officium, the Court authorised the trustees to make a yearly allowance to a daughter who had attained majority and kept house for her mother and a younger sister.

Milne's Trustees, 1919, 57 S.L.R. 112.

(513)

Annuity to widow—Obligation of widow to maintain children—Power to make advances of capital to major children—Special powers.

Under a trust disposition and settlement the widow of the testator received out of the income of the estate an annuity of £300, subject to the burden of maintaining therefrom any children of the marriage remaining in family with her and unable to support themselves. With regard to the surplus income, the trustees were empowered to apply it, in whole or in part, in providing a liberal education for the children, and were directed to accumulate any surplus not so expended during the widow's lifetime and add it to residue. The residue was divisible after her death equally among the children on their attaining majority, vesting being expressly postponed until the period of payment. Power was given to the trustees to advance one-half of each child's prospective share of capital to fit them out in business or marriage or otherwise as the trustees might deem for the child's advantage. After the testator's death, and when the two children of the marriage, James and Robert, were aged respectively twenty-four and twenty-two, and still lived with their mother, the trustees presented a petition to the Court for authority to advance to each, out of surplus income, or otherwise out of capital, and so long as they should be unable to maintain themselves, a yearly allowance of £150. James

was, owing to ill-health, unable to follow any occupation; Robert, as a clerk, earned a salary of £100, rising to £200 by yearly instalments of £10. The capital value of the estate exceeded £35,000, and the yearly surplus income was between £600 and £700. The Court granted the prayer of the petition in the case of James, but refused it in the case of Robert.

Robertson's Trustees, 1909 S.C. 236; 46 S.L.R. 139; 16 S.L.T. 496.

(514)

Power to make advances—Annuities ceasing on beneficiaries attaining certain age—Advances out of funds directed to be accumulated.

Under a trust disposition and settlement the residue of the testator's estate became divisible equally among his four daughters on the death of his widow and on his youngest daughter attaining the age of twenty-five years. So long as his wife should survive him and the youngest of his daughters not have attained the age of twenty-five years, the trustees were to pay certain annual allowances to each of his four daughters. After the testator's death the trustees paid the annual allowances to the daughters until the youngest attained the age of twenty-five. As the widow was then still alive, the period of division of the estate had not arrived, but, as the testator had made no provision for the allowances to his daughters being continued after the youngest reached the age of twenty-five, the trustees then ceased payment. Two of the daughters, however, were unmarried and had no other means of support. The Court, on the petition of the trustees, and in the exercise of its nobile officium, authorised the trustees to continue the advances to the unmarried daughters so long as they should, in the trustees' opinion, be unable suitably to maintain themselves, the allowances to cease on their marriage, and to be deducted from their respective shares of residue.

Sinclair's Trustees, 1921 S.C. 484; 58 S.L.R. 326; 1921, 1 S.L.T. 275.

(515)

Pupil children resident with father abroad—Payment from trust funds belonging to children.

Circumstances in which the Court, on the petition of the father, who had been appointed guardian of pupil children residing with him in New Zealand, authorised and ordained testamentary trustees holding funds belonging to the children to make payment to him of £150 per annum from the income of the funds for the maintenance and education of the children until further orders of the Court.

Seddon, 1893, 20 R. 675; 30 S.L.R. 526.

(516)

Payment to truster's son for aliment of grandchildren.

A testator left a heritable estate, the rental of which was £900 a year, settled upon his only son in life and his children in fee.

Of the income of the personal estate, which was £4600, the son received annually about £2300 as an alimentary payment for the support of himself, his wife, and children, the remaining £2300 of income being accumulated by the trustees for the children. In a petition at the son's instance, asking that the trustees should be ordained to contribute out of the free annual income for the suitable education and maintenance of the children (of whom there were seven under nineteen years of age), the Court authorised the trustees to pay a sum equal to one-half of the cost of such education in each year, including board when from home, and travelling expenses, the payment by the trustees not to exceed £500 in any one year.

Muir v Muir's Trustees, 1887, 15 R. 170; 25 S.L.R. 119.

(517)

Authority to make advances—Incidence of advances on respective shares of beneficiaries.

By his trust deed and settlement a testator bequeathed the residue of his estate equally among his grandchildren, and directed his trustees to accumulate the income until the beneficiaries respectively attained the age of twenty-five (or being grand-daughters were married), when the share of each was to be ascertained and set apart. While the beneficiaries were in minority the trustees obtained authority from the Court to make advances for their education and maintenance, and, in terms of the interlocutor, charged all the advances made to the general accumulation account. On an application for authority to make further advances, held (1) that the previous interlocutor did not decide the incidence of the advances made, and (2) that all the advances made and to be made for behoof of each grandchild should be charged to and deducted from his or her individual share.

Muir's Trustees v Muir, 1899, 37 S.L.R. 257; 7 S.L.T. 222.

(518)

Beneficiary not descendant of truster—Power to make advances of income—Capital unvested—Vested right to income.

A testatrix directed her trustees to hold the residue of her estate "for behoof of A C P . . . until she attains the age of twenty-three years complete, when they shall pay over the same to her, with all accumulations that may have accrued thereon." In the event of A C P not attaining twenty-three, the estate was to be divided among certain substitute beneficiaries. When A C P, who was not a descendant of the testatrix, was seventeen, the judicial factor on the estate presented a note craving power to pay the income of the residue to A C P, who was without other means of subsistence. The Lord Ordinary, in the exercise of the nobile officium, granted the power craved, observing that though A C P had no vested right in the capital of the residue, he was not prepared to hold that she had not a vested right in the income.

Walker, (O.H.) 1905, 13 S.L.T. 141.

6. ASSIGNATION OF INTEREST IN TRUST ESTATE.

(519)

Legacy to married woman declared non-assignable—Authority to trustees to pay husband's debt out of legacy when due.

A legacy to a niece which was declared to be alimentary and non-assignable did not vest until the death of the testator's widow. During the lifetime of the widow the legatee by letter authorised the trustees to pay a promissory note due by her husband to the testator, "now out of the legacy left me by my uncle, or when the same is payable." The trustees accordingly paid the note, and on the death of the testator's widow they deducted the amount so paid from the legacy. In an action by the legatee against the trustees, **held** (1) that the advance was to be regarded as made by the trustees as individuals; (2) that the legacy on vesting became the absolute property of the legatee, and that therefore her prospective interest therein was assignable; and (3) that the trustees, notwithstanding their fiduciary position, were entitled, in virtue of the authority which she had granted, to repay themselves the amount of their advance.

Rothwell v Stuart's Trustees, 1898, 1 F. 81; 36 S.L.R. 97; 6 S.L.T. 215.

(520)

Assignment of share in trust estate—Subsequent payment of share to assignor—Rights of assignee—Compensation.

A beneficiary under a trust estate, who was also a trustee, assigned his interest in the estate to the extent of £1000, and the assignation was duly intimated. Thereafter he withdrew from the trust estate sums largely in excess of his whole share therein. **Held** that the assignees were not affected by the actings of their cedent subsequent to the intimation of the assignation; and, accordingly, that they were entitled to rank on the trust estate for the £1000.

Macpherson's Judicial Factor v Mackay, 1915 S.C. 1011; 52 S.L.R. 778; 1915, 2 S.L.T. 110.

(521)

Duty of trustees to creditor attaching beneficiary's interest.

By her trust disposition and settlement a testatrix directed her trustees, on the death of a liferenter, to convey her whole estate to A, an American citizen, and gave them special powers of investment in American securities, desiring them to act in this matter under the advice of a New York trust company. The trust funds were invested by the trustees in American securities which were deposited with this company. In an action against the trustees by an American creditor of the fief, who had obtained a decree in the Scottish courts adjudging to her the whole interest in the fee, the pursuer maintained that the defenders were bound to invest the funds in such form as would prevent her right under the Scottish decree being defeated. The Court assailed the defenders, **holding** that they were under no duty to do anything for

the purpose of fortifying the pursuer's position which would not have been required in the ordinary course of the administration of the trust.

Brower's Executor v Ramsay's Trustees, 1912 S.C. 1374; 49 S.L.R. 962; 1912, 2 S.L.T. 215.

(522)

Lapsed trust—Right of beneficiary to complete title in his own name—Right of assignee—Act 1867, sec. 14.

The Trusts Act, 1867, sec. 14, does not apply to the assignee of a beneficiary. Macknight, 1875, 2 R. 667.

(523)

Intimation—One only of two trustees.

Intimation of an assignation of a beneficial right under a trust was made to A, one of the two trustees. The other trustee was in bad health, but was able for business, and had not resigned. The funds were in A's hands, and he managed the whole affairs of the trust. **Held** that the intimation was sufficient.

Jameson v Sharp, 1887, 14 R. 643; 24 S.L.R. 453.

(524)

Cedent sole trustee—Intimation to law agent of trust.

Where the cedent of an interest under a trust is himself the sole trustee, intimation of the assignation is unnecessary.

Opinion (per Lord Justice-Clerk Macdonald and Lord Moncreiff) that intimation to the law agents of the trust is sufficient intimation to the trustees.

Browne's Trustee v Anderson, 1901, 4 F. 305; 39 S.L.R. 226; 9 S.L.T. 328.

(525)

Right to control investment—Conveyance of beneficial right.

Marriage contract trustees were authorised to invest funds in lands and to change such investments with the written consent and direction of the spouses. **Held** that conveyances by the husband of his interest in the trust funds did not deprive him of the power to give such consent and direction.

Duke of Devonshire v Fletcher, 1874, 1 R. 1056; 11 S.L.R. 606.

(526)

Right of assignee to inspect trust accounts.

A contingent interest in a trust was assigned by the beneficiary. **Held** that the assignee was entitled, on paying a reasonable fee to the trustees' law agents, to inspect the trust accounts.

Salamon v Morrison's Trustees, (O.H.) 1912, 2 S.L.T. 499.

(526a)

Action by assignee of liferentrix against trustees—Declarator as to amount of a reasonable alimentary allowance—Ancillary conclusions for payment.

A lady who was in right of an alimentary liferent of the residue of a trust estate assigned it in security of a loan. On her

failure to repay, the creditor obtained a decree against her, and thereafter brought an action against the trustees and the life-rentrix concluding for declarator that £275 was a reasonable alimentary allowance and for payment of the surplus to him. The reasonableness of the amount not being disputed by the defenders, the Lord Ordinary granted the declaratory conclusion, but found it unnecessary to dispose of the other conclusions of the summons.

Craig v Pearson's Trustees, (O.H.) 1915, 2 S.L.T. 183.

VI. TERMINATION OF TRUST.

1. REVOCATION.

(1) INTER VIVOS TRUSTS—NOT MATRIMONIAL.

(527)

Trust for administration—Universal trust disposition.

A trust disposition was executed in the following terms:—"I . . . appoint" A and B "my trustees and managers of my affairs, and that absolutely, and for that purpose I assign, dispose, and make over to them . . . my whole heritable and moveable property . . . And I direct my trustees as follows:—(First) My said trustees shall take possession of my estates fore-said, as I hereby authorise them to do, for the purposes after mentioned; (Second) My said trustees will give me the free income of my estate during my lifetime, and I undertake not to interfere with them in any manner of way; (Third) At my death I direct my said trustees to dispose of my estates after making payment of the legacies after mentioned." Directions then followed as to the disposal of the truster's estate at her death and the payment of legacies, and the deed concluded with a clause recalling and cancelling all prior settlements executed by the truster. **Held** that the deed was to be construed as creating a trust for administration only; that it did not divest the grantor of her right to the estate conveyed, and that it was revocable.

Byres' Trustees v Gemmell, 1895, 23 R. 332; 33 S.L.R. 236; 3 S.L.T. 214.

(528)

Recorded and delivered deed.

A trust conveyance of heritage inter vivos, *ex facie* absolute and irrevocable, stamped, recorded in the Books of Council and Session, and extract delivered to trustee, though declared by a subsequent deed to be revocable, **held** a delivered and irrevocable deed.

Tennent v Tennent's Trustees, 1869, 7 M. 936; 41 J. 530; 6 S.L.R. 629.

(529)

Trust for persons named—Divestiture of grantor—Inter vivos disposition to trustees.

In 1903 Mrs. W. executed an inter vivos trust disposition by which—on the narrative

that she wished to make provision for herself in the first place in the case of continued illness or incapacity, and for certain persons therein mentioned, after her death, in the second place—she conveyed to trustees the sum of £700 for behoof of herself in *lifereit*, and on her death for certain persons named in the deed in fee. Power was given to the trustees, at their own absolute discretion, to apply any part of the principal sum for the maintenance of the truster during her life. The deed was declared to be irrevocable. Of even date with this deed, Mrs. W. executed a testamentary settlement of the whole personal estate which should belong to her at the time of her death. The *inter vivos* trust disposition was delivered to the trustees, together with the sum of £700, which was invested and administered by them in terms of the trust. **Held** that the trust disposition was irrevocable, and effectually divested the truster of the sum conveyed.

Walker v Amey, 1906, 8 F. 376; 43 S.L.R. 242; 13 S.L.T. 657.

(530)

Divestiture of grantor—Conveyance by spouses for themselves in *lifereit* and children of wife in fee.

A husband and wife executed a joint trust deed, whereby they conveyed an estate to the husband in *lifereit*, for his *lifereit* use *allanarly*, and to A, and such others as might be assumed as trustees "in fee, heritably and irredeemably," for these purposes; second, for payment to the wife, if she should survive her husband, of the free rents during her life; third, that the trustees should, on the death of the longest liver of the spouses, sell the estate, and divide the free residue among the wife's children by her first marriage: declaring "that the whole provisions herein shall not become vested interests in the said G M, A M," &c., naming the wife's children, "until the term of payment thereof; but on the death of any of them before said term of payment the provision to any of them so dying, leaving lawful issue, shall be divided equally among his or her issue alive at the time of payment, and failing such issue, shall belong to" the surviving children or their issue equally *per stirpes*. The deed was immediately registered in the Register of Sasines on behalf of the husband and the trustee for the respective rights of *lifereit* and fee, and was immediately delivered to A, who accepted, and began at once to act under the trust. During the lifetime of the spouses A made advances to them out of the capital of the trust. **Held**, in an action against him at the instance of the children of the wife, that by the trust deed the spouses had divested themselves of the fee of the estate, and that therefore A was bound to account to the pursuers for the capital of the trust estate advanced by him to the trustees.

Morrison v Allan, 1886, 13 R. 1156; 23 S.L.R. 846.

(531)

Delivery to the trustees.

A trustor by trust disposition, on the narrative that he was then in solvent circumstances, and that he regarded himself as morally and legally liable to the persons therein named for the sums therein mentioned, and that he was desirous of making a suitable provision for his wife and children, disposed certain heritable subjects, and also assigned certain policies of insurance upon his own life to trustees, and bound himself to the trustees to keep the policies in force. He then directed the trustees to hold and apply the trust estate for payment of a variety of provisions to his wife and children, some of which were to come into immediate operation, and also for payment of £500 to a nephew, payment of the last-mentioned provision being directed to be made as soon as the trustees had received payment of the proceeds of the policies of insurance. The residue of the trust estate was directed to be divided, on the death of his wife, among his lawful children. It was further declared that none of the provisions should become vested interests until the period of payment. The deed contained no express power to revoke, and was delivered to the trustees, who were infeft in the heritable subjects and intimated the assignation of the policies in their favour to the insurance companies. Subsequently the trustor executed a deed revoking the provision of £500 to the nephew. **Held**, after the death of the trustor, that the provision in favour of the nephew was irrevocable.

Robertson v Robertson's Trustees, 1892, 19 R. 849; 29 S.L.R. 752.

(532)

Trust subject to mortis causa provisions.

A married woman inter vivos conveyed certain estate belonging to her to trustees for (1) herself in liferent, and (2) her children in fee "subject to the provisions of any mortis causa settlement" she might make. **Held** that the deed in so far as it was not merely administrative was purely testamentary and therefore revocable.

Lockhart v Martin, (O.H.) 1904, 12 S.L.T. 142.

(533)

Inter vivos disposition — Recorded and delivered—Power to trustees to advance capital to trustor.

By trust disposition and assignation a lady assigned and disposed certain heritage described in the deed, and the whole remainder of her estate, heritable and moveable, to trustees, first, for behoof of herself in liferent, exclusive of the *jus mariti* and right of administration of any husband she might marry; and second, for behoof of her two sisters and their respective heirs in fee. In the third place, she provided that, notwithstanding the above provision of liferent and fee, it should be within the power of her trustees, at any time, in their sole discre-

tion, to advance to her the whole or such part of the capital as they might think fit. She further declared that the deed should be held as an alimentary provision for behoof of herself, and should not be affectable or attachable by her debts or deeds, or the diligence of her creditors. The deed was delivered to the trustees, who accepted office, and was thereafter recorded in the Register of Sasines. **Held** that the deed was not revocable by her.

Shedden v Shedden's Trustees, 1895, 23 R. 228; 33 S.L.R. 154; 3 S.L.T. 180.

(534)

Deed declared irrevocable—Immediate vesting in part of the estate.

By de presenti deed a trustor conveyed certain enumerated pieces of property to trustees for herself in liferent and after her death to certain beneficiaries. In the case of certain of the items of property vesting was postponed till her death; in the case of others there was immediate vesting. The deed was expressly declared to be irrevocable, and proceeded on the narrative that it was executed to give effect to bequests by her late husband. **Held** that the deed was irrevocable.

Laurence v Murray, (O.H.) 1901, 9 S.L.T. 165.

(535)

Trustor undivested—Proof of trust dependent on parole testimony of beneficiary.

A B deposited two sums of money in a bank taking the deposit receipts in the following terms:—"A B for behoof of C D." A B never parted with the deposit receipts, which were in her possession and control at her death, but after her death C D brought an action against A B's executor for delivery of the deposit receipts in which she maintained, *inter alia*, that A B held the money in trust for her and sought to prove it by parole evidence of statements made by A B during her lifetime. The defender was assoltized.

Drummond v Mathieson, (O.H.) 1912, 1 S.L.T. 455.

(536)

No existent beneficiary—Disposition by an unmarried man in trust for behoof of himself and his widow in liferent and children in fee—Liferents declared alimentary — Revocation by trustor while still unmarried.

A, an unmarried man, by a deed of trust, assigned to trustees stocks and shares amounting in value to over £1000, with directions to pay the income to himself during his lifetime, and after his death to his widow, should he have married, "declaring that the said provisions in favour of me and of my widow shall be for my and her respective liferent alimentary use alternately, and shall not be affectable by my or her debts, or deeds, or by the diligence of my or her creditors." With regard to the capital he directed the trustees to hold it for behoof of his lawful issue, and, in the event of there being no lawful issue who should acquire a vested right, then on the

death of the survivor of himself and his wife to pay one-half to B, his brother, and the other half to C, his half-sister. The deed was not declared to be irrevocable. The trustees accepted office, and completed a title to the stocks and shares. About a year after granting the deed A, who was still unmarried, desired to revoke it. In a special case, **held** that the deed was revocable, A's limitation of his own interest to an alimentary liferent not having the effect of making it irrevocable, and there being no other person in existence with a right to any portion of the fund—the provisions in favour of B and C being merely testamentary.

Bertram's Trustees v Bertram, 1909 S.C. 1238; 46 S.L.R. 865; 1909, 2 S.L.T. 86.

(537)

Existent beneficiaries—Trust for trustor in liferent and issue in fee.

A lady by a delivered deed conveyed funds to trustees for behoof of herself in alimentary liferent allenerly and her children in fee. At the date of the deed she had children alive and other children were subsequently born. **Held** that the deed was irrevocable.

Opinion (per Lord Stormonth-Darling) that "where a man makes a *de præsentis* trust conveyance for behoof of himself in liferent and for the ultimate payment of the fee to persons named or in existence and delivers the deed, the presumption, I think, must be that the trustees from the first hold for the fiars as well as for the granter, and that unless and until the purposes fail the deed is irrevocable . . . the presumption may be overcome where the deed itself contains clear indications that its primary purpose was to create a trust for administration only."

Smith v Davidson, (O.H.) 1901, 8 S.L.T. 354.

(538)

Beneficiaries in existence with contingent interest—Trust for persons named and survivor and children of such as might de cease—Postponement of vesting till payment.

A trustor by delivered deed conveyed estate to trustees for payment to himself of an alimentary liferent and division of the fee amongst his children A and B, and the survivor of them, and the issue of such of them as might die. Vesting was postponed till the period of payment. One of the children had pupil children. **Held** that the deed was irrevocable because there were in existence beneficiaries with a contingent interest who could not consent to revocation.

Foucalt v Foucart's Trustees, (O.H.) 1896, 4 S.L.T. 211.

(539)

Trust containing contingent provisions for "wife and children"—Ascertainment of identity as at emergence of contingency—Revocation.

A prospective liferenter under a deed of entail executed a trust disposition of his prospective liferent in order to pay debts.

The trustees were directed to pay the free remaining revenue to the trustor as an alimentary allowance, but, if the trustor should become bankrupt or attempt to alienate the revenue, the trustees were directed to apply it in their discretion for the trustor's maintenance or that of his "wife and children." Terms of the trust disposition under which **held** that the expression "wife and children" meant the trustor's "wife and children" as at the date when the discretionary power might fall to be exercised, and, since the consent of a possible future "wife and children" was unobtainable, the trustor was not entitled to revoke the deed.

Leslie v Leslie, (O.H.) 1910, 2 S.L.T. 254.

(2) MATRIMONIAL TRUSTS.

[See MARRIAGE CONTRACT I. 3, II. 2.]

2. RIGHT OF BENEFICIARY TO DEMAND DENUDING.

[For Matrimonial Trusts, see MARRIAGE CONTRACT I. 3 and ALIMENTARY PROVISION.]

(1) IMPOSSIBILITY OF EXECUTING TRUST.

(540)

Trust unworkable—Constitution of new trust with modified purposes—Authority of Court.

A testator directed his trustees to pay an annuity to his widow and to distribute the capital of the estate, so far as consistent with securing the widow's annuity, among his daughters in half-yearly payments. From these payments he excluded the *jus mariti* and right of administration of his daughters' husbands, and declared them strictly alimentary. After four years it was found that the trust had become unworkable, that the moveable property was exhausted, and that though power to borrow on security of the heritage was conferred, no further distribution could be made to the daughters without borrowing in a way prejudicial to their real interests. On the joint application of the widow and the daughters, who were all of full age, the Court authorised a conveyance of the estate by the trustees to new trustees for the purposes of a trust securing the widow's annuity and providing for the distribution of the property among the daughters as an alimentary fund and exclusive of the *jus mariti*.

Gray v Gray's Trustees, 1877, 4 R. 378.

(541)

Directions to trustees mutually repugnant.

The trustees under a trust disposition and settlement were directed to settle the share of one of the trustor's daughters in her marriage contract in terms similar to the terms of the settlement of her two sisters, which were absolutely repugnant. **Held** that the direction, being impossible of execution, because self-contradictory, must be

held *pro non scripto*, and that the daughter was entitled to payment of her share.

Murray v Matheson's Trustees, (O.H.) 1898, 6 S.L.T. 149.

(542)

Public trust to acquire and hold vacant ground—Failure of trust from want of funds.

A vacant piece of ground adjacent to a street of villas was subject to a building restriction in favour of one of the villas. A number of the proprietors of the villas met together and subscribed a sum of money for the purpose of purchasing the vacant piece of ground in order to prevent its being bought by a speculative builder. The subscribers bought the vacant piece of ground, but after some years it was found impossible, through lack of funds, to keep the ground open, and a majority of the subscribers obtained the appointment of a judicial factor, who presented a petition for power to sell the ground subject to a building restriction in favour of all the villa properties similar to that which already existed in favour of one of the villas. The proprietor of that villa objected. **Held** that the trust fell to be wound up, as the original trust purpose had failed; that the Court would not superimpose a second trust to vary the purposes; and therefore that the ground must be sold as it stood, and the price distributed among the contributors after payment of any trust debts.

Wood, (O.H.) 1896, 3 S.L.T. 277.

(543)

Trust to be administered for benefit of employees by partners of firm—Conversion of firm into limited company.

H, by a letter addressed to a firm of which he was a partner, directed two shares of his interest in the business to be held in trust in the books of the firm, subject to his liferent, and the annual proceeds applied "for the purpose of rewarding meritorious or long service employees of our said firm." H died, and seven years after his death the business was converted into a limited company. In an action of multipointing, the shares were claimed by (1) the testator's executor, (2) the surviving partners of the old firm, and (3) the limited company. **Held** that the conversion of the business into a limited company was an event which had not been provided for by the truster, and which rendered it impossible to carry on the trust, and that the shares fell into intestacy.

Hedderwick's Trustees v Hedderwick's Executor, 1910 S.C. 333; 47 S.L.R. 238; 1910, 1 S.L.T. 36.

(544)

Discretionary power to trustees to continue trust till estate cleared of debt—No reasonable prospect of debt being paid—Right of fiar to terminate trust.

A truster declared it to be his wish and intention that the trust should continue for ten years after his death, and such further period as his trustees might consider necessary and expedient for carrying out the "ultimate object" of the trust (viz., the

freeing of the heritable estate from debt) "in so far as this may reasonably be attained." Thirty-five years after the truster's death the estate had not been freed from debt, and the person who, if the period for distribution had arrived, was entitled to the fee demanded that the trustees should denude in his favour. Certain annuities charged on the estate were still current, and, as the fiar was alleged to be financially embarrassed, it was suggested that, if the trustees denuded in his favour payment of the annuities might be endangered. Circumstances in which **held** that, as the trustees admitted that there was no prospect that the estate could be freed of debt within any time that could be specified, they were bound to denude in favour of the fiar.

Sinclair's Trustees v Sinclair, 1913 S.C. 178; 50 S.L.R. 296; 1913, 1 S.L.T. 81.

Cf. Scarlett v Lord Abinger's Trustees, 1907 S.C. 811; 44 S.L.R. 525; 14 S.L.T. 842, No. 559, *infra*.

Home's Trustees v Fergusson's Executrix, 1921 S.C. 474; 58 S.L.R. 367; 1921, 1 S.L.T. 283, No. 560, *infra*.

(545)

Trust contrary to law — Direction to accumulate for purchase of lands—Direction to entail at future date—Failure of trust for accumulation.

A testator directed his trustees to pay the rents of certain lands to his widow during her life, and on her death to accumulate the rents for the purchase of additional lands till the death of the longest liver of certain nephews and nieces, and in that event to execute an entail in favour of the heirs-male of the body of the testator's nephew L. C., and a series of heirs. The testator's widow survived him for thirty-two years, so that accumulation subsequent to her death was struck at by the *Thellusson Act*. **Held** that the failure of the trust purpose did not accelerate the date for executing the entail, as until the death of the longest liver of the nephews and nieces it could not be known who would be the institute.

Campbell's Trustees v Campbell, 1891, 18 R. 992; 28 S.L.R. 771.

(546)

Discretion to trustees to retain estate till death of all testator's grandchildren and in certain events to convey to testator's nearest lineal issue — *Rutherford Act*, 1848, sec. 48—*Entail Amendment Act*, 1868, sec. 17.

A truster, by his trust disposition, directed his trustees, "if they consider it proper, to continue to retain the trust estate under their own management until the death of all my grandchildren, and thereafter, as soon as there shall be five of my lineal descendants in existence, to bring the trust to an end by denuding of the trust estate equally in favour of my nearest lineal issue then alive." **Held** that such a settlement was struck at by the 48th section of the *Rutherford Act* and the 17th section of the *Entail Amendment Act*, 1868, and that the only surviving

grandchild was immediately entitled to the whole estate.

Davie v Davie's Trustees, (O.H.) 1900, 8 S.L.T. 28.

(2) FAILURE OF TRUST PURPOSES OR TRUST MACHINERY.

(547)

Trust exhausted—Payment to beneficiary—Claim for payment by heir-substitute—Claim against trustees qua trustees or qua individuals.

A testatrix provided that "whatever more may remain of my means I wish to be equally divided between my two daughters (A and B) and son C, and in the event of my daughter A having no children, I would wish and will and settle should return to my other daughter's family if not spent during her lifetime, at the same time I give my daughter A full power to use it as she may require, but if not spent at her death it should return to B's family." A duly received her share of the testatrix's estate. A considerable time after A's death B's family sued and recovered from A's executors the share, without interest, which A had received. Thereafter B's family sued the testatrix's trustee for the amount of the interest at 5 per cent. on A's share from the date of her death. The Lord Ordinary dismissed the action as irrelevant, **holding** that A's share did not remain subject to a trust after it had been paid over to A, and that there was no duty on the testatrix's trustee to recover A's share so far as unspent on her death and pay it over to B's family, and accordingly that if the pursuers had any claim, it was a personal claim against A's executors.

Masson v Scott's Trustees, (O.H.) 1910, 2 S.L.T. 28.

(548)

Trust purposes superseded—Trust for rebuilding a bridge—Bridge rebuilt from other funds.

A testator bequeathed his estate to a town council "in trust in order that they, or their successors in office, may use the whole thereof in rebuilding" a certain bridge, "when such a thing may be required; till that time shall arrive, my bequest shall lie in proper security, annually having the interest added to it." The bridge was restored by public subscription, and the necessity for rebuilding it was postponed to an indefinite date. **Held** that the trust had not lapsed.

Templeton v Magistrates of Ayr, (O.H.) 1910, 2 S.L.T. 12.

(549)

Casus improvisus—Gift to two sons on younger attaining twenty-five—Survivorship clause—Younger son dying in minority—Payment to elder son while under twenty-five.

A testator directed his trustees to pay the residue of his estate to two of his sons A and B, on the younger, B, attaining the age of twenty-five. In the event of the death of either son "before the succession opens to him" without leaving issue his share was

to accresce to the survivor. B died in minority at that date. A had not attained the age of twenty-five. **Held** that the whole of the residue vested in A at B's death and that A was entitled to payment thereof.

Mackie v Gladstone, 1876, 13 S.L.R. 368.

(550)

Reason for postponing payment disappearing.

A testator directed his trustees to make over his business and whole stock-in-trade to his son John, "subject to a legacy or debt of £2000 in favour of" his son James, "to be paid to him by his brother John at the first term of Whitsunday, twenty years after my decease (payment of the above legacy or bequest being postponed by me for such a length of time in order that my son John may not be unduly burdened in conducting the said business); and in the event of my son James dying before the said legacy of £2000 becomes payable to him, then I direct my trustees to pay and divide the same equally among his lawful children." The testator died in 1876, and his son John in 1885, leaving a widow, but no children. **Held**, in a question between the trustees, James, and James's children, that the legacy to James vested a morte testatoris, and that as the reasons for postponing the date of payment had disappeared, the payment might be anticipated, under discount in respect the legacy did not carry interest until the term of Whitsunday, 1896.

Finlay's Trustees v Finlay, 1886, 13 R. 1052; 23 S.L.R. 774.

(551)

Alimentary annuity—Annuitant acquiring right to fee—Whether trustees bound to denude.

A testator directed the trustees under his trust disposition and settlement to pay an alimentary annuity to his wife in the event of her surviving him. Her son, in whom the fee of the estate had vested, died, leaving a general disposition and settlement in favour of his mother, and without having received payment of any part of the residue, the whole of which the trustees had found it necessary to retain in their hands to meet the widow's annuity. **Held** that the trustees were bound to continue to make provision for payment of her alimentary annuity out of the residue notwithstanding her acquisition of the fee, and, therefore, that she was not entitled to require them to denude in her favour.

Howat's Trustees v Howat, 1922 S.C. 506; 59 S.L.R. 411; 1922 S.L.T. 382.

(552)

Unqualified right to fee.

By trust disposition and settlement a testator directed his trustees to hold the residue of his estate for behoof of his daughter, "in liferent for her liferent alimentary use alienably," and declared that the liferent should be purely alimentary and not affectable by debts or subject to the jus

mariti of any husband she might marry. In the event of her being married and leaving lawful issue he directed the residue to be made over to such issue after their mother's death, and in the event of her death without lawful issue the residue was to be made over to the trustor's heirs, executors, and assignees whomsoever. The daughter, being 58 and unmarried and being also his heir at law and sole next of kin, brought an action to have it declared that there had vested in her an absolute right to the fee of said residue. **Held** that although there was in her an unqualified reversionary right to the residue of the estate, the right of life interest was qualified, and that the trustees must hold the income of the residue as an alimentary provision for her benefit, and could not pay the capital over to her.

Barron v Barron's Trustees, (O.H.) 1887, 24 S.L.R. 735.

(553)

No continuing trust—Direction to purchase alimentary annuity—Right to immediate payment of capital.

A testatrix directed her trustees to set aside a certain sum, "and to purchase from the Government or any Scottish insurance company of good standing a joint annuity payable to my daughters . . . equally during their joint lives and the lives of the survivors or survivor of them, which annuities shall be for their alimentary use alienably, not subject to their debts or deeds nor liable to the diligence of their creditors and without power of anticipation." The testatrix made no provision for a continuing trust to protect the alimentary character of this annuity, but conferred upon the trustees "all requisite powers for carrying out the purposes of this settlement." **Held** that the daughters were entitled to immediate payment of the capital sum directed to be expended on the purchase of the annuity. **Question** (per Lord Skerrington), whether the constitution of a continuing trust was essential to the creation of a valid alimentary right.

Dempster's Trustees v Dempster, 1921 S.C. 332; 58 S.L.R. 297; 1921, 1 S.L.T. 180.

See also *Kennedy's Trustees v Warren*, 1901, 3 F. 1087; 38 S.L.R. 827; 9 S.L.T. 149. **SUCCESSION**, No. 1243.

(554)

Competing trusts—Power of appointment under marriage contract—Appointor's direction that fund to be administered by her testamentary trustees.

By an antenuptial contract of marriage the trustees were directed, after the death of the surviving spouse, to hold the wife's estate for behoof of the children of the marriage in such proportions, and subject to such conditions, limitations, and restrictions, as she might appoint. The wife executed a deed of appointment by which she directed the marriage contract trustees to hold certain shares of the estate for behoof of her daughter in alimentary life interest, and on her daughter's death to dispose of

the capital in such manner as the latter might direct. Discretionary powers were conferred on the trustees of advancing capital to or for behoof of the daughter. Subsequently the wife made a holograph writing in the following terms:—"I hereby alter the deed of appointment . . . to this extent, that the provisions it contains in favour of my daughter are to be paid to the trustees named" in the wife's trust disposition and settlement "to be administered by them . . . as directed in the said deed of appointment." **Held** that the capital of the estate appointed to the daughter fell, on the death of the survivor of the spouses, to be paid over by the marriage contract trustees to the wife's testamentary trustees, and to be administered by them in terms of the deed of appointment.

Ewing's Trustees v Ewing, 1909 S.C. 409; 46 S.L.R. 316; 1909, 1 S.L.T. 104.

(555)

Funds held by trustees under an inter vivos settlement, for issue subject to power of appointment—Power exercised by will—Whether settlement or testamentary trustees to hold fund.

Where under an inter vivos settlement trustees were directed to stand possessed of trust funds for the issue of the settlor, as she should appoint, and this power of appointment was validly exercised by the settlor in her will, by which she directed the whole residue of her estate to be held by her testamentary trustees for certain purposes, **held** that the settlement trustees were in the circumstances bound to pay over the settlement trust funds to the testamentary trustees.

Dalziel v Dalziel's Trustees, 1905, 7 F. 545; 42 S.L.R. 404; 12 S.L.T. 793.

(556)

Power to wind up trust.

Where one of two acting trustees suddenly proceeded to America with a view to permanent residence there, leaving no address, the Court refused authority to the other trustee to grant conveyances of the trust property as sole remaining trustee, and to wind up the trust.

Waugh's Trustee, 1892, 20 R. 57; 30 S.L.R. 85.

(3) ACCELERATION OF PAYMENT.

(a) Trust for Accumulation or for Payment of Debt.

(557)

Trust for accumulation.

A testator gave his wife an annuity and directed his trustees to accumulate the balance of the revenue. The vesting of the fee was suspended until the widow's death. The widow claimed her legal rights, but this had not the effect of accelerating the vesting. **Opinion** (per Lord Watson) that the existence of the trust for accumulation was

sufficient to bar distribution of the estate fixed by the testator.

Muirhead v Muirhead, 1890, 17 R. (H.L.) 45; 15 App.Cas. 289; 27 S.L.R. 917.

(558)

Accumulation of surplus income for residue during life of annuitant—Acceleration of payment of general legacy refused.

By the sixth purpose of his trust disposition and settlement, a testator directed his trustees upon the death of his wife to set aside out of the residue of his estate the sum of £10,000, the free interest and profits accruing annually from the said sum to be applied as a provision or endowment of a professor of natural science in the New College of Edinburgh in connection with the Free Church of Scotland. By the seventh purpose the testator directed his trustees upon the death of his wife to apply £7000 in building a territorial church, and £3000 as a partial endowment for the minister. The last purpose was in the following terms:—"After all the above purposes shall have been fulfilled, I appoint and direct my trustees to apply and pay over the whole residue and remainder of my estate, if such there shall be, to and for the use and benefit of such four of the schemes of the Free Church of Scotland, and in such proportions as to my trustees shall appear most expedient." The residue of the estate, after payment of legacies, but subject to the widow's annuity, amounted to £27,000. Held that during the widow's life the trustees were not entitled to make an immediate payment of the £10,000 to the prejudice of the four schemes of the church as residuary legatees.

Elder's Trustees v Treasurer of the Free Church of Scotland, 1881, 8 R. 593; 18 S.L.R. 392.

(559)

Trust for payment of debts—Entail to be executed when debts paid off—Offer by beneficiary to pay debts.

A peer who died in 1903 by his will, after providing certain annuities, directed his trustees to apply the surplus income of his estates in Scotland year by year towards payment of the debts secured over his Scots estates, "my intention being that my trustees shall continue to hold and administer my said landed estates in Scotland, and apply the free income thereof in or towards payment of the debts affecting the same until the whole of the said debts shall be absolutely discharged and extinguished." He further directed his trustees after all the debts had been paid to convey the Scots estates by deed of entail to "the person who shall at the time when such debt shall be finally discharged" be in right of the peerage, the destination being subject to an exclusion of Roman Catholics. In 1905 the person entitled to succeed to the Scots estates, if the entail fell to be executed at once, brought an action for declarator that on the pursuer paying off the debts on the Scots estates the trustees were bound to

execute the deed of entail. Held that the trustees were bound to continue the trust until the debts secured on the Scots estates were paid off out of revenue in the ordinary course of administration.

Scarlett v Lord Abinger's Trustees, 1907 S.C. 811; 44 S.L.R. 525; 14 S.L.T. 842.

(560)

Direction to apply revenue of lands in clearing off burdens, and, on debt being extinguished, to convey lands—Offer by prospective beneficiary to pay off debt in return for immediate conveyance.

By his trust disposition and settlement a testator directed his trustees, after paying certain legacies, to accumulate the revenue of his estate of B, and from time to time to apply the same in payment of the debts secured upon the estate, and, as soon as the debts and legacies should have been satisfied, to convey the estate to the eldest son of his brother J. F. and his heirs. Thirty-nine years after the death of the testator, when only about one-third of the debts had been paid off out of surplus revenue, an offer was made on behalf of the then heir of the eldest son of the testator's brother J. F. to pay off, or to provide the trustees with money to pay off, the remaining debts, in return for a conveyance of the estate thus disburdened. Held that, as there was nothing in the settlement restricting the trustees to the surplus revenue of the estate as the only source from which the debts could be repaid, they were bound to accept the offer and grant a conveyance to the person then entitled to the estate.

Horne's Trustees v Fergusson's Executrix, 1921 S.C. 474; 58 S.L.R. 367; 1921, 1 S.L.T. 283.

See also *Sinclair's Trustees v Sinclair*, 1913 S.C. 178; 50 S.L.R. 296; 1913, 1 S.L.T. 81, No. 544, supra.

(b) Renunciation of Provisions.

[See also ALIMENTARY PROVISION II.]

(561)

Renunciation of annuity—Annuity declared to be alimentary.

Terms of settlement under which held that the period of division of residue fixed by the truster could not be anticipated by a discharge of alimentary annuities.

Henderson's Factor, 1874, 11 S.L.R. 507.

(562)

Trust inter vivos—Whether renunciation of reserved alimentary liferent so as to accelerate payment of fee within power of truster.

H executed an inter vivos trust disposition and assignation, which he declared to be irrevocable, whereby he conveyed to trustees a sum of £20,000 that they might pay to him during his life for his alimentary use alienably the free annual income, and hold the fee or capital for behoof of his whole lawful children born or to be born, and the

issue of such of them as should predecease, in such shares as he should fix by any writing under his hand, and, failing such writing, equally per stirpes, payable to them as they attained majority. The fund was paid over to the trustees, who thereafter administered it in terms of the trust disposition and assignation. In 1879 H, being then a widower and 68 years of age, executed a deed of apportionment and division whereby he renounced his reserved liferent over £8500 of the trust funds, and directed his trustees to make an immediate division of that sum among his children. In a question between the trustees on the one hand, and the father and his children, who had all reached majority except one, who was 18 years of age, on the other, held that the deed of renunciation, apportionment, and division was within the power and competency of H, and that the same should receive effect.

Hamilton's Trustees v Hamilton, &c., 1879, 6 R. 1216; 16 S.L.R. 722.

(563)

Right to renounce liferent—Direction to trustees to invest for behoof of A and pay interest.

In his trust disposition and settlement executed in 1858 a testator who had three daughters, one married and two unmarried, directed his trustees, previous to their dividing the residue of his estate, "to set apart and invest" in their own names £1600 in two sums of £800 each "for behoof of" his two unmarried daughters, M and W, "the interest thereof to be paid to them respectively so long as they remain unmarried," declaring that in the event of either of them contracting marriage or dying, the interest on the sum "effeiring to such daughter" should be paid to the other so long as she remained unmarried. The testator further authorised his trustees to pay to each daughter on her marriage a sum not exceeding £200 "out of the said sum of £1600" for outfit, and then directed his trustees after payment of his debts, and "after investing the said sum of £1600," to make over the residue of his estate to his three daughters, share and share alike, "but deducting from the shares of my said children . . . any sum . . . that may have been paid by my said trustees to any of my said daughters for outfit in the event of the marriage of either of them." In the event of any of the children dying before the period of division, her share was to accrue to the survivors. The testator was survived by his three daughters. Held (1) that the provision in the residuary clause that the sums paid by the trustees for marriage outfit from the £1600 should be deducted from M and W's shares of residue showed the testator's intention that the fee of the £1600 should form part of the residue, and that it fell to be disposed of accordingly, and (2) that the unmarried daughters were entitled to renounce their liferents of the £1600, and to obtain immediate payment

of their shares of the capital thereof as residue.

Whitehead's Trustees v Whitehead; 1897, 24 R. 1032; 34 S.L.R. 782; 5 S.L.T. 74.

(564)

Heritage held for a beneficiary in liferent with power of disposal — Liferent not declared alimentary—Sale of interest by beneficiary.

A trustee held certain heritable property for behoof of a lady under directions "to apply the same to the sole and separate use of (the lady) during the natural term of her life, jus mariti being excluded, and the said trustee shall pay over and apply or dispose and assign the said property to such persons as the said (lady) shall by any deed from time to time appoint." Then followed a substitution of other persons. The lady sold her interest in the property. Held that the lady being sole beneficiary and her interest not being restricted to an alimentary liferent, she was entitled, on executing an irrevocable deed of appointment, to a decree ordaining the trustee to execute a disposition to the purchaser.

Steward v Vanner, (O.H.) 1894, 1 S.L.T. 549.

(565)

Exercise of power of appointment given to liferentrix—Uncertainty as to value of trust fund at termination of liferent.

The liferentrix of a marriage contract trust fund who had a power of apportionment of the fee apportioned it to the extent of £800. The liferentrix and all the fiars except one, who had disappeared, consented to the £800 being immediately paid over. Held that the marriage contract trustees were not entitled to make immediate payment, because the trust fund was of uncertain amount, liable to be increased or diminished according as the investments of the trustees increased or diminished, and accordingly, if immediate payment were made, the other fiars might be prejudiced.

Robertson v Robertson's Trustees, (O.H.) 1900, 8 S.L.T. 50.

(566)

Renunciation of liferent — Execution of power of appointment.

A judicial factor held a marriage contract estate for the widow in liferent, and the only child of the marriage in fee. The child had an indefeasible right of fee. The judicial factor, with concurrence of the liferentrix, presented a petition for authority to denude in favour of the fiar on the liferentrix renouncing her liferent and executing an appointment of the capital to the fiar.

Mackie's Judicial Factor, (O.H.) 1920, 2 S.L.T. 95.

(567)

Widow repudiating testamentary provisions—Residue—Postponement of payment.

A trust settlement directed the trustees to give the truster's widow the liferent of his furniture and an annuity of £70, and further bore, "upon the death of my spouse, and

the youngest of my children having attained majority or the whole of them being married, I direct my trustees" to "divide" the residue of the heritable and moveable estates among the trustor's children, the shares of daughters to be held by the trustees for behoof of them in liferent, and of their children in fee. The trustor was survived by his widow, and by six daughters, all of whom were married. The widow renounced her provisions, and claimed terce and jus relictæ. The terce amounted to £160 per annum. **Held** that, as it appeared from the deed that the trustor had postponed the period of division to the date of the widow's death, for no other purpose than to give effect to the provisions in her favour, which had now lapsed, the period had arrived for dividing the residue, and that the subsistence of the legal burden of terce was no impediment to the division.

Alexander's Trustees, 1870, 8 M. 414; 42 J. 193; 7 S.L.R. 240.

(568)

Residue—Conveyance to residuary legatees subject to burdens.

A testator directed his trustees, in the event of his leaving no issue, to pay to his widow a free yearly annuity of £200, and give her the liferent use of a house, "and whatever further interest and annual income my said estates shall yield . . . shall be accumulated during the lifetime of my said wife by my said trustees, and form part of my estates." The estate yielded a clear return of more than £300 a year, after paying the widow's annuity, which, in the event, which happened, of the trustor leaving no issue, was the only provision to be paid or provided for during her life. On her death the trustees were to pay to the children of J M "surviving at said period" the sum of £100 each, and an annuity of £100 a year to the brother of the trustor's widow, "provided he return to this country and reside here, and provided my said trustees consider that he requires the same." The residue was to form a fund to be vested in certain persons ex officio for the establishment of a charitable foundation, to be styled after the trustor, "The Lucas Trust." **Held**, on the widow's repudiation of the settlement, that the trustees and patrons of "The Lucas Trust" were entitled to an immediate conveyance of the residue, subject to existing and contingent interests.

Lucas's Trustees v "The Lucas Trust," 1881, 8 R. 502; 18 S.L.R. 363.

(569)

Right to surrender policy of insurance held in trust for married woman — Married Women's Policies of Assurance Act, 1880, sec. 2.

A policy effected by a married man upon his own life for behoof of his wife under the 2nd section of the Married Women's Policies of Assurance Act, 1880, may be surrendered at any time by the trustee who holds it, with concurrence of the wife.

Opinion (per Lord Shand) that it may be surrendered without the concurrence of the

wife, unless the insurance company have notice of any intended breach of trust.

Schumann v Scottish Widows' Fund Society, 1886, 13 R. 678; 23 S.L.R. 474.

(c) Security for Payment of Provisions.

(570)

Payment under burden of debts and provisions.

A testator left his whole estate in trust for payment of his debts, the expenses of the trust, an annuity to his widow, and certain provisions to his younger children. On payment of the debts and provisions, the trustees were directed to convey the residue to the testator's eldest surviving son, but not until he should have attained the age of twenty-five. The eldest son having attained the age of twenty-five, **held** that the trustees were not entitled to convey the residue to him on condition that he bound himself to satisfy the whole debts, obligations, and liabilities affecting the trust estate.

Colt v Colt's Trustees, 1868, 5 S.L.R. 660.

(571)

Demand for payment by one of several flars — Consent of liferenter.

A testator conveyed his heritable and moveable estates to trustees for payment of certain legacies and annuities, and for payment of the liferent of the remainder to his widow. He further directed his trustees, after the death of the longest liver of himself and his wife, to pay a provision of £18,000 to his son, and a provision of £8000 to each of his four daughters, and to hold the residue of his estate for behoof of his son. He declared that the children's provisions should vest at his decease. The testator was survived by his widow and by his five children. The son applied to the trustees for payment of his provision of £18,000. The widow consented to the application, and offered to discharge her liferent in regard to that sum. The funds in the hands of the trustees at the date of the application were amply sufficient to meet all the children's provisions. **Held** that the trustees were not bound to accede to the son's demand, in respect that the daughters were entitled to *pari passu* payment of their provisions along with the son, and that it was possible that when the date of payment arrived the estate might be insufficient to pay the provisions in full.

Haldane's Trustees v Haldane, 1895, 23 R. 276; 33 S.L.R. 206; 3 S.L.T. 199.

(572)

Direction to distribute on expiry of lease.

A testator directed that his trustees should, on the expiry of a lease of a mill in his favour, "in or about the year 1892, as I think, . . . but not sooner, pay and convey" the residue of his estate to certain beneficiaries, whose right to the residue vested a *morte* testatoris. **Held** that the trustees were entitled before the expiry of the lease to pay over

the available residue to the beneficiaries, reserving only so much as was necessary to carry on the administration of the trust, and to protect themselves from personal liability.

Archibald's Trustees v Archibald, 1882, 9 R. 942; 19 S.L.R. 709.

(573)
Gift of one-third part of annual income—Right of fiars to payment of capital during subsistence of liferent.

Testamentary trustees were directed to "pay one-third part of the annual income or produce of the residue" of the estate to the testator's widow during her life, and to "hold" the residue "subject always to the foresaid liferent" for behoof of the children. There was a further direction that the sons' shares should be paid to them on attaining majority. **Held** that the trustees, on making provision for payment to the widow of the income of a third of the revenue, might during her life pay the capital to the beneficiaries.

Robertson's Trustees v Black, 1910 S.C. 1132; 47 S.L.R. 839; 1910, 2 S.L.R. 149.

(574)
Payment under burden of annuity—Sums set aside to meet legacies.

A proprietor of an entailed estate, after making provisions of specific amount to his younger children, payable at majority or marriage, directed his trustees, after the purposes of the trust "have been fully satisfied by the succession to the lands of P . . . opening to them," to convey the residue to his eldest son under burden of an annuity to his mother. P . . . was a property to which the testator had succeeded, subject to a liferent, and formed a very large portion of the estate at his own disposal. The liferenter predeceased the testator. Sums having been set aside to satisfy the provisions of certain of the younger children, of which the term of payment had not arrived, the eldest son called on the trustees to convey the residue to him. **Held** that, irrespective of the question whether the younger children's portion had vested or not, he was entitled to a conveyance.

Scott v Scott's Trustees, 1876, 4 R. 229; 14 S.L.R. 272.

(575)
Annuity to widow—Payment of surplus over sum required to secure annuity.

A testator directed his trustees to pay an annuity of £4000 a year to his widow, "this is to be a first charge on my estate; Third, the balance of the income of my estate to be divided equally among my children; Fourth, on the death of my wife, my estate to be equally divided among my four children; Fifth, in the event of the death of any of my children (being married) without leaving any family, the widow or widower to be liferented in their portion." The testator was survived by his wife and children. He left moveable estate valued at £469,900, and the sum required to secure the widow's an-

nuity was £150,000. **Held** that the capital having vested in the children a morte testatoris, the trustees were bound forthwith to distribute the capital among the children, except in so far as it was necessary to retain capital to secure the widow's annuity.

Coats' Trustees v Coats, 1903, 5 F. 401; 40 S.L.R. 330; 10 S.L.T. 585.

(576)
Trust for payment of annuity—Annuity heritably secured.

Where under a testamentary trust only one special interest remains to be provided for, and that is of a partial kind, and can be provided for as effectually in some other way, the Court will liberate the estate from the trust.

A trustor conveyed certain lands to testamentary trustees for payment of various provisions, directing them after satisfaction thereof to convey the lands to a certain series of heirs named in a deed of entail also executed by him. All the purposes of the trust having been satisfied, except payment of a small annuity out of the rents, and certain other provisions all in favour of one beneficiary, **held** that the judicial factor on the trust estate was entitled to convey it to the heir of entail then in right of the succession, the annuity and other provisions in question being made real burdens upon the estate, and being declared in the disposition and deed of entail executed by the judicial factor at the sight of the Court to be still payable and prestable by him, and authority of the Court accordingly interposed to the said disposition and deed of entail.

Munro v Macarthur, 1878, 16 S.L.R. 126.

(577)
Security for annuity—Agreement between annuitant and beneficiaries.

A trustor directed his trustees to invest his means, and "from the free annual proceeds thereof" to pay a certain annuity; further, upon the death of the annuitant, to "divide my whole means and estate into seven shares," to be paid to certain named beneficiaries. There was a substitution in the event of any of the beneficiaries predeceasing the testator. The annuity did not exhaust the income. **Held** that as the estate vested a morte testatoris, the sanction of the Court might be given to an arrangement between the beneficiaries and the annuitant under which the estate was to be divided, on satisfactory security being given to the annuitant.

Mackay's Trustees, 1878, 16 S.L.R. 197.

(578)
Purchase of annuity out of capital—Alimentary annuity.

Where trustees administering a trust estate of upwards of £3000 were directed in the first place to apply a sum of £50 per annum for the alimentary maintenance of the trustor's son, the capital of the trust estate being divisible among other beneficiaries on the son's death, **held** that the trustees were not entitled to purchase an annuity out of the

capital without the consent of all the beneficiaries in right of the capital.

Parlane's Trustees v Parlane, 1902, 4 F. 805; 39 S.L.R. 632; 10 S.L.T. 48.

(579)

By antenuptial contract of marriage executed on the occasion of his second marriage, A obliged himself to pay to his intended wife, in the event of her surviving him, a free alimentary annuity. A predeceased his wife, leaving a trust disposition and settlement, by which he conveyed his whole estates to trustees for, *inter alia*, "implement of the provisions contained in the marriage contract," and directing his trustees to hold the residue of his estate for behoof of six of his children by his first marriage equally. Five of the children to whom the fee of the residue was destined, with consent of the widow, who was forty-six years of age, with the view of terminating the testamentary trust, called on the testamentary trustees to apply so much of the capital of the residue as was necessary in the purchase of a Government annuity, payable to the marriage contract trustees for behoof of the widow as an alimentary annuity. The sixth child had gone abroad, and his address was unknown, but there was no presumption that he was dead. A factor *loco absentis* who had been appointed to him objected to the proposed application of capital. In a special case, **held** (1) that the testamentary trustees would sufficiently implement the obligation undertaken by A in his antenuptial marriage contract by purchasing a Government annuity in the terms proposed, and that the marriage contract trustees would be in safety to accept such an annuity; but (2) that the testamentary trustees were not entitled to apply the capital of the residue in such a purchase except with the consent of all the beneficiaries in right of the capital proposed to be so applied, such an application of capital not being an ordinary act of trust administration.

Graham's Trustees v Graham's Trustees, 1898, 1 F. 357; 36 S.L.R. 273; 6 S.L.T. 257.

(580)

A testator directed his trustees or their successors to hold £4000 for behoof of his son D in *liferent* *allenarly*, and of his issue in fee, whom failing, to pay the same to the testator's other sons, with power to the trustees, if they thought it prudent, to pay the whole or any part of the principal to D. In a petition at the instance of a judicial factor, appointed on the resignation of the trustees, of the *liferenter* (then fifty-two years of age and unmarried), and of all others then in existence who were interested in the fund, for the appointment of a new judicial factor, with special powers, to apply a fourth part of the fund in purchasing an annuity for behoof of the *liferenter*, the Court granted the special powers craved.

Simson, 1883, 10 R. 540; 20 S.L.R. 359.

[For conditions defeasible at will of legatee, see SUCCESSION XVII.]

(4) PRESUMPTION AGAINST CHILD-BEARING.

[See also PRESUMPTION I.]

(581)

Offer to renounce *liferent* — *Liferent* not declared alimentary.

Testamentary trustees held a fund in trust for one of the testator's nieces in *liferent* *allenarly*, and her children as they respectively attained majority in fee. The *liferent* was not declared to be alimentary. In 1902, when the niece was fifty-seven years of age, and all her existing children had attained majority, a special case was presented for determination of the question whether the trustees were entitled, on the joint request of the niece and the children, to pay over the capital of the fund to the children. The trustees maintained that they were not in safety to do so, in respect of the possibility of the niece having other children. At the date of the special case the niece was a widow, her husband having died in 1898, nineteen years after the birth of the youngest child. It was admitted that the fee had vested in the children, subject to partial defeasance in the event of other children being born and attaining majority. The children offered to purchase an annuity for their mother, and she and they offered to discharge the trustees, and to obtain and deliver to the trustees a paid-up policy of insurance, providing for the payment of such sum as might be necessary in the event of other children being born. **Held** that the trustees were entitled, on the completion of the proposed arrangements, to pay over the fund to the children.

M'Pherson's Trustees v Hill, 1902, 4 F. 921; 39 S.L.R. 657; 10 S.L.T. 143.

(582)

Application to *nobile officium* — Competency — Application at instance of beneficiary.

By his trust disposition and settlement a testator directed, with regard to a legacy of £13,500, that it should be paid to certain persons as trustees, to be held by them in trust for behoof of his daughter in *liferent* and of her children in fee, on such conditions as she might appoint by any writing under her hand, which failing, equally among them; and, failing children, for such person or persons as the daughter might appoint. The testator died in 1896, and, in 1922, the daughter, being then fifty-nine years of age and unmarried, appointed the legacy to herself absolutely, and directed that it should be paid over to herself. Thereafter she presented a petition to the *nobile officium* of the Court, setting forth these facts, and craving the Court to authorise payment of the trust funds to her. She also averred that the restriction of her interest to a *liferent* was applicable only in the event, which had become impossible, of a child being born to her, and that payment of the funds to her would not affect the interest of any living person except herself. The Court refused the petition, **holding** that the petitioner's proper

remedy was not by an application to the nobile officium, but by a direct action against the trustees for payment.

Snodgrass, 1922 S.C. 491; 59 S.L.R. 394; 1922 S.L.T. 339.

(583)

Gift of fee subject to defeasance on birth of children.

A trustee conveyed his estate to trustees for payment of the annual income to his daughter, to be under her exclusive control and at her sole disposal, and also directed that they should hold the estate for the benefit of her lawful children if she was married, and if she died unmarried or without lawful children, that they should convey and make over the estate to his nearest lawful heir whomsoever. The daughter, who was her father's heir, and was also unmarried and fifty-five years of age, raised an action of declarator of her right to the fee. **Held** that the fee had vested in the daughter both under the special destination and as her father's nearest lawful heir, and that the trustees were bound to convey the estate to her on condition that she entered into an obligation to reconstitute the trust if she married and had a child.

Williamson v Williamson's Trustees, (O.H.) 1881, 19 S.L.R. 276.

3. EXONERATION OF TRUSTEES.

(584)

Action of multipointing and exoneration—Double distress—Competency.

Connell's Trustee v Chalk, 1878, 5 R. 735; 15 S.L.R. 413, No. 638, *infra*.

Mackenzie's Trustees v Sutherland, 1895, 22 R. 233; 32 S.L.R. 172; 2 S.L.T. 422, No. 639, *infra*.

(585)

Double distress—Claim by creditor and claim by beneficiary—Competency.

Glen's Trustees v Miller, 1911 S.C. 1178; 48 S.L.R. 931; 1911, 2 S.L.T. 178, No. 640, *infra*.

(586)

Petition for discharge—Trustees resigning obtaining discharge from co-trustees but not from beneficiaries—Act 1867, sec. 9.

Two trustees resigned from a trust. They were able to obtain a discharge from the other trustees, but not from the beneficiaries, so they presented a petition under sec. 9 of the Trusts Act, 1867, to obtain a discharge from the Court. The Lord Ordinary dismissed the petition, **holding** that under the statute the Court could only intervene when it was impossible for the resigning trustee to obtain a valid discharge either from the remaining trustees or from the beneficiaries.

Matthew's Trustees, (O.H.) 1894, 2 S.L.T. 122.

(587)

Judicial audit.

Testamentary trustees were directed by the testator to apply the residue of the trust estate in the establishment and maintenance of a charitable institution, and to

apply to the Court annually for a remit to an accountant, whose report upon their intromissions, when approved by the Court, should be to them a sufficient exoneration and discharge. **Held** (by a majority of seven judges) that the Court could not competently entertain an application by the trustees for an audit of their accounts in terms of the foregoing direction in the trust deed.

Dundas, 1869, 7 M. 670; 41 J. 343; 6 S.L.R. 435.

(588)

Discharge—Disposition of heritage to legatees—Right of trustees to general discharge of intromissions.

Two heritable properties formed practically the whole assets of a trust estate, and the rents of the properties were subject to the general purposes of the trust. Under the trust deed the trustees were directed to make over the properties to two legatees on the occurrence of a certain event. **Held** that on making over the properties to the legatees, the other trust purposes having been fulfilled, the trustees were entitled to obtain from the legatees a general discharge of their intromissions.

Davidson's Trustee v Cooper, (O.H.) 1895, 3 S.L.T. 28.

(589)

Objection to trust accounts—Mora.

Challenge of trust accounts, brought forty years after their date, when interest to challenge first emerged, **held** not barred by mora, or by an award by an accountant given effect to in an action between another party and the trustee.

Aitken v Hunter, 1871, 9 M. 756; 43 J. 413; 8 S.L.R. 510.

(590)

Transaction between trustees and beneficiaries—Mora.

Buckner v Jopp's Trustees, 1887, 14 R. 1006; 24 S.L.R. 680, No. 412, *supra*.

(591)

Trustees continuing to act though functi officio.

In an action of multipointing and exoneration raised by testamentary trustees the Court found one of the claimants entitled to certain lands. During the dependence of a reclaiming note against this decree the trustees granted a lease of part of the lands, and refused to convey the estate to the claimant until they received exoneration. **Held** that the trustees were entitled to exoneration up to the date of raising the action, but that they were bound to denude in favour of the heir without receiving exoneration for subsequent actings.

Barnet's Trustees v Barnet, 1872, 10 M. 730; 44 J. 414; 9 S.L.R. 462.

(592)

Expenses of obtaining exoneration.

In an action by a sole trustee for his discharge in which defences were lodged, **held**

that the pursuer, who was successful in the action, was entitled to expenses taxed as between agent and client.

Davidson's Trustee v Simmons, 1896, 23 R. 1117; 33 S.L.R. 748; 4 S.L.T. 80.

VII. ACTIONS RELATING TO TRUSTS.

1. JURISDICTION.

(1) INTERNATIONAL LAW.

(593)

Trustee resident in England.

Held (per Lord M'Laren, Ordinary) that a trustee under a Scottish trust who was domiciled in England, and was cited edictally, was subject to the jurisdiction of the Court of Session in an action of accounting for the trust funds, to which all the trustees were called as defenders.

Kennedy v Kennedy, 1884, 12 R. 275; 21 S.L.R. 274.

(594)

—A person carrying on business in Scotland granted a trust deed for behoof of his creditors to two trustees, one of whom resided in Scotland and the other in England. In an action of accounting raised in Scotland against both trustees, the trustee residing in England pleaded no jurisdiction. The Court repelled the plea, on the ground that the trust estate was in Scotland.

Robertson's Trustee v Nicholson, 1888, 15 R. 914; 25 S.L.R. 652.

(595)

—**Held** that a domiciled Englishman resident in England, who is a trustee administering a Scots trust which includes Scots heritable estate, is subject to the jurisdiction of the Scots courts in all actions relating to the trust and the trust estate, and therefore in an action in which the Court had to determine whether the trust still subsisted or had been brought to an end.

Lord Ashburton v Escombe, 1892, 20 R. 187; 30 S.L.R. 194.

(596)

Jurisdiction of sheriff court.

The proprietor of a feu in the county of Lanark raised an action of damages in the sheriff court of that county against his superiors, two trustees, of whom one resided in the county and the other was domiciled in and resided in England. The ground of action was that the defenders had leased the minerals within the pursuer's feu to a tenant who had worked them. The defenders pleaded that the sheriff had no jurisdiction. **Held** that it was competent for the sheriff to entertain the action, as it involved a claim which arose directly out of the administration and management of an estate within his jurisdiction.

Thomson v Wilson's Trustees, 1895, 22 R. 866; 32 S.L.R. 653; 3 S.L.T. 77.

(597)

All trustees resident furth of Scotland—Allegation in defence that trust estate distributed.

In an action by a legatee against two trustees who had taken out confirmation in Scotland under a Scottish trust deed, the trustees pleaded no jurisdiction in respect that they were not resident in Scotland, and that the whole estate had been distributed twelve years before. The Lord Ordinary (Kyllachy) repelled the plea, **holding** that the jurisdiction once constituted against them by their obtaining confirmation, and acting as trustees under a Scottish trust, remained unaffected.

M'Gennis v Rooney, 1891, 18 R. 817.

(598)

English heritage—Jurisdiction of English court to determine right of administration of English heritage belonging to a Scotsman.

A testator, domiciled in Scotland, conveyed to trustees his whole estate, consisting in part of English heritage, and gave them powers of sale. He declared that he desired his affairs to be administered and wound up as far as practicable in accordance with the law and practice of Scotland. He left, among other legacies, three legacies to a nephew who was his heir, and directed that the residue of his estate should be divided among charities. By the English Statute of Mortmain charities cannot take heritage or the proceeds of heritage under a mortis causa deed. The trustees raised an action in the Scots courts, with a conclusion, *inter alia*, for declarator that they were entitled to call upon the heir, as a condition of taking the English heritage, to bear a rateable proportion, corresponding to the value of the real estate, of the whole debts, legacies, and bequests made by the testator, with a view of dividing, under their own administration in Scotland, the whole estate, so as to carry out, as fully as possible, all the trust purposes. The heir thereupon took proceedings in the English court for the purpose of ascertaining his rights to the English estate and for obtaining administration of the testator's real and personal estates, but only in so far as it might be necessary or proper for the purpose of obtaining for himself the English real estate free of all liabilities. The Scots court sisted procedure in the declarator, to await the decision of the English court as to the right to administer the English heritage.

Hewit's Trustees v Lawson, 1891, 18 R. 793; 28 S.L.R. 528.

(599)

Conflict between courts of Scotland and England—Trust funds partly in Scotland partly in England—Order of English court on Scottish executors confirmed in Scotland—Confirmation and Probate Act, 1858, sec. 12—Treaty of Union, 1706, article 19.

Orr Ewing's Trustees v Orr Ewing, 1885, 13 R. (H.L.) 1; 10 App.Cas. 453; 22 S.L.R. 911. JURISDICTION, No. 61.

(600)

Appointment of judicial factor.

A judicial factor appointed on a trust estate on the ground that the estate might be removed forth of the jurisdiction of the Scots courts.

Orr Ewing's Trustees v Orr Ewing, 1885, 13 R. (H.L.) 1; 10 App.Cas. 453; 22 S.L.R. 911.

Bowman v Russell's Trustees, 1891, 19 R. 205; 29 S.L.R. 175.

(601)

Forum non conveniens.

The child of a deceased person raised an action concluding (1) for declarator of legitimacy; (2) for payment of legitim out of his estate; and (3) for payment of aliment in the event of decree not being obtained under the first two conclusions. The action was directed against the trustee of the deceased under his deed of settlement, his widow, and his sister, the two latter of whom were interested in respect of their pecuniary rights and interests in the estate of the deceased. All the defenders were in England, but the pursuer alleged that she had used arrestments to found jurisdiction against the trustee. **Opinions** (per Lord Shand and Lord Adam) that in the absence of the widow and sister, who were the real parties interested in the action as defenders, the Court of Session was *forum non conveniens* to try the question with the trustee, who was only interested as a holder of funds.

Morley v Jackson, 1888, 16 R. 78; 26 S.L.R. 52.

(602)

English trust — Trustees holding heritage in Scotland — Breach of trust — Action of accounting.

The trustees of a domiciled Englishman acting under his will, which was made in the English form, lent a sum of money out of the trust estate to one of their number who became bankrupt. The trustees had bought heritable property in Scotland for the residence of the testator's children, one of whom resided in Scotland. In an action of accounting brought against the trustees the Lord Ordinary repelled a plea for the defenders of *forum non conveniens*.

Mackay v Mackay, (O.H.) 1897, 4 S.L.T. 337.

(2) SCOTTISH COURTS.

(603)

Jurisdiction of Inner House — Application alternatively under Trusts Acts and nobile officium.

A petition by beneficiaries under a trust deed for advances out of the trust funds rested alternatively upon the nobile officium of the Court and the provisions of the Trusts Act, 1867, is competently presented in the Inner House.

Webster v Miller's Trustees, 1887, 14 R. 501; 24 S.L.R. 368.

(604)

Petition for power to sell heritage

and for special powers—Act 1867, sec. 16—**Nobile officium.**

A benevolent society presented a petition to the Inner House for authority to sell a heritable property on certain terms, and for authority to apply to the general purposes of the society a fund bequeathed to it for a special purpose for which it would no longer be required if the terms of the sale were carried through. Quoad the crave for authority to sell, the petition was founded on the Trusts (Scotland) Act, 1867, which enacts that petitions under the Act shall be brought before a Lord Ordinary; quoad the other crave the application was to the nobile officium of the Court. **Held** that the whole petition might competently proceed before the Inner House, in respect that it was not reasonably convenient, in view of the close connection between the subject-matter of the two craves, that there should be separate petitions, one to the Outer and the other to the Inner House.

Prime Gilt Box Society, 1920 S.C. 534; 57 S.L.R. 463; 1920, 2 S.L.T. 2.

(605)

Petition for power to purchase heritage and to borrow on security of the trust estate — Competency — Act 1867, sec. 16— Nobile officium.

Testamentary trustees presented a petition in the Inner House for power (1) to purchase heritage, and (2) to borrow money on the heritage when purchased, to meet part of the purchase price. The former crave was an appeal to the nobile officium of the Court; the latter was a crave which, under sec. 16 of the Trusts (Scotland) Act, 1867, fell to be brought in the first instance before a Lord Ordinary. The Court allowed both craves of the petition to proceed before the Inner House.

Anderson's Trustees, 1921 S.C. 315; 58 S.L.R. 245; 1921, 1 S.L.T. 186.

(606)

Power to English trustees to charge heritage in Scotland—Nobile officium.

Held that a petition by trustees acting under an English will to charge heritage in Scotland belonging to the trust with the amount of estate and succession duties paid by them in respect thereof was properly presented to the Inner House, as being an appeal to the nobile officium.

Harris' Trustees v Harris, 1904, 6 F. 470; 41 S.L.R. 357; 11 S.L.T. 726.

(607)

Jurisdiction of Lord Ordinary—Petition for removal of trustee on ground of mental incapacity—Act 1891, sec. 8.

Held that a petition for the removal of a trustee under a marriage contract on the ground of mental incapacity, brought under sec. 8 of the Trusts (Scotland) Amendment Act, 1891, was competently brought before a Lord Ordinary.

Johnston v Johnston, 1900, 2 F. 467; 37 S.L.R. 344; 7 S.L.T. 343.

Reid, (O.H.) 1897, 5 S.L.T. 124.

2. TITLE TO SUE AND DEFEND, AND LIABILITY TO BE SUED.

(608)

Nomination as trustees — Declarator of validity of trust.

A holograph testamentary writing contained bequests of certain heritable subjects and a nomination of trustees in these terms: "My wish is that Peter Robb be one trustee and Alexander Smith be the other." Held that the trustees named had a title to sue an action of declarator for the purpose of establishing the validity of the trust and completing their own title to the subjects.

Robb's Trustees v Robb, 1872, 10 M. 692; 44 J. 383; 9 S.L.R. 454.

(609)

Title of nominated trustees to apply for an order for opening sealed letter alleged to contain trust directions.

Edmond v Lord Provost of Aberdeen, 1898, 1 F. 154; 35 S.L.R. 193; 5 S.L.T. 230, No. 52, supra.

(610)

Validity of title to sue based on order of Court of Chancery.

Owing to informality in the deed of assumption, the title of existing trustees was invalid. The trust estate was situated in England and Ireland as well as in Scotland, and on the application of the trustees an order was made by the Court of Chancery in England, with a view to cure the defect. The trustees came to sue in Scotland, as superiors of certain lands, for reduction of a decree of forfeiture of superiority pronounced in 1849 and decree for the recovery of casualties of non-entry. Held that, as the trust was as much an English as a Scottish trust, the title conferred on them by the Court of Chancery must be recognised as valid, at least until set aside in a competent process.

Rossmore's Trustees v Brownlie, 1877, 5 R. 201; 15 S.L.R. 129.

(611)

Action by one of two trustees—Refusal of co-trustee to concur—Co-trustee called as defender.

One of two co-trustees was also a beneficiary under the trust deed. He brought an action, suing as trustee only, against an alleged debtor. All the other beneficiaries requested the trustees to abstain from suing the alleged debtor, and the other trustee refused to concur in the action and was called as defender for his interest as trustee. Held that the pursuer had no title to sue, and action dismissed.

Campbell's Trustee v Campbell, (O.H.) 1894, 1 S.L.T. 563.

(612)

Action by one trustee without concurrence of remaining trustees—Judicial factor.

Where one of three trustees sued another for payment of a sum alleged to be due by him to the trust estate, without concurrence

of the remaining trustee, a judicial factor was appointed and conjoined as pursuer.

Morison v Gowans, 1873, 1 R. 116; 11 S.L.R. 27.

(613)

Option in a contract of copartnery to trustees of a deceased partner to become partners in his stead—Title of one of several trustees to enforce the right.

The trustees of a deceased partner of a trading company had power to carry on his interest in it after his death. By a majority, consisting of A and B, they resolved to give notice to the company that they elected, in terms of the contract of copartnery, to take up the deceased's share in the partnership, C, the third trustee, declining to vote. The company disputed the right of the trustees to become partners. A and C subsequently, after inquiry, arrived at the opinion that it was not for the benefit of the trust to become a partner of the company. A then resigned office, and B, against the wish of C, raised an action in her own name against the company for declarator that the trustees by the notice given had, according to the terms of the deed of copartnery, made the trust a partner. Held that B had no title to sue.

Neilson v Mossend Iron Co., 1885, 12 R. 499; 22 S.L.R. 265.

Judgment reversed on another point, 1886, 13 R. (H.L.) 50; 11 App.Cas. 298; 23 S.L.R. 867.

(614)

Reduction—Action by single trustee under prior deed—Beneficial interest.

In an action brought for reduction of a trust disposition and settlement on the ground that the granter was at the date of execution of unsound mind, the pursuer set forth as his title to sue that he was one of three trustees nominated and appointed in and a beneficiary under a prior trust disposition and settlement executed by the granter. The pursuer did not call as defenders the two other trustees under the earlier deed. Held that the pursuer had a title to sue as a beneficiary under what he alleged to be the only valid settlement of the testator.

Question, whether he had a title to sue as a trustee.

Duncan v Duncan, 1892, 20 R. 200; 30 S.L.R. 167.

(615)

Action for arrears of trust funds—University—Concurrence of true beneficiaries.

Funds having been bequeathed to be invested and the proceeds applied towards the maintenance of two professors in a university, the university with the concurrence of the two professors interested raised an action of declarator and accounting against the trustees. Held this was a good title to sue for arrears.

Magistrates of Aberdeen v University of Aberdeen, 1877, 4 R. (H.L.) 48; 2 App. Cas. 544; 14 S.L.R. 490.

(616)

Breach of trust—Action by one of two parties having title to sue.

In an action against trustees for alleged

breach of trust at the instance of one of two beneficiaries, the defender pleaded that the action was incompetent, in respect that the other beneficiary was neither conjoined as a pursuer nor called for her interest as a defender.

Held (1) that as any beneficiary might sue for breach of trust, the action was competent; but (2) that as the action if properly and not collusively contested would be *res judicata* against the other beneficiary, it was proper that intimation should be made to her that she might, if so advised, sist herself as a pursuer.

Observed that the other beneficiary could not be called as a defender, as she had no interest to defend.

Allen v M'Combie's Trustees, 1909 S.C. 710; 46 S.L.R. 485; 1909, 1 S.L.T. 296.

(617)

Loss through improper investment—Liability of law agent to be sued along with trustees—Trustees and law agent of trust.

An action of damages at the instance of beneficiaries under a trust against both the trustees and the law agent to the trust, on account of loss sustained owing to the insufficiency of the security upon which part of the trust funds was lent, **held** incompetent as against the law agent, because he had not been employed by the pursuers.

Raes v Meek, 1889, 16 R. (H.L.) 31; 14 App.Cas. 558; 27 S.L.R. 8.

(618)

Loss through improper investment—Loss of capital and income—Title of judicial factor to sue trustees for recovery of income.

A judicial factor, who had superseded trustees in a testamentary trust, brought an action against the trustees for recovery of capital and interest which had been lost by them through an investment. The trust was for the benefit of (1) liferenters quoad the revenue, and (2) fiars. **Held** that the pursuers had no title to demand more than replacement of the capital, the claim for recovery of interest being a question for the liferenters.

Macfarlane's Trustees v Macarthur, (O.H.) 1900, 8 S.L.T. 111.

(619)

Action by heirs ab intestato against trustees and against alleged debtor to trust.

The heirs ab intestato of A raised an action against his testamentary trustees, and also against Glasgow Infirmary, which had received payment of a legacy out of A's estate. The pursuers alleged that the legacy was void, and had been paid in error, and that the sum paid fell into intestacy, and they demanded that the amount should be repaid to the pursuers or to the trustees. The trustees concurred with the legatee in maintaining in defence that the money was properly paid, and pleaded "no title to sue." **Held** that the pursuers had a good title to maintain the action to the effect of

demanding that the money should be repaid to the trustees.

Armour v Glasgow Royal Infirmary, 1909 S.C. 916; 46 S.L.R. 740; 1909, 1 S.L.T. 503.

(620)

Inhibition.

When a heritable bond is granted in favour of certain persons as trustees, the assignation of the beneficial interest to other persons does not affect the title of the trustees to use inhibition in their own names against the debtor in the bond.

Clarke v M'Nab, 1888, 15 R. 569; 25 S.L.R. 389.

(621)

Liability to be sued—Liability of trustees for interest on uninvested funds—Competency of trying question in action of accounting.

Melville v Noble's Trustees, 1896, 24 R. 243; 34 S.L.R. 210; 4 S.L.T. 198, No. 201, *supra*.

(622)

All parties not called—Action ex delicto against one of several trustees.

Beneficiaries in a trust brought an action against one of the trustees to enforce personal liability against him for alleged loss to the trust estate through the trustees having illegally lent trust funds to one of their own number. The defender pleaded that the action should be dismissed as all the trustees had not been called. The Court repelled the plea on the ground that the action was founded on delict.

Croskery v Gilmour's Trustees, 1890, 17 R. 697; 27 S.L.R. 490.

[See also PROCESS IV. 6 (4) (e).]

(623)

Action against trustee who had resigned—Action by creditor of testator.

Held that a creditor of a testator had no title to sue a trustee who had resigned for an accounting of his intromissions with the trust estate and for payment of the debt due by the testator to the creditor.

Town and County Bank v Walker, 1905, 13 S.L.T. 287.

(624)

Action against trustee after estate distributed and trustee discharged.

Held that it is competent to sue a trustee, who has distributed the whole trust estate and been discharged by the beneficiaries, for the purpose of constituting a claim against the trust estate.

Assets Co. v Falla's Trustee, 1894, 22 R. 178; 32 S.L.R. 143; 2 S.L.T. 349.

(625)

Prescription—Claim against representative of trustee.

A claim against the representative of a trustee for a sum alleged to be due under the trust is not a claim of trust accounting, but an ordinary debt, and the negative prescription is a good answer to it.

Murray v Mackenzie, (O.H.) 1897, 34 S.L.R. 571; 4 S.L.T. 231.

(626)

Action of count and reckoning by beneficiary against trustees and against alleged debtor to trust—Allegation by pursuer that trustees and debtor acting in concert.

A beneficiary under a trust raised an action against A, one of the trustees, as an individual, and against her and the other trustees as trustees, concluding that A should count and reckon to the trustees for a sum alleged to be due by her to the trust, she having acted as leading trustee and factor for many years. The pursuer alleged that the trustees had refused to call on A to account, and that they were acting in concert with her for the purpose of enabling her to evade her obligation. **Held** that the pursuer had a title to sue.

Watt v Roger's Trustees, 1890, 17 R. 1201; 27 S.L.R. 904.

(627)

Action of count and reckoning by beneficiary against trustee—Demand for general accounting for his whole intromissions.

A beneficiary of a trust brought an action against one of the trustees calling upon him as an individual to account for the "whole intromissions had by him with the means and estate of the deceased." **Held** that the pursuer had no title to sue.

Opinion (per Lord Low, Ordinary) that an action in the above form was not necessarily incompetent, but that to justify it the circumstances must be special.

Crammond v Gordon, (O.H.) 1902, 10 S.L.T. 12.

(628)

Accounting against the representatives of the trustees under a lapsed trust—Procedure—Parties to call as defenders.

Houstoun's Factor v Houstoun's Trustees, 1868, 6 M. 286; 40 J. 156. PROCESS, No. 1078.

(629)

Creditors in bond.

Title of creditors in a bond and disposition in security over the trust estate to call trustees to account for their intromissions.

Lucas' Trustees v Beresford's Trustees, 1892, 19 R. 943; 29 S.L.R. 813.

(630)

Personal bar—Mora—Objections to trust accounts—Action brought on interest emerging.

Where the interest of the challengers of trust accounts did not emerge until the death of the liferentrix of a trust estate, nearly forty years after the date of the accounts, **held** that they were not barred by mora nor by an award of an accountant given effect to in an interlocutor of Court in an action between the liferentrix and the trustee.

Aitken v Hunter, 1871, 9 M. 756; 43 J. 413; 8 S.L.R. 510.

(631)

Action by beneficiary against debtor to

trust—Claim previously compromised by trustee.

Where a beneficiary of a trust brought an action against a debtor of the trust, with whom the trustees had arrived at a settlement, to have the debtor ordained to exhibit an account of her transactions with the deceased truster, action dismissed on the ground that the pursuer had no title to sue, and that her only recourse was against the trustees on conclusions appropriate to a suit for maladministration.

Observed (per Lord Stormonth-Darling, Ordinary) that the case was "quite different from a case where the claim desired to be enforced, be it good or bad, has never been made and is still open."

Hannah v Sharp, (O.H.) 1901, 9 S.L.T. 333.

(632)

Assignment of interest in security—Action for payment against trustees—Concurrence of assignees.

A beneficiary under a trust assigned his interest by an assignment which was *ex facie* absolute but truly in security. The assignment was intimated to the trustees. He sued the trustees for payment with the consent of the assignees, who were willing to grant a discharge in favour of the trustees. **Held** that the beneficiary had a title to sue.

Craig v Craig's Trustees, (O.H.) 1918, 2 S.L.T. 293.

(633)

Creditor of trust suing debtor of trust alleging that trustee declined to move.

A creditor of a person divested of his estate by decree of *cessio* raised an action to recover his debt against a person alleged to be a debtor to the estate. The action concluded alternatively for payment to the pursuer, or otherwise to the trustee in the *cessio*, and was founded on averments to the effect that the pursuer was the only unpaid creditor, and that the trustee had declined to move in the matter. **Held** that the pursuer had no title to sue.

Observed that the pursuer might have compelled the trustee to give the use of his name on security being found for expenses, or to grant an assignment of his claim against the defenders.

Henderson v Robb, 1889, 16 R. 341; 26 S.L.R. 222.

(634)

Title and interest to appear in reclaiming note—Trustee removed from office after obtaining decree for expenses in Outer House.

A trustee on a sequestrated estate, who had raised an action and obtained from a Lord Ordinary a decree for expenses, was afterwards removed from office. The defender having reclaimed, and the new trustee having declined to sist himself, the previous trustee presented an application to be sisted on the ground that he had an interest in the question of expenses. The Court refused the application.

Mackenzie v Fowler, 1897, 24 R. 1080; 34 S.L.R. 810; 5 S.L.T. 107.

3. COMPETENCY.

(635)

Application for directions of Court — Judicial Factors (Scotland) Act, 1889, sec. 18.

Earl of Stair's Trustees, 1896, 23 R. 1070; 33 S.L.R. 777; 4 S.L.T. 92, No. 369, *supra*.

(636)

Special case—Whether power conferred by trust deed—All parties agreed that exercise of power desirable.

A special case, to which the parties were the trustees on a trust estate and the beneficiaries, was brought to determine a question as to the trustees' power to sell certain heritable subjects, the trustees maintaining that they had no such power, the other parties maintaining that they had. All parties, however, were agreed that a sale would be expedient.

Held that, although there was no real contention between the parties, the special case was competent.

Mitchell Innes' Trustees v Mitchell Innes, 1912 S.C. 228; 49 S.L.R. 241; 1912, 1 S.L.T. 85.

Galloway v Campbell's Trustees, 1905, 7 F. 931; 42 S.L.R. 712; 13 S.L.T. 256. Process, No. 1235.

(637)

Declarator that trustees were acting ultra vires — Action involving appeal to nobile officium—Competency of action.

Question, whether an action of declarator that testamentary trustees had acted ultra vires in reducing, under a discretionary power conferred upon them, the income payable to a beneficiary and that they were bound to exercise the discretion fairly and reasonably was not incompetent in respect that it involved an appeal to the nobile officium of the Court necessitating a petition to the Inner House.

MacTavish v Reid's Trustees, (O.H.) 1904, 12 S.L.T. 404.

(638)

Multiplepointing — Exoneration and discharge—Double distress.

A testamentary trustee, who was in doubt whether the right to a legacy was vested in the legatee's trustee in bankruptcy or in a person to whom the legatee had previously granted an assignation, refused to accept a discharge from the assignee without the concurrence of the trustee in bankruptcy, which the latter refused to give, although by letter he withdrew any claim and authorised the payment to the trustee.

Held that the testamentary trustee was not entitled to raise an action of multiplepointing for his exoneration.

Connell's Trustee v Chalk, 1878, 5 R. 735; 15 S.L.R. 413.

(639)

Exoneration and discharge—Double distress.

While trustees were in course of distributing a trust estate amounting to £300

among the beneficiaries a claim for a debt of £64 was made against it, in payment of which the beneficiaries, with the exception of A and B, were willing to acquiesce. The trustees having brought an action of multiplepointing (in which the fund in medio was the whole estate) against the beneficiaries and the creditor for the purpose of obtaining exoneration and discharge, A and B pleaded that the action was incompetent. The Court dismissed the action as incompetent on the grounds (1) that there was no double distress; and (2) that the trustees did not aver that the beneficiaries had refused to grant them extrajudicial exoneration and discharge.

Mackenzie's Trustees v Sutherland, 1895, 22 R. 233; 32 S.L.R. 172; 2 S.L.T. 422.

(640)

Exoneration and discharge—Double distress—Claim by creditors and claims by beneficiaries.

Testamentary trustees, exposed to a claim by a single creditor for the whole funds under the administration, brought an action of multiplepointing for distribution of the estate and for their own exoneration, calling as defenders the creditor and the beneficiaries entitled to take under the trust. The creditor was prosecuting his claim by a direct action against the trustees; and among the beneficiaries no questions were raised *inter se*.

Held that the action was incompetent either as an action for distribution or for exoneration, in respect that the claim of the creditor and the claims of the beneficiaries were not truly competing claims, and that the creditor was not delaying to constitute his debt against the estate.

Glen's Trustees v Miller, 1911 S.C. 1178; 48 S.L.R. 931; 1911, 2 S.L.T. 178.

(641)

Double distress—Action by beneficiaries to submit doubtful claim to jurisdiction of Court.

While testamentary trustees were engaged in administering the trust funds, the ultimate beneficiaries, on the ground that the trustees were about to pay a claim to which they objected, raised a multiplepointing with a view to bring the trust fund into Court for distribution.

Held that the action was incompetent, there being no double distress.

Robb's Trustees v Robb, 1880, 7 R. 1049; 17 S.L.R. 717.

(642)

Claim by trustees.

When trustees under a testamentary deed bring an action of multiplepointing to have a question which has been raised as to its validity determined, it is their duty to lodge a claim, as trustees, for the whole fund for the purpose of administration.

Hall's Trustees v Macdonald, 1892, 19 R. 567; 29 S.L.R. 465.

Judgment on the merits reversed in the House of Lords, 1893, 20 R. (H.L.) 88; [1893] A.C. 642; 31 S.L.R. 279.

(643)

Fund in medio.

Where there were competing claimants to one-half of a trust estate, the right to the other half not being in dispute, one of the claimants raised an action of multiplepoinding in name of the trustee, bringing the whole estate into Court as the fund in medio.

Held that the action was incompetent.

Macnab v Waddell, 1894, 21 R. 827; 31 S.L.R. 679; 2 S.L.T. 44.

(644)

Objection to trustees' condescendence of fund in medio, that it did not include debt due to trust—Allegation by trustees that debt discharged.

In a multiplepoinding brought by testamentary trustees for the distribution of an estate, one of the beneficiaries stated as an objection to the condescendence of the fund in medio that it did not include a sum of £600 said to be due to the estate by one of the trustees. In answer the trustees produced a discharge granted by the trustee to the alleged debtor, and explained that they were satisfied they could not prosecute the claim with any hope of success, but they offered to allow the objector to sue in their names on his finding security for the expenses of the proceedings. The Court repelled the objection, **holding** that this was all the trustees could be required to do.

Brown's Trustees v Brown, 1888, 15 R. 581; 25 S.L.R. 393.

(645)

Application by Scottish trustees to pay income to fathers of minor beneficiaries in England—Nobile officium.

Petition by trustees acting under a Scottish trust settlement for authority to pay the income of legacies to the fathers of minor beneficiaries who were domiciled in England, and from whom, according to the law of England, a valid discharge could not be obtained, refused on the ground that

the Court had no power to grant the authority craved.

Atherstone's Trustees, 1896, 24 R. 39; 34 S.L.R. 40; 4 S.L.T. 118.

(646)

Petition under Presumption of Life Act, 1891—Claim to share of beneficiary presumed dead—No competing claimant—Action to obtain judicial exoneration.

A beneficiary under a trust deed disappeared, and his sister obtained a decree in a petition under the Presumption of Life Act, 1891, presuming his death, and claimed his share of the trust estate. There was no competing claimant, but the trustees raised a multiplepoinding stating that they had been unable to discover any reliable information as to whether the brother had ever been married and left lawful issue. **Held** that the pursuers were entitled to raise the action for their judicial exoneration as trustees and that the action was competent.

Davidson v Ewen, (O.H.) 1895, 3 S.L.T. 162.

(647)

Petition to complete beneficiary's title to funds in a lapsed trust—Person entitled to the possession of the trust property "for his own absolute use"—Body of trustees entitled to immediate conveyance in trust—Act 1921, sec. 24.

The Trusts (Scotland) Act, 1921, enacts, by sec. 24, that any person who shall be entitled to the possession "for his own absolute use" of property held in a lapsed trust may apply to the Court for authority to complete a title to it in his own name. **Held** that the method of completing title provided by the section was not competent to a body of trustees administering a charitable trust, who were entitled to an immediate conveyance of property held in a lapsed trust for the purpose of administering it in terms of their own trust.

M'Clymont Trustees, 1922 S.C. 503; 59 S.L.R. 397; 1922 S.L.T. 379.

4. EXPENSES OF LITIGATION.

[See EXPENSES I. 12, II. 2 and III. 13 (7).]

TRUST DEED FOR CREDITORS. See **BANKRUPTCY.**

TURNPIKE ROADS ACT, 1831. See **LIMITATION OF ACTIONS.**

TUTOR. See **MINOR AND PUPIL.**

UDAL PROPERTY. See **FISHINGS; HERITABLE PROPERTY.**

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V. VALUE—*Continued.*

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I. VALUATION ROLL.

1. PREPARATION OF ROLL.

(1)

Failure to return particulars called for by assessor—Recovery of penalties—Nature of particulars that may be called for—"Yearly rent or value"—Act 1854, secs. 1 and 7.

Held that the only statement which a proprietor of heritable subjects in a burgh is bound to make to an assessor under sec. 7 of the Valuation of Lands (Scotland) Act, 1854, is a statement of the particulars enumerated in sec. 1 of the Act; and accordingly that, while bound to state the "yearly rent or value" of the subjects, he is not bound

to state the "gross amount to be paid by the tenant yearly."

Bruce v Walker, 1911 S.C. (J.) 7; 6 Adam, 338; 48 S.L.R. 65; 1910, 2 S.L.T. 317.

(2)

Failure to supply assessor with adequate information.

Forrest's Factor v Assessor for Lanarkshire, 1920 S.C. 496; 57 S.L.R. 563; 1920, 2 S.L.T. 194, No. 235, *infra*.

Scouller v Assessor for Glasgow, 1912 S.C. 757; 49 S.L.R. 152; 1911, 2 S.L.T. 491, No. 331, *infra*.

Cowan & Sons v Assessor for Midlothian, 1894, 21 R. 812; 31 S.L.R. 733; 2 S.L.T. 48, No. 352, *infra*.

(3)

Prosecution for false return.

A proprietor of lands within a burgh, having been convicted and sentenced by the sheriff, upon a complaint charging him with having knowingly made a false return under the Act of 1854, of the actual annual rent of his property, brought a suspension on the ground that the complaint was irrelevant. **Held** that the complaint ought to have set forth wherein the return was erroneous, and what was the actual value of the lands, and conviction and sentence suspended accordingly.

Robertson v Hamilton, &c., 1878, 4 Coup. 154; 16 S.L.R. 181.

(4)

Notes on valuation roll.

Held that notes on the valuation roll, stating the number of furnaces of an ironwork

which were out of blast, ought to be discontinued.

Addie, 1868, 11 M. 979.

(5)

Cost of preparing burgh valuation roll—Method of assessment—Act 1854, sec. 18—Local Acts—Implied repeal.

Held that the Corporation of Glasgow are precluded by the provisions of the Glasgow Municipal Act, 1878, and the City of Glasgow Act, 1891, from requiring the parish councils of the parish of Glasgow and of other parishes partly within the boundaries of the city, under sec. 18 of the Lands Valuation (Scotland) Act, 1854, to assess and levy along with the poor rates the cost of preparing the burgh valuation roll.

Glasgow Corporation v Glasgow Parish Council, 1910 S.C. 858; 47 S.L.R. 711; 1910, 2 S.L.T. 51.

(6)

Resolution by county council to print roll—Treasury—"Regulation"—Local Government Act, 1889, sec. 83.

Held that a resolution of the county council to have the valuation roll printed is not a "regulation" requiring the approval of the Treasury in the sense of the 83rd section of the Local Government Act, 1889.

County Council of Lanarkshire v Lord Advocate, 1892, 19 R. 617; 29 S.L.R. 497.

(7)

Expenses connected with printing roll—Liability of Crown—Act 1854, secs. 3 and 18—Act 1857, sec. 1—Registration Amendment Act, 1885, sec. 12.

When the assessor under the Lands Valuation Acts is the surveyor of Inland Revenue for the district, and the county council has resolved, under sec. 12 of the Registration Amendment Act, 1885, that the valuation roll shall be printed, the extra trouble caused to the assessor and his clerks in preparing and revising the roll for the press falls to be paid for by the Inland Revenue.

County Council of Lanarkshire v Lord Advocate, 1892, 19 R. 617; 29 S.L.R. 497.

2. CONCLUSIVENESS OF ROLL.

[See also ELECTION LAW II. 6.]

(8)

Where party assessed has neglected statutory mode of redress.

Where an assessment has been made for the poor or other purpose upon the amount contained in the existing valuation roll, and the party assessed, thinking himself aggrieved, has neglected the proper statutory means of redress, held that it is incompetent in subsequent proceedings to adduce evidence to contradict the valuation roll.

M'Lachlan v Tennant, 1871, 43 J. 390; 2 Coup. 45; 8 S.L.R. 497.

(9)

Failure of assessor to notify proprietor of increased valuation—Action for reduction of entry—Competency—Jurisdiction of Court of Session—Act 1854, secs. 5 and 30—"Want of compliance with the provisions of this Act"—"Making up" valuation roll.

An entry in the valuation roll having been increased in amount without the statutory notice required by sec. 5 of the Lands Valuation (Scotland) Act, 1854, having been given, the person aggrieved brought an action in the Court of Session for reduction of the entry. Held (1) that the failure to give notice was not a want of compliance with the provisions for "making up" the roll, and so was not exempted from challenge by sec. 30 of the Act of 1854; (2) that an action in the Court of Session for reduction of the entry was competent, by virtue of the jurisdiction inherent in the Court to grant redress in all cases where the rights of a subject have been infringed through an inferior tribunal, or administrative body, acting ultra vires of its statutory powers.

Moss' Empires v Assessor for Glasgow, 1917 S.C. (H.L.) 1; 54 S.L.R. 12; 1916, 2 S.L.T. 216.

(10)

Subjects twice entered—Poor—Assessment—Act 1854, secs. 8, 9 and 33.

A county valuation roll containing an entry of certain lands contained also a separate entry of part thereof. The collector of poor rates of the parish assessed the proprietor upon both entries. In a suspension, held that the error, as one of assessment and not of valuation, could be rectified by the Court.

Sharp v Latheron Parochial Board, 1883, 10 R. 1163; 20 S.L.R. 771.

(11)

Erroneous entry in roll—Action in Court of Session for relief from assessment—Declarator and interdict—Reduction of entry in roll—Competency—Act 1854, sec. 30.

A body of trustees were entered in the valuation roll as proprietors, tenants, and occupiers of salmon fishings, and on appeal to the magistrates the entry in the roll was sustained. They brought an action in the Court of Session concluding for reduction of the entry in the roll, and also for declarator that they were not liable to assessments in respect thereof, and for interdict to restrain any proceedings against them for recovery. Held that the action was competent as regards the conclusions for declarator and interdict.

Observations as to the competency of the reductive conclusion of the summons.

Abercromby v Badenoch, (O.H.) 1909, 47 S.L.R. 18; 1909, 2 S.L.T. 114.

(12)

Action in Court of Session for relief from assessment—Declarator and interdict—Competency—Act 1879, sec. 6.

Held that sec. 6 of the Valuation Act, 1879, did not debar the proprietor of an

estate from bringing an action for declarator that no part of his lands fell within the municipal boundary of an adjacent city and for interdict against the corporation from assessing him.

Hope v Magistrates of Edinburgh, (O.H.)
1897, 5 S.L.T. 195.

(13)

Conclusiveness in question of poor law assessments—Poor Law (Scotland) Amendment Act, 1845, sec. 37.

A parochial board assessed for poor rates the owner and occupier of waterworks on the annual value of the subjects appearing in the valuation roll without allowing deduction of the average cost of repairs, insurance, &c., in terms of the 37th section of the Poor Law Act, on the ground that the assessor in preparing the valuation roll had already made these deductions. In a suspension held (1) that for the purposes of assessment under the Poor Law Act, 1845, the valuation roll as completed in terms of the Valuation of Lands Act, 1854, was conclusive as to the yearly rent or value of lands and heritages entered therein, and that the Court of Session had no jurisdiction to review the process by which the entry there made was reached; and (2) that before assessment the suspender was entitled to have the above deductions made from the sum entered in the valuation roll.

Magistrates of Glasgow v Hall, 1887, 14 R. 319; 24 S.L.R. 241.

(14)

Held that a parish council in assessing for poor rates are bound to take as conclusive the annual value of the subjects entered in the valuation roll, and to make the deductions allowed by sec. 37 of the Poor Law Act, 1845, from the annual value so ascertained, irrespective of the deductions which may have been made by the assessor in fixing the annual value of the subjects as entered in the valuation roll.

Burghhead Harbour Co. v George, 1906, 8 F. 982; 43 S.L.R. 754; 14 S.L.T. 253.

(15)

Entries in valuation roll as basis for assessment.

A pursuer brought an action concluding for declarator that he was not tenant or occupier, in the sense of the Lands Valuation Acts, of certain subjects, and was not liable to be rated or assessed for burgh and parish rates in respect thereof, and for interdict against such assessment. He averred that he had been entered in the valuation roll as tenant and occupier of the subjects; that he was not a tenant or occupier in the sense of the Valuation Acts and could not legally be entered in the valuation roll as such; and that he was threatened with proceedings for the recovery of rates and taxes in respect of the subjects in question.

Opinions (per Lord Justice-Clerk Scott Dickson and Lord Ormisdale) that these averments were irrelevant, in respect that the entry in the valuation roll was not decisive of

liability to assessment, which depended on the Burgh Police and Poor Law Acts, and the pursuer had failed to aver that he was not liable to assessment under these Acts.

Dante v Assessor for Ayr, 1922 S.C. 109; 59 S.L.R. 101; 1922 S.L.T. 74.

(16)

Effect of Crofters Holdings Act, 1886.

In an action for payment of an assessment of poor rates laid upon the defender (1) as proprietor and (2) as occupier, in respect of tenants paying under £4 of rent—the entries in the valuation roll being the basis of assessment—the defender stated that she was unable to recover payment (1) of her rents, and (2) of the rates which she had paid for tenants under £4; that her tenants were crofters, and that prior to the making up of the valuation roll they had made application to the Crofters' Commission for reductions of rent, which, if granted, would take effect from the date of application, and that the Commission had pronounced an order sisting in hoc statu her right to sell in execution of any decree for rent she might obtain. She maintained that as, subsequent to the date of the valuation roll, her only available remedy for the recovery of rents and rates had been suspended by the action of the Crofters' Commission under the Crofters Acts, the remedies of the collector for enforcing payment from her of rates founded on the valuation roll ought also to be suspended. Held that the defence was irrelevant.

Macfarlane v Matheson, 1888, 16 R. 230; 26 S.L.R. 155.

(17)

In question of assessment to property tax.

The Commissioners of Inland Revenue, in estimating the annual value of lands and heritages, are not bound by the valuation roll, except in counties and burghs in which the officer of Inland Revenue has been appointed assessor for the valuation roll in terms of the Valuation of Lands Act, 1857.

Observed that the provisions of the Lands Valuation Act, 1857, sec. 6, are applicable to purposes of local taxation only, and have not repealed or altered the rule laid down by the Property and Income Tax Act, 1842, sec. 60, for ascertaining the value of lands for purposes of imperial taxation.

Menzies v Inland Revenue, 1878, 5 R. 531; 15 S.L.R. 285.

(18)

Interpretation of entries—Salmon fishings—Entry of "fishings" equivalent to "salmon fishings."

In a question between a fishery board, who were entitled under the Salmon Fisheries (Scotland) Act, 1868, to impose an assessment on salmon fisheries entered in the valuation roll, and a proprietor who had a right to the salmon fishing in a river ex adverso of his estate but who averred that it was worthless in comparison with the trout fishings, circumstances in which held

that the board were entitled to treat an entry in the roll of "fishings" as an entry of "salmon fishings."

Don District Fishery Board v Burnett,
1918 S.C. 37; 55 S.L.R. 90; 1917, 2
S.L.T. 183.

(19)

**Questions between landlord and tenant—
Act 1854, sec. 6.**

Opinions (per Lord Justice-Clerk Moncreiff and Lord Trayner) that the 6th section of the Act 1854, laying taxation on one who under a long lease is deemed to be proprietor, will not supersede any previous agreement between him and the actual owner as to payment of public burdens.

Jopp's Trustees v Edmond, 1888, 15 R.
271; 25 S.L.R. 211.

(20)

Reduction of rent—Proof of agreement.

Opinion that a return by a landlord to an assessor under the Valuation Act of the rent of a farm is not conclusive evidence as between landlord and tenant of an agreement to reduce the rent fixed in a written lease.

Rattray v Leslie's Trustee, 1892, 19 R.
853; 29 S.L.R. 764.

(21)

**Question between superior and vassal—
Proof of value.**

In an action by a superior for declarator and for payment of a casualty of composition, where the parties were at issue as to the amount payable, **held** that the valuation roll was not conclusive as to the annual value of the lands, and that the superior was entitled to a proof.

Duke of Argyll v Bullough, 1904, 6 F.
949; 41 S.L.R. 737; 12 S.L.T. 258.

II. APPEALS.

1. TO THE VALUATION COMMITTEE.

(22)

Competency—Notice of appeal—Act 1854, secs. 5 and 9.

The Lands Valuation Act, 1854, sec. 9, enacts that any person whose name is entered by the assessor in the valuation roll shall be entitled to appeal to the commissioners of supply with reference to such entry, provided the appellant shall intimate in writing that he is to maintain the appeal, and "specify the amount of the valuation which he alleges should be substituted for that stated by the assessor." The proprietor of K intimated in writing to the assessor "an appeal against your entering in the valuation roll the shootings of K at £5," and added that the lands were not shot over, and that if the shootings were let as assessed the rent of the lands would be diminished to a very much larger extent. Before writing the letter he had stated to the assessor verbally that he objected to the shootings being entered in the valuation roll at all.

Held that there had been sufficient intimation of an appeal against the shootings being entered in the roll.

Maitland v Assessor for Midlothian, 1888,
15 R. 592; 25 S.L.R. 318.

(23)

Notice of appeal—Failure to specify valuations to be substituted.

Circumstances in which **held** that magistrates were right in refusing an appeal on the ground that the notice of appeal given to the assessor did not specify the valuation to be substituted for the assessor's entry.

Observed that if the assessor had had knowledge of the grounds of the appeal, the objection to the notice could not have been sustained.

Symington & Sons v Assessor for Coatbridge, 1895, 22 R. 588; 32 S.L.R. 431.

(24)

Failure to specify valuations to be substituted—Act 1854, sec. 9.

In the course of preparing the valuation roll of a burgh, the assessor received from the education authority a list of the schools in the burgh with their existing valuations. On the assessor intimating that he proposed to increase these valuations, a correspondence took place between the parties, the education authority objecting to the basis of valuation proposed by the assessor, but intimating that they were prepared to agree to an increase of 10 per cent. on the existing valuations. Eventually the assessor transmitted to the education authority a notice of the assessments which he had made, and the relative notice as to right of appeal. In reply, the clerk to the education authority wrote, "With reference to the notices received of the valuations ranging from 100 per cent. increase to 333 per cent. increase, I beg to intimate an appeal." The magistrates having dismissed the appeal as incompetent, in respect that the appellants had not specified the figures which they alleged should be substituted for those of the assessor, as required by sec. 9 of the Lands Valuation Act, 1854, **held** that, as it was clear in the circumstances that the authority objected to any increase on the existing valuations, there had been a sufficient compliance with the requirements of the section, and that the appeal had been competently taken.

Ayrshire Education Authority v Assessor for Irvine, 1922 S.C. 435; 59 S.L.R.
288; 1922 S.L.T. 109.

(25)

Timeous intimation.

An assessor having before making up his roll intimated to a proprietor that he proposed to enter his subjects at a certain valuation, the proprietor gave notice that he appealed against the intended valuation. The assessor thereafter made up the roll and transmitted the statutory notice of the entry to the proprietor, who gave no further intimation of appeal. **Held** that the notice of

appeal required by sec. 9 of the Act must be intimated to the assessor after the entry in the roll has been made, and after notice of the entry has been made to the party affected in terms of sec. 5, and that the notice of appeal in question was therefore insufficient.

Assessor for Linlithgowshire v Ballantine, 1895, 22 R. 591; 32 S.L.R. 432; 2 S.L.T. 570.

(26)

Timeous intimation.

Where intimation of appeal in terms of the Valuation Act, 1854, was not given six days before the day fixed for the hearing of valuation appeals in a burgh, although owing to adjournments it was given more than six days before the appeal was actually heard, **held** that as no reasonable excuse for the delay had been given, the intimation was not timeous, and that the appeal was rightly refused by the magistrates.

Watson, Gow & Co. v Assessor for Glasgow, 1910 S.C. 807; 47 S.L.R. 374; 1910, 1 S.L.T. 189.

(27)

Hearing of evidence — Same grounds of appeal determined in previous year — Act 1879, secs. 7, 8 and 9.

The valuation roll annually made up by the assessor being in each year, in terms of the Valuation of Lands Act, a new roll, any person aggrieved by an entry in it is entitled to appeal, and the commissioners of supply of the county or magistrates of the burgh, as the case may be, are bound to hear any evidence tendered by him in support of his appeal, although the entry in the roll and the evidence tendered are the same as were under consideration in an appeal court in a former year, and there is no change of circumstances.

Smith v Assessor for Argyllshire, 1885, 12 R. 905; 22 S.L.R. 753.

(28)

A valuation appeal committee are not entitled to refuse to hear an appeal on the ground that they had heard and disposed of the same questions between the same parties in the preceding year. Where a valuation committee refused to hear an appeal, the Court remitted, with instructions to hear evidence and arguments, and to dispose of the case on the merits.

Lamont v Assessor for Dumfriesshire, 1900, 2 F. 610.

2. TO THE VALUATION APPEAL COURT.

(29)

Jurisdiction of Valuation Appeal Court.

The Valuation Appeal Court is a supreme court, and its proceedings cannot be set aside by the Court of Session on the ground that they are ultra vires and incompetent.

Stirling & Sons v Holm, 1873, 11 M. 480; 45 J. 306; 10 S.L.R. 296.

(30)

Competency.

Question whether it is competent under the valuation statutes to appeal to the Valuation Appeal Court on questions other than proper questions of value.

Cuninghame v Assessor for Ayrshire, 1895, 22 R. 596; 32 S.L.R. 453; 2 S.L.T. 618.

(31)

Entry of party on roll.

Held that an appeal to the Lands Valuation Appeal judges on the question whether the appellant had been improperly entered in the roll as the proprietor of the subjects described is incompetent. Per Lord Low—“The result of the Valuation Acts appears to me to be this—(1) any entry in the roll can be brought under review of the commissioners or magistrates, either by a person whose name is entered in the roll or by a third party; (2) the determination of the commissioners or the magistrates in regard to the yearly value can be brought under review of this Court either by the person whose name is entered in the roll, or by the assessor, or by a third party; but (3) no appeal at the instance of any one is allowed from the determination of the commissioners or the magistrates in regard to any entry other than that of the yearly value.”

British Linen Co. v Assessor for Aberdeen, 1906, 8 F. 508; 43 S.L.R. 442; 13 S.L.T. 952.

(32)

Questions incident to value.

While no appeal to the Valuation Appeal Court is competent in regard to any entry in the valuation roll other than that of yearly value, the Court is not thereby debarred from incidentally determining questions which may affect other entries in the roll (such as the question whether an appellant is proprietor or tenant) where these questions require to be decided in order to reach the question of yearly value.

Ferguson v Assessor for Invernesshire, 1912 S.C. 768; 49 S.L.R. 158; 1911, 2 S.L.T. 505.

(33)

Substance of question.

An appeal to the Lands Valuation Appeal Court is competent only upon a question of value, but the fact that the determination of the valuation committee does not take the form of a decision as to value will not preclude an appeal if the true question at issue is one of value. **Held**, accordingly, that an appeal against the decision of a committee, which had directed that a parish church and churchyard should be deleted from the valuation roll as having no value, was competent as being truly an appeal on a question of value.

Assessor for Kincardineshire v Heritors of St. Cyrus, 1915 S.C. 823; 52 S.L.R. 268; 1915, 1 S.L.T. 49.

(34)

Objection to constitution of valuation committee — Member of committee

brother of assessor — Administration of justice—Judge—Disqualification.

In an appeal to the Lands Valuation Appeal Court against a determination of the valuation committee of a burgh upholding a valuation of the burgh assessor, the appellant challenged the determination on the ground, *inter alia*, that one of the members of the committee was a brother of the assessor, the other party to the appeal, and was as such disqualified for sitting. **Held** that the objection was one which the Court could not competently consider, its function being limited to determining questions of valuation. **Opinion** (per Lord Salvesen) that there was no substance in the objection. **Observations** upon the respective roles of the committee and the assessor in valuation proceedings.

M'Gilvray v Assessor for Oban, 1916 S.C. 665; 53 S.L.R. 486; 1916, 1 S.L.T. 102.

(35)

Time for lodging appeals.

Stein v Assessor for Falkirk, 1912 S.C. 853; 49 S.L.R. 380; 1912, 1 S.L.T. 295, No. 47, *infra*.

(36)

Notes of evidence—Evidence laid before judges—Weight of evidence against findings—Duty of Court.

When the evidence taken before the valuation committee or magistrate is recorded and laid before the judges along with findings in fact, the judges, while entitled to examine the evidence, will not, unless the great weight of evidence is against the findings, disregard them.

Smith v Assessor for Argyllshire, 1885, 22 S.L.R. 753.

(37)

Power of judges to review evidence of comparative value in a locality.

Question how far, when the evidence has been recorded, the appeal judges are to consider the whole valuations of similar subjects within the district for the purpose of ascertaining, by a balance of evidence, whether the assessor, in his valuation of a particular subject, has arrived at a correct result upon the question of amount, as compared with other subjects.

M'Jannet v Assessor for Stirling, 1882, 10 R. 32; 19 S.L.R. 590.

See also *Assessor for Argyllshire v Islay Distillery Co.*, 1884, 11 R. 841; 21 S.L.R. 563, No. 342, *infra*.

(38)

Appeal against recent valuation by the judges—New evidence.

In 1902 the Lands Valuation Appeal judges fixed the yearly value of the Alma Spinning Mill, Arbroath (occupied by the owners), at £1293, and in succeeding years the assessor continued to enter the mill at that sum. In 1907 the owners appealed against the entry, and adduced evidence that since 1900 nearly all the similar mills in Arbroath had been

sold, and at prices which showed that the assessor's valuation of these mills was over 50 per cent. too high. The valuation committee (with the exception of £130, which they allowed for depreciation) confirmed the assessor's valuation on the ground that there was no change of circumstances since the value was fixed in 1902. **Held** by the Judges, on appeal, that the evidence (which was not before the Court in 1902) as to the recent sales of other mills justified a reconsideration of the value of the mill in question, and reduced the valuation to £923.

Webster & Sons v Assessor for Arbroath, 1908 S.C. 613; 45 S.L.R. 508; 15 S.L.T. 996.

(39)

—Renewed appeal on different ground.

In 1910 the Valuation Appeal Court of new considered and determined the value of certain subjects which it had settled in 1908, although there had been no material change of circumstances, upon the ground that the case raised a question which had not been considered in the previous appeal.

North British and Mercantile Insurance Co. v Assessor for Edinburgh, 1910 S.C. 814; 47 S.L.R. 368; 1910, 1 S.L.T. 169.

(40)

Appeal by third party—Over-valuation.

Objection by third parties not on the valuation roll that the valuation was fictitious for the purpose of creating a vote **held** to be competent.

M'Gregor, &c. v Menzies, 1874, 4 R. 1144.

(41)

Complaint by third party—Act 1854, sec. 13.

A distillery and malt barns were entered at £300. A third party complained and craved that the valuation should be increased to £400. The commissioners, by the casting vote of the preses, altered the valuation to £400. The proprietor of the subjects craved a case, which was stated accordingly. The complainer before the commissioners declined to be a party to the case, maintaining that it was incompetent, in respect that under the Act of 1854 the decision of the commissioners was final, while under the Act of 1857 it was only the officer of Inland Revenue or the appellant in the Valuation Court who could require a case. **Held** that the commissioners were wrong, and that the valuation should be £300.

Magistrates of Linlithgow, 1878, 9 R. 1236.

(42)

—Act 1854, sec. 13.

The proprietor of lands and heritages in a county made a complaint against the accuracy of the return made by another proprietor to the assessor. **Held** that the complaint, not being a complaint against the valuation stated by the assessor, was not competent.

Question (per Lord Fraser), whether a complaint by a third party, that a property

has been entered by the assessor at too high a rent, is competent.

Question, whether under the Valuation Acts a third party can competently bring before the appeal judges, on a case stated, a complaint made to the magistrates or commissioners of supply.

Rule v Lord Abinger, 1883, 10 R. 502; 20 S.L.R. 323.

(43)

—Act 1854, secs. 8, 9, and 13—Act 1879, secs. 6, 7, 8, and 9.

The Lands Valuation Acts entitle persons dissatisfied with an assessor's valuation of subjects held by themselves "to appeal," and persons dissatisfied with an assessor's valuation of subjects held by others "to complain" to the commissioners or magistrates "sitting as an appeal court," and give right to persons "entitled to appeal" to the commissioners or magistrates to require them to state a case for the opinion of Her Majesty's Judges. **Held** that the right to require a case to be stated is given to third parties complaining as well as to those objecting to the valuation of their own property.

Ferrier v Assessor for Edinburgh, 1892, 19 R. 882; 29 S.L.R. 723.

See also British Linen Co. v Assessor for Aberdeen, 1906, 8 F. 508; 43 S.L.R. 442; 13 S.L.T. 952, No. 31, *supra*.

(44)

Expenses.

Observed that if assessors continued in the face of express and repeated decisions to raise questions, it would be matter for consideration whether expenses should not be awarded against them.

Forbes Irvine v Assessor for Aberdeenshire, 1893, 20 R. 626; 30 S.L.R. 617.

(45)

—Power to award expenses—Failure to give timeous intimation that appeal withdrawn.

Intimation by the Lands Valuation Appeal Court that, although it was not the practice of the Court to make any award of expenses, the Court would in future hold itself free to award expenses against an appellant who has put his opponent to unnecessary expense by failing to give timeous notice that the appeal has been withdrawn.

Assessor for Greenock v Wilson, 1919 S.C. 474; 56 S.L.R. 177; 1919, 1 S.L.T. 109.

3. STATEMENT OF CASE FOR APPEAL.

(46)

Observations on the form of special case required by the Valuation Act, 1857, sec. 2. Bank of Scotland, 1873, 11 M. 991; 45 J. 586; 10 S.L.R. 663.

(47)

Duties (1) of appeal committee; (2) of parties to the appeal.

Valuation committees in counties and burghs must hold their Courts between 10th and 19th September, with continuation of

days, and complete their work and dispose of all appeals before 30th September. Parties appealing against any determination of a committee, and the respondents in such appeal, must hand to the clerk of the committee their reasons for appeal and answers respectively within ten days from the determination appealed against, i.e., in no case later than 10th October; and the clerk of the valuation committee must transmit the complete case to the Inland Revenue as soon after that date as is reasonably possible, and at any rate in time for the sitting of the Lands Valuation Appeal Court. In preparing the case it is the duty of the committee themselves to state the facts and their determination upon them, and to add the reasons of appeal and the answers furnished by the parties; but it is also proper and convenient that the committee should submit a draft of the case to the parties for their observations, provided that no undue delay is thereby caused.

Stein v Assessor for Falkirk, 1912 S.C. 853; 49 S.L.R. 380; 1912, 1 S.L.T. 295.

(48)

Findings in fact—Act 1879, sec. 7.

In a case stated on a complaint, the valuation committee set forth the evidence at length, as taken down in shorthand, and the following determination:—"The committee find that the complainer has failed to establish his averments, and they therefore find it unnecessary to alter the roll in this case." **Held** that the case had been improperly stated, as it did not set forth the facts proved. Lord Lee was of opinion that, but for well-founded objections on other grounds, it ought to be remitted for amendment, and Lord Fraser, that it ought to be dismissed as incompetent.

Rule v Lord Abinger, 1883, 10 R. 502; 20 S.L.R. 323.

(49)

In a case stated for the opinion of the Valuation Appeal Court, the valuation committee set forth the contentions of the parties, that the appellants had led evidence (which was set forth at length, as taken down in shorthand), and the following determination:—"The committee sustained the appeal to the effect of reducing the valuation" to a certain sum. **Held** that the case had been improperly stated, as it neither set forth the facts proved, nor stated whether the determination of the committee proceeded on the principle contended for by the assessor, or on that contended for by the appellants, and case dismissed.

Steel Co. of Scotland v Assessor for Lanarkshire, 1892, 19 R. 847; 29 S.L.R. 722.

(50)

In an appeal **held** that a case stated for the opinion of the Lands Valuation Appeal Court which did not set forth the facts proved was not a case stated in terms of the Act, and that the appeal fell to be dismissed.

Union Tube Co. v Assessor for Coatbridge, 1895, 22 R. 583; 32 S.L.R. 425.

(51)
Observed that, in stating a case for appeal to the Valuation Appeal Court, it is the duty of the valuation committee to make specific findings of fact, and it is not sufficient to refer the Appeal Court to the notes of evidence.

Guardbridge Paper Co. v Assessor for Fife, 1921 S.C. 634; 58 S.L.R. 425; 1921, 1 S.L.T. 360.

(52)

Remit for restatement.

A case for appeal against a decision of burgh magistrates contained merely a narrative of what took place before the magistrates, and a statement that certain evidence was led, and that the magistrates arrived at certain conclusions, with an appendix containing a print of the evidence. Case remitted to be restated, with directions to the magistrates to set forth the facts bearing on the matters at issue which they find to be admitted or proved or within their personal knowledge, and also the grounds of their decision.

Glasgow and South-Western Railway Co. v Assessor for Greenock, 1898, 25 R. 1229; 35 S.L.R. 943; 6 S.L.T. 148.

(53)

Amendment of case—Minute of admission of facts on appeal—Act 1879, secs. 7 and 9.

A case for appeal under the Valuation of Lands (Scotland) Amendment Act, 1879, in a case in which there had not been any evidence led, did not contain any statement by the valuation committee of facts admitted, or within the personal knowledge of the committee. The Court remitted to the valuation committee to restate the case, setting forth the facts bearing on the matter at issue which they found to be admitted or within their personal knowledge.

Aberdeen District Lunacy Board v Assessor for Aberdeenshire, 1907 S.C. 737; 44 S.L.R. 429; 14 S.L.T. 792.

(54)

Remit for further evidence.

Circumstances in which in a valuation appeal the Court, on a motion of the appellant, in terms of the 9th section of the Valuation Act, 1879, remitted the case to the valuation committee to take further evidence, although the appellant had declined to avail himself of an opportunity of leading the evidence when the case was before the commissioners.

Ramsden v Assessor for Inverness, 1894, 21 R. 797; 31 S.L.R. 472; 1 S.L.T. 532.

(55)

Refusal of motion for remit.

Held that the power conferred upon the Court by sec. 9 of the Valuation of Lands (Scotland) Amendment Act, 1879, to remit a case, for further information, to the commissioners or magistrates by whom it has been stated, is limited to such matters as a mistake committed in the statement of the case, the setting forth specific details of

matters stated generally, or the correction of a judgment of the valuation committee refusing to allow competent, or admitting incompetent evidence; and that the Court will not remit a case to enable an appellant to lead evidence which was available to him when the case was before the commissioners.

Assessor for Argyllshire v Marquis of Breadalbane, 1889, 16 R. 793; 26 S.L.R. 529.

(56)

A case for appeal contained a narrative of what took place before the magistrates, with the contentions of parties, and a statement that the magistrates arrived at certain conclusions, but did not set forth the facts found by the magistrates. It did not appear that the appellants had complained of the form of the case or requested the magistrates to make definite findings in fact. The Court dismissed the appeal, refusing to make a remit for restatement, on the ground that the appellants were responsible for the form of the case unless they could show that they had done their best to obtain a case properly stated.

Stirling Gaslight Co. v Assessor for Stirling, 1899, 1 F. 583; 6 S.L.T. 326.

(57)

An assessor entered certain subjects at a yearly value ascertained by taking a percentage on the cost of the subjects. In an appeal to the magistrates the appellants maintained that the assessor ought to have taken the rent stipulated in a lease of the subjects, but led no evidence to show that the assessor's valuation was excessive, assuming that the lease was to be disregarded. The magistrates having confirmed the assessor's valuation, the appellants appealed to the Valuation Judges. Motion by the appellants for a remit to the magistrates for an inquiry into the value of the subjects refused.

Bell v Assessor for Edinburgh, 1904, 6 F. 501; 41 S.L.R. 490; 12 S.L.T. 18.

III. PARTIES LIABLE TO BE ENTERED IN THE ROLL.

(58)

Competency of Appeals to Valuation Appeal Court.

British Linen Co. v Assessor for Aberdeen, 1906, 8 F. 508; 43 S.L.R. 442; 13 S.L.T. 952, No. 31, supra.

Ferguson v Assessor for Inverness-shire, 1912 S.C. 768; 49 S.L.R. 158; 1911, 2 S.L.T. 505, No. 32, supra.

1. PROPRIETOR.

(59)

Creditor in possession receiving rents—Competency of entering proprietor in roll as owner—Competency of suing creditor not entered in roll for payment of rates—Act 1854, sec. 42—Local Government (Scotland) Act, 1889, sec. 105.

The proprietor of heritable subjects was

entered in the valuation and assessment rolls of a county for the years 1911-13 as the owner of the subjects. The county council, who had failed to recover from him the rates due for these years, having discovered that a heritable creditor had been in receipt of the rents for the years in question under a decree of maills and duties, issued demand notes in July, 1914, to the heritable creditor for the unpaid rates, and thereafter brought an action against him to recover the amount. **Held**

(1) that the proprietor of the subjects might be entered in the roll as owner, although a heritable creditor was in actual receipt of the rents; and (2) that, the proprietor being correctly upon the roll for the years 1911-13, it was incompetent in 1914 to demand payment of the rates for these years from the heritable creditor whose name did not appear in the roll; and action dismissed. **Semble** that the only persons against whom proceedings for the recovery of rates can competently be taken by the rating authority are those whose names appear in the roll for the period of assessment.

Lanarkshire County Council v Miller, 1917 S.C. 35; 54 S.L.R. 45; 1916, 2 S.L.T. 236.

(60)

Bondholder — Possession — Unoccupied house.

A bondholder was entered as proprietor of an unoccupied house. He stated that a previous proprietor (now bankrupt) had sold the house to a feuing company, on an unrecorded conveyance, and that the company had for the last two years been entered as proprietors on their own return. The assessor stated that the company, and the previous proprietor and his creditors, had repudiated connection with the property, and had referred to the bondholder as virtual owner; that he had exposed the property to sale by public roup, and advertised it to be let, and that the key was held by a local factor for his behoof. The appellant denied he had advertised the house to be let, or had employed the local factor, or had the key. The committee refused to delete the appellant's name as proprietor, on the ground that by the Valuation Act, 1854, sec. 42, "proprietor" included adjudgers, wadsetters, or other persons in actual receipt of the rents and profits of lands and heritages. **Held** that the committee were wrong.

Ritchie, 1881, 9 R. 1244.

(61)

Bondholder in possession under decree of maills and duties.

The appellants were entered as proprietors of four houses as heritable creditors in possession. The houses were in the same terrace. There was no appeal in regard to one house which was let, and yielded a rent. The appellants stated that the other houses were vested in the trustee on a sequestrated estate. They had entered into possession of the let house under decree of maills and duties, but did not enter into possession of the unlet houses. The committee held the

appellants to be in possession. **Held** that the committee were wrong.

Bryden's Trustees, 1881, 9 R. 1244.

(62)

Lease of twenty-eight years with breaks—Act 1854, sec. 6.

Bishop v Assessor for Paisley, 1910 S.C. 821; 47 S.L.R. 372; 1910, 1 S.L.T. 158, No. 192, *infra*.

(63)

White fishings—Solway Act, 1804 (44 Geo. III. c. xlv.), sec. 9.

The Solway Act, 1804, sec. 9, enacts that if any person or persons, not being the owner, occupier, or farmer of a salmon fishery within the limits of the Act, or a person duly authorised by such owner, occupier, or farmer, shall kill or attempt to kill any fish whatsoever within these limits he shall be liable in certain penalties. The owner of a salmon fishery within the limits of the Act granted licences to erect stake-nets within the bounds of his fishery for the purpose of taking white fish, under certain regulations and on certain payments. **Held** that he was properly entered in the valuation roll as proprietor of "fishings in Solway" in respect of these payments, the rent or value being stated at their gross amount.

Lord Herries, 1883, 11 R. 397; 21 S.L.R. 539.

(64)

Mid-superior of salmon fishings who has imposed restriction on method of fishing by his disponent—Act 1854, sec. 42.

The proprietor of certain salmon fishings in the sea, disposed them by feu-disposition to trustees, who by feu-disposition disposed them to a third party, but under burden of a restriction prohibiting such third party from fishing with net and coble. The trustees were entered in the valuation roll as proprietors of fishings.

Held in an action of declarator and interdict, that the trustees were not proprietors of fishings within the meaning of the Valuation of Lands (Scotland) Act, 1854, and were not liable to be assessed in respect thereof.

Abercromby v Badenoch, (O.H.) 1909, 47 S.L.R. 18; 1909, 2 S.L.T. 114.

(65)

Buildings erected by squatter—Act 1895, sec. 4.

The contractors for the construction of certain waterworks were permitted by the tenants of farms adjoining the works, and by the water trustees for whom the works were being constructed, to erect stores and huts on the farms and on ground belonging to the water trustees. The contractors had no lease, and paid nothing for the permission. They let the stores and huts, and received rent for them. **Held** that the contractors, having no title of tenancy, did not fall to be entered in the valuation roll as "proprietors" of the stores and huts within the meaning of the Lands Valuation (Scot-

land) Act, 1854, sec. 42, or under the Lands Valuation (Scotland) Amendment Act, 1895, sec. 4.

Young & Sons v Assessor for Peebles, 1899, 1 F. 579; 36 S.L.R. 597; 6 S.L.T. 326.

(66)

Croft sold by Congested Districts Board—Payment by annual instalments—Method of valuation.

A crofter prior to 1905 held a croft from the proprietor of the estate of Glendale at a fair rent fixed by the Crofters' Commission. In 1905 the Congested Districts Board purchased the estate and entered into an agreement with the crofter to sell him his holding at a price payable by annual instalments spread over fifty years, possession to be given immediately, but a formal title to be granted only after the price had been paid up in full. **Held** that from the date of the sale the crofter had become proprietor of the holding, and, accordingly, that it fell to be entered in the valuation roll at its true letting value and not at the rent that had been fixed for it as a crofter-holding by the Crofters' Commission.

Ferguson v Assessor for Inverness-shire, 1912 S.C. 768; 49 S.L.R. 158; 1911, 2 S.L.T. 505.

(67)

Proprietor and occupier—Parish minister.

Held that a parish minister was proprietor and occupier of his manse and glebe in the sense of sec. 42 of the Valuation Act, 1854, and as such subject to a local road assessment imposed on proprietors and occupiers as defined by that Act.

Cowan v Gordon, 1868, 6 M. 1018; 40 J. 597; 5 S.L.R. 645.

(68)

Waterworks of local authority from which no profit could be made.

The magistrates and town council of a town, as the local authority, brought water into the town, by means of pipes laid for the most part along the public roads. The cost of the works was obtained from the Public Works Loan Commissioners, repayable, with interest, by instalments spread over fifty years. The works could not be let, and, as the magistrates maintained, yielded no profit. **Held** that the magistrates were rightly entered as proprietors and occupiers of the waterworks in the county valuation roll.

Magistrates of Castle-Douglas, 1881, 9 R. 1243.

2. TENANT.

(69)

Renunciation of lease—Act 1854, sec. 5.

Premises were let on lease for seven years to a public company which went into liquidation. Before the Whitsunday following the liquidators agreed with the landlord for a renunciation of the lease. This agreement was confirmed by the shareholders on 8th June, and the receipt and discharge

were granted on 30th June. Intimation of this change was made to the assessor before 8th September, but he continued the name of the company on the valuation roll as tenants. **Held** that under the 5th section of Lands Valuation Act, 1854, the company should not have been entered as tenants, and that the proprietors should have been entered both as proprietors and occupiers.

Scottish Lands and Buildings Co., &c. v Assessor for Edinburgh, 1884, 11 R. 568; 21 S.L.R. 403.

(70)

Subjects let to partnership—Death of one partner—Trustee in sequestration of surviving partner renouncing lease—Acquiescence of landlord.

A lease was taken by two partners of a firm on behalf of the firm. The firm was thereafter dissolved by the death of one of the partners, and the remaining partner becoming insolvent, a trust deed was executed for behoof of his creditors, to which the landlord acceded. The trustee declined to adopt the lease, and the landlord acquiesced on the footing of his obtaining a ranking for damages in respect of the failure to continue the lease. The firm (per the trustee) were entered in the valuation roll as tenants of the premises, the premises being entered in the roll as unoccupied. **Held** that the firm ought not to have been entered in the roll.

Clunas & Allison's Trustee v Assessor for Dundee, 1902, 9 S.L.T. 509.

(71)

Seasonal tenant—Act 1854, sec. 1.

Certain stances were let to a restaurateur as refreshment stances for five seasons at a rent per season. The period of the let for each season was from a date in April to a date in October. The lessee erected kiosks upon the stances which he removed at the close of each season. **Opinions** (per Lord Justice-Clerk Scott Dickson and Lord Ormisdale) that the lessee was rightly entered in the valuation roll as tenant and occupier of the stances, in respect that his occupation of the stances was rateable notwithstanding that his right of occupation was for part only of the year. **Opinion contra** (per Lord Salvesen).

Dante v Assessor for Ayr, 1922 S.C. 109; 59 S.L.R. 101; 1922 S.L.T. 74.

(72)

Exhibitors within grounds of Scottish National Exhibition—Lease or permission to use ground—Act 1895, sec. 4.

The executive committee of the Scottish National Exhibition held the ground occupied by the exhibition under a lease which, inter alia, excluded sub-tenants, but empowered the executive to allocate space to exhibitors and make charges therefor. Certain caterers for amusements and exhibitors entered into agreements with the executive, by which they were empowered to make erections on ground allocated to them upon certain terms of payment. The assessor

having, under sec. 4 of the Valuation of Lands (Scotland) Act, 1895, entered the caterers and exhibitors in the valuation roll as proprietors of their respective erections, held upon appeal that as they were not lessees of the ground allocated to them, they did not fall to be entered in the roll.

Popular Amusements, Limited v Assessor for Edinburgh, 1909 S.C. 645; 46 S.L.R. 426; 1909, 1 S.L.T. 223.

3. OCCUPIER.

(73)

Occupier—Whether letting for a year or less than a year—Act 1854, sec. 2.

The appellants were proprietors of houses, which were let at monthly rents varying from 14s. to 10s. The agreements bore that the houses were let for a year at a rent per month of four weeks payable in advance; if in arrear of rent the tenant was to remove on receiving three days' notice. By the Lands Valuation Act, 1854, sec. 2, the names, &c., of tenants and occupiers of subjects separately let, for a shorter period than a year, were not to be inserted in the roll, the effect being to subject the proprietor to liability for occupiers' rates. The assessor did not enter the names, &c., of the present tenants and occupiers. The commissioners held that the letting was yearly, and that the tenants were to be entered. Held the commissioners were right.

M'Intyre, 1880, 9 R. 1239.

(74)

Colliery company letting houses to their employees during employment.

Employees of a colliery company occupied dwelling-houses belonging to the company at a rent of less than £10 a year, under an agreement which set forth that the occupancy was terminable at a week's notice on either side, but that the occupant of the house was liable to summary ejection in the event, inter alia, of his ceasing to be in the employment of the company. The employees further authorised the company to deduct from their wages the amount of their house rents "as weekly tenants." An employee was neither entitled nor bound to take one of the company's houses on entering its service; and the company had no control over its employees except during the hours of their active employment.

Held that the company were not occupiers of the houses within the meaning of the Valuation Acts.

Carron Co. v Francis, 1915 S.C. 872; 52 S.L.R. 693; 1915, 2 S.L.T. 36.

(75)

Sub-tenant.

The rent of a farm let on an improving lease was fixed at £15. A sub-tenant of part of the farm was entered as occupier at £55. Held that the name of the sub-tenant should not be entered on the roll.

Fraser, 1867, 11 M. 976.

(76)

Held that a number of cottages held in lease by a firm of fishcurers, and sub-let to fishermen, should be valued at the original rent, but that the names of the occupiers, with the rents paid by them, should also be entered, as a guide to the assessor in making up the roll of voters.

Hay & Co., 1869, 11 M. 981.

(77)

Where subjects are sub-let the only rent which ought to appear in the valuation roll under the heading "Yearly rent or value" is the rent paid by the principal tenant to the owner. The occupier's column may, however, contain in addition to the name of the principal tenant that of the sub-tenant, with the rent paid by him and the extent of his occupation.

Cowdenbeath Coal Co. v Assessor for Fife, 1891, 18 R. 948; 28 S.L.R. 622.

(78)

Sub-lease of part of subjects let—Separate entry of part sub-let.

Where subjects let are in part sub-let the whole rent payable by the tenant and received by the landlord should be entered as a single sum in the column of the valuation roll headed "yearly rent or value," but the name of the sub-tenant should be entered in the column headed "occupier."

Observations on the competency of entering a subordinate figure in the valuation roll, showing the value of the sub-let portion of the subjects.

Glasgow Billiard Rooms Co. v M'Call, 1933, 5 F. 507; 40 S.L.R. 592; 10 S.L.T. 760.

(79)

Sub-tenancy under lease where sub-tenants are excluded.

Circumstances in which the sub-tenants were entered as occupiers jointly with the tenants.

Duke of Richmond, 1869, 11 M. 981.

(80)

Public park owned and regulated by municipal corporation.

Opinion that the proper entry under the head "occupier" was "the corporation" and not "the public."

Glasgow Parish Council v Assessor for Glasgow, 1912 S.C. 818; 49 S.L.R. 315; 1912, 1 S.L.T. 157, 171.

(81)

Advertisement board—Act 1889, secs. 3 and 4.

Held that the Advertising Stations (Rating) Act, 1889, did not warrant the insertion in the valuation roll, as tenant or occupier, of the name of a person who paid a yearly rent for the exclusive use of advertising boards attached to a house not belonging to or occupied by him.

Fry & Sons v Assessor for Edinburgh, 1893, 20 R. 622; 30 S.L.R. 612.

(82)

Act 1889, sec. 3—Applicability to Scotland.

A billposter was tenant of a piece of vacant ground, at an annual rent of £25, with exclusive right to erect billposting hoardings thereon. Having erected such hoardings and affixed advertisements thereto, he was entered in the valuation roll (1) as tenant and occupier of the site at the annual value of £25, and (2) as proprietor and occupier of the hoardings at the annual value of £6. He appealed against the former entry (but not against the latter), and craved that his name should be deleted from that entry, maintaining that his landlord as being "the person who permitted the ground to be used" for advertisement hoardings, was under sec. 3 of the Advertising Stations (Rating) Act, 1889, to be deemed to be in the beneficial occupation of the ground, and to be alone rateable in respect thereof. **Held** that the entry was in accordance with the Lands Valuation (Scotland) Acts, 1854 and 1895, and that it was right. **Question** whether the Advertising Stations (Rating) Act, 1889, applied to Scotland. **Opinion** that even if the Act applied to Scotland the entry was right, in respect that the appellant was the person who had permitted the ground to be used for advertisement, hoardings, within the meaning of sec. 3.

Beith v Assessor for Glasgow, 1904, 6 F. 504; 41 S.L.R. 589; 12 S.L.T. 97.

(83)

Contract permitting erection on board—Whether owner of land or owner of board the "occupier" of site—Statute—Applicability to Scotland—Lands Valuation (Scotland) Act, 1854, secs. 1 and 6—Advertising Stations (Rating) Act, 1889, sec. 3.

The owner of hotel premises entered into an agreement with a firm of billposters by which, for an annual payment of 10s. 6d., he permitted them to affix an advertisement board for tyres to a part of his premises to be afterwards determined. The permission was to remain in force for three years, and thereafter to be ended by three months' notice from either party. The agreement provided that the firm should have reasonable access to the premises for purposes connected with the board, and also that no other advertisement of a tyre was to be displayed on the premises. Following on this agreement a board was erected on a strip of vacant ground in front of the hotel, and the "site" of the board was entered by the assessor in the valuation roll at the yearly rent or value of 10s. 6d. and the firm of billposters as "tenants" and "occupiers." In an appeal at their instance they contended that they should not have been entered as tenants or occupiers, in respect (1) that the agreement was not a lease but a licence, (2) that under sec. 3 of the Advertising Stations (Rating) Act, 1889, the owner of the land, being the person who "permitted" the ground to be used for

advertisement, must be deemed to be the "occupier." **Held** that the entry was correct under the Lands Valuation Acts, in respect that the agreement was in effect an ordinary lease of a portion of land at a yearly rent, and that the Act of 1889 (if applicable to Scotland, as to which opinions reserved) in no way altered the prescribed mode of making up the valuation roll under the Valuation Acts.

A. J. Wilson & Co. v Assessor for Kincardineshire, 1913 S.C. 704; 50 S.L.R. 240; 1913, 1 S.L.T. 29.

IV. SUBJECTS FALLING TO BE INCLUDED IN THE ROLL.**1. GENERALLY.**

For competency of appeal to the Valuation Appeal Court on the question whether particular subjects ought to enter the roll, see—

Assessor for Kincardineshire v Heritors of St. Cyrus, 1915 S.C. 823; 52 S.L.R. 268; 1915, 1 S.L.T. 49, No. 33, *supra*.

(84)

Church.

Held that parish churches were not to be entered in the valuation roll.

Heritors of Kingoldrum, 1877, 4 R. 1149.

(85)

Parish churchyard.

Held that parish churches and churchyards, being extra commercium, are not valuable as lands and heritages within the meaning of the Valuation Acts, and should not be entered in the valuation roll.

Assessor for Kincardineshire v Heritors of St. Cyrus, 1915 S.C. 823; 52 S.L.R. 268; 1915, 1 S.L.T. 49.

(86)

Private chapel.

Held that a private (Episcopal) chapel yielding no revenue was rightly entered in the valuation roll.

Menzies, 1873, 11 M. 989; 45 J. 585.

(87)

University buildings—Special immunity from taxation claimed.

The University of Glasgow claimed exemption from all public or local taxation and assessments in virtue of a series of charters and statutes, combined with immemorial usage, and the old university buildings were never entered on the valuation roll. On the transference of the University to new buildings, objections was made to the entry of these buildings in the valuation roll. **Held** that they were properly entered in terms of the Valuation Act, such entry not being intended to determine any question of liability, but being merely for the purpose of valuation.

University and College of Glasgow v Magistrates of Partick, 1870, 11 M. 982; 43 J. 181; 44 J. 430; 8 S.L.R. 284; 9 S.L.R. 443.

(88)

Public bridge.

Held that a bridge was properly entered in the valuation roll in respect that it yielded a revenue from bridge dues.

Magistrates of Dumfries, 1871, 11 M. 984; 9 S.L.R. 444.

(89)

The Ayr Bridge was entered at £1480, the sum for which it was let to a tenant. The trustees appealed against the bridge being put on the roll, on the ground that it was a part of the turnpike road, and not a heritable subject within the meaning of the Valuation Act. The bridge had been erected under special Act, and the trustees were restricted as to the application of the revenue—which was to be applied to the cost of erecting the bridge and paying off the debt on it. When the debt was cleared off, the bridge was to be declared free of pontage. By arrangement between the trustees and the magistrates the pontage could be determined at once. The magistrates dismissed the appeal. **Held** that the magistrates were right.

Ayr Bridge Trustees, 1881, 9 R. 1246.

(90)

—Where transferred to road trustees under Roads and Bridges Act, 1878, but dues still leviable.

By the 93rd section of the Roads and Bridges (Scotland) Act, 1878, bridges over the river Leven which had belonged to private proprietors, who exacted pontage dues, were vested from the date of the Act in the county road trustees, who were to provide part of the compensation by continuing to levy the pontage dues. When the compensation had been paid the bridges were to become highways, and free of toll. **Held** that while the dues were leviable the bridges fell to be entered as assessable subjects on the valuation roll.

Dumbartonshire County Road Trustees, 1884, 11 R. 571; 21 S.L.R. 401.

(91)

Market.

The magistrates of a burgh let the right to levy rents or dues for stands in the public street of the burgh on market days. **Held** that the market stances, being the solum of a public street, and therefore not capable of being the subject of a lease, should not be entered in the roll.

Aberdeen City Treasurer, 1877, 4 R. 1149.

(92)

Lunatic asylum (public).

Held that a lunatic asylum supported by public rates should be entered in the valuation roll.

Banffshire District Lunacy Board, 1870, 11 M. 982; 44 J. 430; 9 S.L.R. 443.

(93)

Showground—Public square—Ground belonging to private person.

Ground in the centre of a town belonging to a private individual was used as a

public square, but at certain times in the year was occupied as a showground by owners of travelling shows who paid the proprietor £20 a year for the temporary right of occupancy.

Held (1) that the ground fell to be entered in the valuation roll; (2) that it ought to be entered as “land (market place)”; and (3) that the value to be entered was £20.

Stevenson v Assessor for Upper Ward of Lanarkshire, 1901, 3 F. 459; 38 S.L.R. 494; 8 S.L.T. 440.

Public parks.

[See V. 3 (m), *infra*.]

(94)

Public sewers and purification works in burgh—“Lands and heritages.”

Held that sewers and sewerage purification works in a burgh were “lands and heritages” within the meaning of the Lands Valuation (Scotland) Act, 1854, and as such fell to be entered in the valuation roll at their true and not at a merely nominal value.

Assessor for Aberdeen v Magistrates of Aberdeen; Assessor for Lanark v Magistrates of Lanark, 1913 S.C. 712; 50 S.L.R. 244; 1913, 1 S.L.T. 38.

See also Water of Leith Sewerage Commissioners v Assessor for Midlothian, 1914 S.C. 664; 51 S.L.R. 177; 1914, 1 S.L.T. 24, No. 400, *infra*.

(95)

Unfinished waterworks.

Avondale Parish Council v Middle Ward District Committee of Lanarkshire County Council, 1898, 25 R. 594; 35 S.L.R. 668; 5 S.L.T. 384, No. 411, *infra*.

(96)

Private sewer—Conduit attached to factory—Partly in burgh, partly in county—Act 1854, sec. 42.

The Inveresk paper mills were situated in the county of Midlothian at a short distance outside the boundaries of the burgh of Musselburgh. From the mills there was laid a conduit, the sole purpose of which was to carry off effluent or waste from the mills. For the greater part of its length the conduit, which was constructed of concrete, was underground, and for two-thirds of its length it was within the burgh of Musselburgh, passing underneath streets and other property belonging to the burgh. In so far as within the burgh it had been constructed by the proprietors of the mills in virtue of a recorded agreement with the town council, by which the town council gave the proprietors of the mills a right of wayleave for the conduit. **Held** that, in view of its nature and construction, the conduit fell within the definition of lands and heritages in sec. 42 of the Valuation of Lands (Scotland) Act, 1854, and that the portion of the conduit within the burgh had rightly been entered in the burgh valuation roll.

Inveresk Paper Co. v Assessor for Musselburgh, 1907 S.C. 747; 44 S.L.R. 433; 14 S.L.T. 790.

(97)

Commuted multures.

Held that payments in commutation of multures were not "lands and heritages" in the sense of the Valuation Act.

Duchess of Sutherland, 1869, 11 M. 980.

(98)

Held that an annuity of forty bolls of victual secured on lands in lieu of multures did not fall within the description of "lands and heritages" in the sense of the Valuation Act.

M'Leod, 1869, 11 M. 980.

(99)

Moss—Fuel.

Held that the revenue derived from moss lands for fuel should be included as rent in the valuation roll.

Forbes, 1873, 11 M. 990; 45 J. 585; 10 S.L.R. 662.

(100)

Slag heap.

A large slag heap, owned by trustees and deposited on ground belonging to them, was let to a railway company under a lease by which the company had, on payment of a royalty or fixed rent, right to remove and use the slag for the purposes of their railway. **Held** that the slag heap was a heritable subject, and that the trustees and the railway company had rightly been entered in the valuation roll as respectively the proprietors and the tenants thereof.

Airdrie, Coatbridge, and District Water Trustees v Assessor for Lanarkshire, 1908 S.C. 596; 45 S.L.R. 491; 15 S.L.T. 889.

(101)

Submarine minerals—Lease from Crown—Ownership—Solum of sea inter fauces terræ.

A proprietor, who possessed under lease from the Crown the minerals lying under the sea below low-water mark ex adverso of his lands, appealed against the assessor having entered in the valuation roll the rent paid by him for the subjects, on the grounds (1) that they were not the property of the Crown, but res nullius until occupied by himself; and (2) that the minerals being in the bed of the sea below low-water mark, they were beyond the limits of the parish and county in the valuation roll of which they were entered. **Held** (1) that the appellant, by his acceptance of the lease from the Crown, and by his possession ex facie under it, was barred from objecting to the entry of the minerals in the valuation roll; (2) that the entry of the minerals under the sea had been properly made in the valuation roll of the adjoining parish.

Cuninghame v Assessor for Ayrshire, 1895, 22 R. 596; 32 S.L.R. 453; 2 S.L.T. 618.

(102)

Compensation for surface damage—Right to prevent coal from being worked.

The titles of a vassal reserved to the superior the coal in the lands feued, but gave the vassal the right to prevent the coal from being worked except on the "stoop-and-

room" system, one object of which was to provide against the subsidence of the surface. The vassal entered into an agreement with the lessee of the coal under which, in return for annual payments, the amount of which was to be regulated by the coal won, the lessee became entitled to work the coal on the "longwall" or complete excavation system. **Held** that the vassal did not fall to be entered in the valuation roll as proprietor of collieries in respect of such payments.

Assessor for Fife v Currer, 1888, 15 R. 632; 25 S.L.R. 465.

(103)

Dredged channel in open sea.

Held that a channel dredged by harbour commissioners outside the entrance to their harbour, and below low-water mark, was not land and heritage owned and occupied by the harbour commissioners within the meaning of the Lands Valuation (Scotland) Act, 1854.

Leith Docks Commissioners v Magistrates of Leith, 1911 S.C. 1139; 48 S.L.R. 919; 1911, 2 S.L.T. 141.

(104)

Loch—Fishings—Fishings of no value—Loch not let as separate subject.

The Loch of Skene was entirely surrounded by the estates of Skene and Echt. It was not let or occupied as a separate subject, the fishings being of no value. The assessor in making up the valuation roll treated the loch as a separate subject, and entered it at a yearly value of £10 in name of each proprietor. **Held**, upon appeal, that the loch did not fall to be entered on the roll, as it had no value separable from the adjoining lands of which it was merely an adjunct, but **observed** that a loch, if actually let or if otherwise a direct source of profit to its proprietor, or the shootings and fishings over a loch, might in certain circumstances fall to be entered separately in the roll.

Assessor for Aberdeenshire v Lady Cowdray, 1911 S.C. 970; 48 S.L.R. 395; 1911, 1 S.L.T. 231.

(105)

Fishings—Trout fishings.

Observations as to the method of dealing with a right of trout fishing for the purposes of the valuation roll.

Don District Fishery Board v Burnett, 1918 S.C. 37; 55 S.L.R. 90; 1917, 2 S.L.T. 183.

(106)

Annual compensation for injury to fishings.

Held that an annual payment as compensation for injury to fishings did not fall to be entered in the valuation roll.

Magistrates of Renfrew, 1868, 11 M. 979.

(107)

Sum paid by upper proprietors to lower proprietor for abstention from netting.

The upper proprietors of salmon fishings on a river agreed to pay £782 a year to the proprietor of the fishings at the mouth in consideration of his abstaining from netting

the river. Thereafter the rod-fishings were let at greatly increased rents, at which figures they were entered in the roll. The "rod-fishings" at the mouth, which were in the proprietor's own hands, were entered at an estimated yearly value, and there was also an entry of "right of net fishing" at £782.

Held that the latter entry fell to be deleted, it being for the proprietor to determine in what manner his right of salmon fishing should be exercised, and it not being disputed that the value entered in the roll of the rod-fishings represented the fair annual value of that manner of exercising the right.

Assessor for County of Elgin v Duke of Richmond and Gordon, 1905, 7 F. 424; 42 S.L.R. 512; 12 S.L.T. 831.

(108)

Charge for permission to view place of interest—Waterfalls.

Held that the valuation of "land under wood and Clyde waterfalls" rightly included the income derived from the charge made by the proprietor for visitors passing through his woods to view the falls.

Ross v Assessor for Upper Ward of Lanarkshire, 1898, 3 F. 461.

(109)

—Abbotsford.

The furnished mansion-house, offices, and grounds of Abbotsford were let to a tenant at a rent of £170, under reservation to the proprietor of right to admit visitors during certain months to Sir Walter Scott's library and certain other rooms containing articles of interest. The proprietor derived a revenue of £419 from charges for admission thereto. **Held** that the income derived from this latter source did not fall to be taken into account in fixing the value of the subjects to be entered in the valuation roll.

Maxwell Scott v Assessor for Roxburghshire, 1890, 17 R. 833; 27 S.L.R. 606.

(110)

—The mansion-house of Abbotsford was let as a furnished house, together with offices, garden ground, and shootings. The lease reserved to the proprietors a right of access to the rooms known as Sir Walter Scott's library, drawing-room, &c., and of showing these rooms to visitors and tourists during weekdays from 1st March to 15th October; and further reserved to the proprietors absolutely the chapel and sacristy, and certain rooms, cupboards, &c., for storing superfluous furniture. The proprietor derived a revenue from showing the first-mentioned rooms to visitors. The house and shootings were entered in the valuation roll at £130, the lessee being entered as tenant or occupier, and there was a separate entry at £50, of the portions absolutely or partially reserved, the proprietors being entered in this entry as tenants or occupiers. The proprietors appealed against the latter entry, contending that it ought to be deleted. **Held** that

the portions of the house absolutely reserved to the proprietors fell to be entered in the roll, but not those to which a right of access was reserved, and the parties being agreed that £10 was the fair annual value of the former, if separately let, that the valuation at £50 fell to be reduced to £10.

Maxwell Scott's Trustees v Assessor for Roxburghshire, 1902, 4 F. 536; 39 S.L.R. 852.

(111)

Advertisement board—Whether board a heritable erection falling to be entered in roll—Act 1895, sec. 4.

Opinions reserved upon the question whether an advertisement board erected on a piece of vacant ground was a "heritable erection," within the meaning of sec. 4 of the Lands Valuation (Scotland) Amendment Act, 1895, falling to be entered in the valuation roll.

A. J. Wilson & Co. v Assessor for Kincardineshire, 1913 S.C. 704; 50 S.L.R. 240; 1913, 1 S.L.T. 29.

2. MACHINES, TOOLS, AND APPLIANCES.

(1) CASES BEFORE ACT OF 1902.

(112)

Plant and tools—Fixed or attached to lands or heritages.

Held that the annual value of plant and tools not physically attached to lands or heritages should not enter the valuation roll.

North British Railway Co. v Assessor of Railways and Canals, (O.H.) 1887, 25 S.L.R. 4.

(113)

Grain mill.

Held that the annual value of machinery in a cornmill fell to be included in the valuation.

Chalmers, 1871, 11 M. 983; 44 J. 430; 9 S.L.R. 444.

(114)

Paper mill—Steam engines.

The steam power of a paper mill in the hands of the proprietor was supplied by a number of engines of different sizes, which were fixed by bolts and nuts to solid foundations of masonry, specially designed for their reception. Although they could be removed without injury to themselves or to the buildings, the foundations would have required alteration to adapt them to engines of any other shape or size. **Held** that the engines were heritable fixtures in the sense of the Act of 1854, and fell to be valued as part of the lands and heritages.

Observed that the rules which regulate the rights of landlord and tenant in regard to machinery erected by the tenant during the currency of his lease had no application; and that the principles to be applied were practically those which regulate the rights of heir and executor.

Cowan & Sons v Assessor for Midlothian, 1894, 21 R. 812; 31 S.L.R. 733; 2 S.L.T. 48.

(115)

Machinery in foundry.

In a foundry occupied by the proprietors a number of machines of different sizes, weighing from two to sixty tons, were attached by bolts to specially prepared foundations. If the machines were removed the foundations would require to be altered or reconstructed, unless the machines were replaced by other machines of the same size and shape. **Held** that the machines were "fixed or attached" to the lands or heritages in the sense of the Lands Valuation (Scotland) Act, 1854, sec. 42, and fell to be valued as part of the foundry.

In the same foundry there were (1) a drilling machine five tons in weight, resting on a sole-plate without bolts; (2) a morticing machine four tons in weight, resting on a concrete foundation without bolts; and (3) a number of travelling cranes which ran on rails bolted to wooden beams fixed to the walls. **Held** that these machines were not "fixed or attached" to the lands or heritages in the sense of the Lands Valuation (Scotland) Act, 1854, sec. 42, and did not fall to be valued as part of the foundry.

Assessor for Dundee v Carmichael & Co., 1902, 4 F. 525; 39 S.L.R. 573; 9 S.L.T. 513.

(2) CASES AFTER ACT OF 1902.

(116)

"Machinery fixed or attached" — Electricity supply company—Act 1854, sec. 42—Act 1902, sec. 1.

In reaching the yearly value of an electric supply company's works, **held** (1) that a milker booster, switchboard for electric lighting department, booster, traction switchboard with boosters, storage battery, switchboard and balancer, electric generators, motor generators, and high tension switchboards, all being within the company's building, and loose or so fixed that they could be removed without necessitating the removal of any part of the building, were not "lands and heritages" within the meaning of the Valuation of Lands (Scotland) Acts; but (2) that copper mains laid loose in pipes through the streets were "lands and heritages," not being in a building, and so not within the exemption enacted by sec. 1 of the Act of 1902.

Coatbridge and Airdrie Electric Supply Co. v Assessor for Coatbridge, 1907 S.C. 780; 44 S.L.R. 454; 14 S.L.T. 937.

(117)

—Machinery in any "building"—Act 1902, sec. 1.

The Lands Valuation (Scotland) Amendment Act, 1902, sec. 1, modifies the definition of "machinery fixed or attached" contained in sec. 42 of the Valuation Act, 1854, in cases where the machinery is situated in "any building occupied for any trade, business, or manufacturing process." **Held** that structures in steel works consisting of roofs supported on pillars, and having in some

cases no sides, and in others "splits" covering a portion only of the sides, were "buildings" within the meaning of that section.

Colville & Sons v Assessor for Lanarkshire, 1922 S.C. 460; 59 S.L.R. 347; 1922 S.L.T. 294.

(118)

—Removal "without necessitating the removal of any part of the building"—Machines attached to foundations by cement—Act 1902, sec. 1.

The Lands Valuation (Scotland) Amendment Act, 1902, sec. 1, excludes (with certain exceptions) from the definition of "machinery fixed or attached" contained in sec. 42 of the Valuation Act, 1854, machines "which are only so fixed that they can be removed from their place without necessitating the removal of any part of the building." A number of machines in steel works rested on foundations of brick or concrete. It was necessary that the machines should be perfectly level and in complete contact throughout with their foundations. In order to avoid the necessity of planing the bed-plates of the machines and of removing all inequalities from the foundations, the machines, when they were installed, were levelled up by wedges inserted between the foundations and the bed-plates, and cement was run in which filled all vacant spaces and also, incidentally, attached the bed-plates to the foundations, the result being that the removal of the machines from their places would involve breaking the cement. **Held** that the machines could be removed from their places without necessitating the removal of any part of the buildings, and, accordingly, that they did not fall within the category of "machinery fixed or attached."

Colville & Sons v Assessor for Lanarkshire, 1922 S.C. 460; 59 S.L.R. 347; 1922 S.L.T. 294.

(119)

—Act 1854, sec. 42—Onus of proof.

Held that soda-recovery plant, rotary furnaces, tanks, grass boilers, and similar plant, installed in a paper mill in connection with the manufacturing processes, were not heritable subjects falling to be entered in the valuation roll, in respect that the assessor had failed to discharge the onus of proving that they could not be removed without injury to the buildings in which they were situated.

Guardbridge Paper Co. v Assessor for Fife, 1921 S.C. 634; 58 S.L.R. 425; 1921, 1 S.L.T. 360.

(120)

—"Appliances"—Rails for overhead travelling crane—Bar cooling framework—Act 1902, sec. 1.

The Lands Valuation (Scotland) Amendment Act, 1902, sec. 1, excludes (with certain exceptions) from the definition of "machinery fixed or attached" contained in sec. 42 of the Valuation Act, 1854,

"machines, tools, or appliances" in buildings occupied for trade purposes, which can be removed without necessitating the removal of any part of the building. In certain steel works an overhead travelling crane ran upon rails which were attached to brackets by screw bolts with moveable nuts, the brackets being riveted to the upright steel columns or pillars which supported the roofs. In the same works, for the purpose of supporting bars of steel while cooling, frameworks composed of iron bars were laid across transverse walls within the buildings. **Held** that the rails upon which the crane ran and the cooling frameworks were "appliances," and, accordingly, as they could be removed without disturbing the building, they were not "machinery fixed or attached."

Colville & Sons v Assessor for Lanarkshire, 1922 S.C. 460; 59 S.L.R. 347; 1922 S.L.T. 294.

(121)

— "Plant for heating such building"
— Linoleum factory—Bed-frames for supporting linoleum in drying chamber—Hot-air and steam apparatus for drying linoleum
— Automatic sprinklers for extinguishing fire
— Act 1854, sec. 42—Act 1902, sec. 1.

Held in the valuation of a linoleum factory (1) that the expression "machinery fixed or attached" in sec. 42 of the Lands Valuation (Scotland) Act, 1854, as amended by the Lands Valuation (Scotland) Amendment Act, 1902, sec. 1, did not include the bed-frames upon which the linoleum was supported in the drying chamber, each bed-frame occupying the whole of a specially constructed building without rigid attachments to either floor or walls, and being capable of removal in sections without injury to the building, and that accordingly the bed-frames did not fall to be entered in the valuation; (2) that the hot-air apparatus and steam pipes used for drying the linoleum by raising the temperature in the drying chambers to 135 degrees were "plant for heating . . . such building" and were rightly included in the valuation; (3) that a sprinkler apparatus, consisting of small piping and sprinkler-heads and forming part of an automatic fire-extinguisher, was heritable and was rightly included in the valuation.

Michael Nairn & Co. v Assessor for Kirkcaldy, 1915 S.C. 801; 52 S.L.R. 256; 1915, 1 S.L.T. 58.

(122)

— Drying machines connected with fixed boilers and engines, but removable without interfering with buildings—Act 1854, sec. 42—Act 1902, sec. 1.

In a fish manure and oil factory the machines for drying the raw material consisted of long steel cylinders resting horizontally on iron pedestals connected by holding-down bolts to concrete blocks sunk into the soil. The outer portion of these cylinders formed steam jackets for supplying

the heat to dry the materials in the interiors. These jackets were connected by steam pipes with the factory boilers, and the condensed steam was carried back by other pipes to the feed-pumps of the boilers. The material in the cylinders was stirred by means of revolving shafts passing through the cylinders, and the vapours from the process of drying were carried off by means of fans. The revolving shafts and fans were driven by belts connected with the factory engines. **Held** that the drying machines were not "machinery fixed or attached" to the heritable subjects within the meaning of the Lands Valuation (Scotland) Act, 1854, sec. 42, as amended by the Lands Valuation (Scotland) Amendment Act, 1902, sec. 1, and accordingly were not "lands and heritages" falling to be entered in the valuation roll, in respect (1) that they did not form part of the plant for producing or transmitting first motive power, or for heating or lighting the building; and (2) that they could be removed from their places without necessitating the removal of any part of the building in which they stood.

Aberdeen Fish Manure and Oil Co. v Assessor for Kincardineshire, 1916 S.C. 681; 53 S.L.R. 492; 1916, 1 S.L.T. 81.

(123)

— Machinery for "producing or transmitting first motive power" — Electric motors—Current purchased from generating station—Act 1854, sec. 42—Act 1902, sec. 1.

Machinery in certain iron works was driven by two electric motors situated in the works, the electric current required for the motors being led into the works by cables from the generating station of an electrical power company which sold electric current to consumers. The motors and the cables connecting them with a switchboard in the works were the property of the proprietors of the works; the switchboard and the cables connecting it with the generating station were the property of the electrical power company. **Held** that the motors were machinery for "producing or transmitting first motive power," and fell accordingly, as "lands and heritages," to be valued in the valuation roll under the Lands Valuation (Scotland) Act, 1854, sec. 42, as amended by the Lands Valuation (Scotland) Amendment Act, 1902, sec. 1.

Etna Iron and Steel Co. v Assessor for Lanarkshire, 1919 S.C. 474; 56 S.L.R. 113; 1919, 1 S.L.T. 29.

(124)

— Electric motors for driving machines—Combined electric motor and machine—Current purchased from generating station—Act 1854, sec. 42—Act 1902, sec. 1.

A butcher installed in his premises (1) electric motors, which drove machines for mincing and other purposes, and (2) a combined motor and meat-crushing machine known as the "Hobart." The electric

current required for the motors and the "Hobart" was purchased from the Corporation of Glasgow, from whose generating station it was led into the premises by cables. The motors rested upon rails, and were kept in position by T bolts; the "Hobart" was not bolted, but rested upon a wooden box, and could be removed by simply undoing the couplings of the cables. As regarded the motors, **held** (1) that they were machines for "producing or transmitting first motive power" within the meaning of sec. 42 of the Lands Valuation (Scotland) Act, 1854, as amended by sec. 1 of the Lands Valuation (Scotland) Amendment Act, 1902; (2) that, as such, and in respect, further, that they were in some degree fixed or attached to the solum, they came within the definition of "lands and heritages" contained in the above sections. As regarded the "Hobart" machine, **held** that, as there was nothing in the case to enable the Court to separate the two functions it performed, it could not, as a unumquid, be regarded as limited to the production or transmission of first motive power, and, as it could be removed from its place without the removal of any part of the building where it was situated, it was not a heritable subject. **Question** whether, in order to bring machinery for producing or transmitting first motive power within the definition of "lands and heritages," any attachment or fixture whatsoever is necessary.

Assessor for Glasgow v Watson, 1920 S.C. 517; 57 S.L.R. 629; 1920, 2 S.L.T. 262.

(125)

———Boilers supplying steam both for power and manufacturing processes—Pump and filters for boilers—Mechanical stokers and rakers—Shafting—Act 1854, sec. 42—Act 1902, sec. 1.

In the valuation of a paper mill, **held** that, under machinery or plant "for producing or transmitting first motive power," there fell to be included (1) all the boilers employed in raising steam for the engines which produced the motive power, although a portion only of the steam so raised was used in the engines, the remainder being employed directly in the manufacturing processes; (2) the pumps which fed the boilers, and the filters which cleansed the water supplied to the boilers; (3) the mechanical plant which stoked and raked out the furnaces which heated the boilers; (4) the main shafting throughout the mill, which was driven by belting directly from the engine which supplied the motive power, as distinguished from the secondary shafting driven off the main shafting. **Held**, accordingly, that these items were "lands and heritages" under the Lands Valuation Act, 1854, sec. 42, as amended by the Lands Valuation Amendment Act, 1902, sec. 1, and fell, as such, to be entered in the valuation roll.

Guardbridge Paper Co. v Assessor for Fife, 1921 S.C. 634; 58 S.L.R. 425; 1921, 1 S.L.T. 360.

(126)

———Electric motors—Electric dynamos—Motor generators—Rotary converters—Act 1902, sec. 1.

In a number of steel works the machinery was driven by electric motors. In some of the works the current for the motors was supplied by dynamos driven by steam engines situated within, and belonging to, the works. In others the current was purchased from an electric power company. In some of the latter works the motors were driven directly by the current so purchased without conversion; in others the current required to be converted, which was effected by one or other of two methods. By one method the purchased current drove a machine known as a "motor generator," composed of two distinct units, the motor and the converting generator driven by the motor. By the other method the purchased current drove a rotary converter, which performed the same function as the motor generator, but was an indivisible machine of which it was impossible to affirm that one part received and another produced current. **Held** that, under machinery or plant "for producing or transmitting first motive power," there fell to be included (1) the motors which were directly driven by the purchased current without conversion; (2) the motor portion of the motor generator; and (3) (a matter of concession) the whole rotary converter; but that there fell to be excluded (1) the steam-driven dynamos and the motors driven by the electric current produced by the dynamos, and (2) the generator portion of the motor generator, and (3) motors driven by converted current.

Colville & Sons v Assessor for Lanarkshire, 1922 S.C. 460; 59 S.L.R. 347; 1922 S.L.T. 294.

(127)

Reserve or "stand-by" plant.

Of six boilers installed in a paper mill four only were used at a time, the other two being kept in reserve against any emergency. The six boilers were used in rotation. Further, certain auxiliary electric lighting plant was used only at week-ends, when the main plant was not running. **Held** that all the boilers and the electric lighting plant fell to be entered in the roll at their full value.

Guardbridge Paper Co. v Assessor for Fife, 1921 S.C. 634; 58 S.L.R. 425; 1921, 1 S.L.T. 360.

3. OTHER ACCESSORIES OF HERITAGE.

(128)

Tenant's fixtures.

Fixtures erected by a tenant which are heritable in a question between heir and executor, though they may be removeable in a question between landlord and tenant, fall to be entered in the roll under sec. 4 of Lands Valuation (Scotland) Amendment Act, 1895.

Gilchrist v Assessor for Lanarkshire, 1898, 25 R. 589; 35 S.L.R. 663; 5 S.L.T. 330.

(129)

Water rights — Right of millowner to water for mill—Occupier.

The proprietors of a mill had a right, under the feu contracts by which they acquired the ground on which their mill was built, to a supply of water from an aqueduct passing through the ground, in such manner as not to diminish the supply of water. For this right they were bound to pay a certain "rate or duty or ground annual," which was declared to be a real burden on the ground. The aqueduct and the water supply belonged to a water trust who were rated thereon. The magistrates and council having taken into account in the valuation of the mill the amount annually paid by the proprietors of the mill for water rights as being the annual value of an assessable subject, **held** (by Lord Lee) that this judgment was right (by Lord Fraser) that it was wrong. The judges being thus divided in opinion, the valuation stood.

Fleming, Reid & Co. v Assessor for Greenock, 1885, 22 S.L.R. 606.

(130)

Water for mill obtained from adjacent county—Claim to deduction in roll of county where mill situated.

The owners and occupiers of a paper mill in Clackmannanshire paid a yearly rent of £150 as tenants of a water right in Fife for water for the rest of the mill. **Held** that the rent paid for the tenancy of the water right in Fife should not be deducted from the annual value of the mill in Clackmannanshire, as determined on the basis of the capital value of the mill, calculated on the floor and cubic space of the mill premises according to the method universally applied in the county in the case of public works not actually let.

James Alexander Weir, Limited v Assessor for Clackmannanshire, 1901, 4 F. 513; 38 S.L.R. 853.

(131)

House fittings.

The proprietor of a house let it unfurnished, but fitted with grates, gas fittings, chandeliers, blinds, curtain poles, and picture rods. He contended that a certain percentage of the gross rent should be allowed as a deduction in respect of the said fittings, as these were moveable, but the assessor entered the gross rent in the valuation roll. **Held** that these fittings formed part of the lands and heritages let, and that their annual value was rightly included in the valuation.

Cowans v Assessor for Forfarshire, 1910 S.C. 810; 47 S.L.R. 382; 1910, 1 S.L.T. 263.

(132)

"Buildings and pertinents thereof"—Cast-iron plates and sleepers laid on ground in steel works—Act 1854, sec. 42.

The ground inside buildings which formed part of steel works was paved with large plain square cast-iron plates, and in some cases with old railway sleepers, which were

not attached to the soil, and could be removed to any other position without fitting or alteration. They were originally laid in order to facilitate the conveyance of material to the machines, but, in works in which overhead railways had been subsequently introduced, their main use was to provide a firm and tidy flooring. **Held** that the plates and sleepers did not form part of the buildings, and were not "lands and heritages."

Colville & Sons v Assessor for Lanarkshire, 1922 S.C. 460; 59 S.L.R. 347; 1922 S.L.T. 294.

4. TENANTS' ERECTIONS AND IMPROVEMENTS.**(1) CASES BEFORE ACT OF 1895.**

(133)

Additional buildings erected by the tenant under a lease for a period not exceeding twenty-one years which contains no obligation on the tenant to erect such buildings or to pay rent therefore, do not increase the valuation of the subjects leased.

Assessor for Glasgow v North British Railway Co., 1884, 11 R. 562; 21 S.L.R. 397. See also—

Duke of Richmond, 1868, 11 M. 978.

Graham Brothers, 1871, 11 M. 982; 43 J. 228; 44 J. 430; 8 S.L.R. 332; 9 S.L.R. 443.

Magistrates of Perth, 1871, 11 M. 983.

Summerlee Iron Co., 1875, 4 R. 1146.

Nitshill Coal Co., 1879, 9 R. 1238.

Nimmo & Co., 1880, 9 R. 1239.

Coltness Iron Co. v Assessor for Linlithgowshire, 1882, 10 R. 21.

Thomson v Assessor for Renfrewshire, 1883, 10 R. 500.

Gossnell v Assessor for Edinburgh, 1883, 10 R. 665.

Marr Typefoundry Co. v Assessor for Edinburgh, 1884, 11 R. 563.

Morrison's Trustees v Assessor for Coatbridge, 1893, 20 R. 616; 30 S.L.R. 610.

Furnace Gases Co. v Assessor for Lanarkshire, 1893, 20 R. 620; 30 S.L.R. 609.

Coltness Iron Co. v Assessor for Lanarkshire, 1895, 32 S.L.R. 426; 2 S.L.T. 521.

(2) CASES AFTER ACT OF 1895.**(a) Erections or Structural Improvements.**

(134)

Alterations on public-house by tenant—No alteration in rent.

The tenant of a public-house to meet objections under the Licensing Act executed an alteration on the premises at the cost of £25. The rent remained unaltered. The assessor continued the previous valuation, but added a new entry in respect of the alterations—"Part of public-house, £60." **Opinions** reserved on the question whether the alterations were "erections or structural improvements" within the meaning of the Act.

Peggie v Assessor for Kirkcaldy, 1901, 3 F. 462; 38 S.L.R. 492; 8 S.L.T. 409.

(135)

Offices erected by shipowners who occupied a special berth in a harbour—Lease—Act 1895, sec. 4.

The Clyde Navigation Trustees, proprietors of the quays in Glasgow harbour, allocated a special berth at one of the quays to a shipping company, during the granters' pleasure, and under reservation of a right to the trustees to use the berth for general purposes when vacant. The company paid no rent for the berth, but they rendered certain services in the matter of collecting dues. The company, with the permission of the trustees, erected offices on the quay, but they were entitled to remove them in the event of their vacating the berth. The assessor entered the offices in the valuation roll as erections or structural improvements of which the shipping company were proprietors, under sec. 4 of the Lands Valuation Amendment Act, 1895. **Held** that the section was inapplicable and that the entry fell to be deleted, in respect that (assuming the company to be lessees of the berth) the lease was not for a yearly rent conditioned as the fair annual value of the subject let, which was a condition precedent to the application of the section. **Opinions** that the shipping company were not lessees of the berth.

Assessor for Glasgow v Clyde Shipping Co., 1920 S.C. 510; 57 S.L.R. 554; 1920, 2 S.L.T. 191.

(136)

Corrugated iron sheds resting on bricks or sleepers and easily removable—Wooden shed resting on sleepers but fitted for wheels—"Erections" by lessee—Act 1854, sec. 42—Act 1895, sec. 4.

The tenant of a piece of ground placed on it two sheds as bothies for his employees and as storehouses. The sheds were made of corrugated iron, and rested on bricks or sleepers. They were so constructed that they could be taken to pieces and re-erected, and one had in fact formerly been erected elsewhere. The tenant had also placed upon the ground a wooden shed which he used as his office. It was constructed to move on wheels, but the wheels had been removed and it rested on sleepers placed on the ground. The wheels, however, were preserved, and could be replaced at any moment, if it was desired to move the shed elsewhere. **Held** (1) that the corrugated iron sheds were heritable subjects and fell to be entered in the valuation roll under sec. 4 of the Lands Valuation (Scotland) Amendment Act, 1895, as "erections" made by the lessee; (2) that the wooden shed was not a heritable subject, and, accordingly, did not fall to be entered in the valuation roll.

Assessor for Glasgow v Gilmartin, 1920 S.C. 488; 57 S.L.R. 224; 1920, 1 S.L.T. 191.

(137)

"Erections or structural improvements" by lessee—Machinery—Act 1895, sec. 4.

Heritable machines installed by a tenant

are "erections" within the meaning of sec. 4 of the Lands Valuation (Scotland) Amendment Act, 1895.

Assessor for Glasgow v Watson, 1920 S.C. 517; 57 S.L.R. 629; 1920, 2 S.L.T. 262.

(b) Exemptions.

(138)

Agricultural purposes—Tomato house in market garden—Act 1895, sec. 4.

Held that greenhouses used for cultivating tomatoes in a market garden were not erections and structural improvements for agricultural purposes within the meaning of the exemption contained in sec. 4 of the Lands Valuation (Scotland) Amendment Act, 1895.

Gilchrist v Assessor for Lanarkshire, 1898, 25 R. 589; 35 S.L.R. 663; 5 S.L.T. 330.

(139)

Small landholder—House and shop—Market gardening—Glass houses for tomato growing—Act 1895, sec. 4—Small Landholders (Scotland) Act, 1911.

A small landholder under the Small Landholders (Scotland) Act, 1911, on whose holding there was no house, erected thereon a building consisting of a dwelling-house of two rooms and a kitchen and a small shop. He also erected three glass houses in which he grew tomatoes, and he used the rest of his ground as a market garden. **Held** that the house, shop, and glass houses all fell, under sec. 4 of the Lands Valuation (Scotland) Amendment Act, 1895, to be entered in the roll at their fair annual value, with the holder as proprietor and occupier, in respect that they were erections made by the holder which did not fall within the exemption in sub-sec. (1) of that section of "erections or structural improvements made or acquired for agricultural purposes." **Observations** (per Lord Johnston) on the position of a small landholder in the matter of (a) house building, (b) market gardening.

Blane v Assessor for Ayrshire, 1915 S.C. 797; 52 S.L.R. 265; 1915, 1 S.L.T. 47.

(140)

Small landholders' houses rebuilt or enlarged for letting to summer visitors—Small Landholders (Scotland) Act, 1911.

The dwelling-houses upon the holdings of certain small landholders under the Small Landholders (Scotland) Act, 1911, who paid rent for their lands only, had been enlarged or rebuilt either by the existing holders or by their fathers to whose rights they had succeeded, for the purpose of letting to summer visitors. **Held** that the houses did not fall under the exemption of "erections or structural improvements made or acquired for agricultural purposes," contained in sub-sec. (1) of sec. 4 of the Lands Valuation (Scotland) Amendment Act, 1895, and accordingly that, under that section, they had been rightly entered in the valuation roll, with the small landholders as proprietors and occupiers, at figures representing the difference between their actual value and the

value of dwelling-houses in keeping with the agricultural requirements of the holdings.

Sym v Assessor for Bute, 1915 S.C. 781; 52 S.L.R. 199; 1915, 1 S.L.T. 41.

(141)

Improvements for working or cleaning minerals — Clayfield—"Minerals"—Lands Valuation (Scotland) Amendment Act, 1895, sec. 4, exemption (2).

A tenant who under his lease had right to dig and take clay to a considerable depth below the surface made certain erections upon the ground let to him, which he used exclusively for the purpose of working the clay. **Held** that "clay" was a "mineral" within the meaning of exemption (2) of sec. 4 of the Lands Valuation (Scotland) Act, 1895, and that the erections fell to be deleted from the roll.

Assessor for Portobello v Mitchell & Sons, 1896, 23 R. 686; 33 S.L.R. 520.

(142)

Electric lighting plant—Act 1895, sec. 4, exemption (2).

The tenant of a colliery erected electric lighting plant at the colliery. The light was not supplied for any purpose except the ordinary business of surface operations at the colliery and the lighting of the pit bottom. **Held** that the electric lighting plant was within exemption (2) of sec. 4 of the Lands Valuation (Scotland) Act, 1895, and did not fall to be entered in the roll.

Assessor for Fife v Wemyss Coal Co., 1903, 5 F. 505.

(143)

Mineral lease—Rent paid by royalties—Value of erections included in royalties—Act 1895, sec. 4, exemption (2).

A firm of brick manufacturers, lessees of minerals under a thirty-one years' lease for which rent was paid by royalties, erected new buildings on the subjects let as a head office for their whole business, which worked two other mineral fields held under different leases. **Held** that the new buildings fell to be valued and entered in the roll as separate subjects under sec. 4 of the Lands Valuation (Scotland) Amendment Act, 1895; repelling the pleas (1) that, as the buildings had been erected to facilitate the increasing output of the business, their value was already included in the valuation of the subjects of the lease, which was based from year to year on the increasing amount of the royalties, and (2) that, in any event, they fell under the exemption in sec. 4, of erections used exclusively for the purpose of working the minerals.

John G. Stein & Co. v Assessor for Stirlingshire, 1915 S.C. 775; 52 S.L.R. 196; 1914, 2 S.L.T. 436.

(144)

Act 1895, sec. 4, exemptions (2) and (3).

A tenant of certain seams of fireclay and quarries of rotten rock and freestone rock under a lease which stipulated for a fixed

rent or for a royalty on every ton of these minerals carried away, erected certain kilns in which the rotten rock and freestone rock, after being quarried, was dried, and also certain buildings containing two boilers, an engine, and pan-mills, in which the fireclay, rotten rock, and freestone rock were ground. **Held** (1) that these erections did not fall within the meaning of exemption (2) in respect that they were used for converting the minerals on which the royalty was payable into a finished product; and (2) that they did not fall under exemption (3), in respect that the royalty was not calculated upon the finished product, but upon the raw mineral.

Garthverrie Fireclay Co. v Assessor for Lanarkshire, 1897, 24 R. 738; 34 S.L.R. 619; 4 S.L.T. 295.

(145)

Structures in which minerals are treated—Mineral lease—Granite crushing plant—Act 1895, sec. 4, exemption (3).

A lease of granite quarries, including a site for a granite crushing plant, stipulated for the payment in lieu of rent of certain specified royalties upon all products of the quarries sold by the tenants, including a royalty on every ton of "crushed granite manufactured" by the tenants. The tenants erected a crusher in which they broke up stones which, by reason of their inferior quality or size, could not be used for more profitable purposes. **Held** that the plant was exempted from entry in the valuation roll under sec. 4 (3) of the Lands Valuation (Scotland) Amendment Act, 1895, in respect that it was a "structure" for "treating" minerals, and that one of the royalties was calculated upon the minerals as so treated.

D. H. & J. Newall v Assessor for Kirkcudbrightshire, 1919 S.C. 468; 56 S.L.R. 110; 1919, 1 S.L.T. 13.

(146)

Kilns for baking blaes—Lands Valuation (Scotland) Amendment Act, 1895, sec. 4, exemption (3).

Held that kilns, ovens and other apparatus for grinding, moulding and baking blaes, and turning the same out in the form of bricks, were structures in which minerals were treated within the meaning of exemption (3).

Assessor for Stirlingshire v Stein & Co., 1900, 2 F. 596; 37 S.L.R. 656; 7 S.L.T. 385.

(147)

Buildings and machinery for dressing stone—Lands Valuation (Scotland) Amendment Act, 1895, sec. 4 (3).

Held that the exemption in sec. 4 (3) did not apply to buildings and machinery used for cutting and dressing stone by mechanical means.

Scottish Freestone Quarries v Assessor for Dumfriesshire, 1900, 2 F. 602; 37 S.L.R. 660; 7 S.L.T. 465.

(148)
Rent calculated by minerals treated in erections—Act 1895, sec. 4 (3).

A chemical company under agreement acquired right to recover the tar and ammonia from the gases of the adjoining blast furnaces of an iron company at a royalty of one shilling per ton on the coal consumed in the furnaces of the latter. They erected buildings for the purpose of working the gas on a piece of ground adjoining the ironworks, which had been leased to them under the agreement. **Held** that as the lease was not a lease of minerals, exemption (3) of sec. 4 of the Lands Valuation (Scotland) Amendment Act did not apply.

Furnace Gases Co. v Assessor for Lanarkshire, 1896, 23 R. 689; 30 S.L.R. 609.

(149)
Lordship calculated upon minerals as treated in such structures—Act 1895, sec. 4 (3).

Blaes were let at a fixed rent or, in the option of the landlord, at a lordship per ton of bricks or goods manufactured at the works in kilns erected by the tenant. **Held** that the rent or lordship stipulated in the lease was calculated upon the minerals as treated in the structures and that the exemption in sec. 4 (3) applied to the kilns.

Held further, that it was not a ground for taking the structures out of the exemption that the tenant had power to make bricks therein out of blaes of clay brought from elsewhere.

Assessor for Stirlingshire v Stein & Co., 1900, 2 F. 596; 37 S.L.R. 656; 7 S.L.T. 385.

(150)
Lordship stipulated for unmanufactured minerals removed—Act 1895, sec. 4 (3).

A mineral lease stipulated for a lordship of 6d. per ton on unmanufactured clay removed from the lands, and for a lordship of 6½d. upon goods manufactured in the kilns erected by the tenant.

Held that it was not a ground for taking the structures out of the exemption in sec. 4 (3) that a lordship was stipulated under the lease for clay removed in an unmanufactured state.

Cleghorn Terra-Cotta Co. v Assessor for Lanarkshire, 1900, 2 F. 600; 37 S.L.R. 658; 7 S.L.T. 386.

5. CUMULO OR SEPARATE VALUATION.

(151)
Dwelling-house with adjuncts.
Opinion (per Lord Fraser) that where premises consist of a dwelling-house and adjuncts the assessor ought to value the whole as one subject.

M'Jannet v Assessor for Stirling, 1882, 10 R. 32; 19 S.L.R. 590.

(152)
Farmhouse and farm.
Held that the dwelling-house attached to a farm should not be separately entered in the valuation roll.

Henderson, 1871, 11 M. 985; 44 J. 431; 9 S.L.R. 445.

(153)
Farm buildings within special district—Principle of valuation—Local Government (Scotland) Act, 1894, sec. 45, sub-sec. (1).

Of a farm of 223 acres, 9 acres, including the farmhouse and steadings, lay within a special water supply and drainage district. The assessor, in valuing the 9 acres, included the value of the buildings thereon. **Held** that the farm, with the farm buildings, should have been valued as a unum quid, and the amount distributed proportionally to acreage.

Forbes Irvine v Assessor for Aberdeen-shire, 1897, 24 R. 741; 34 S.L.R. 622.

(154)
Grass parks farmed by proprietor as one holding.

An assessor entered separately, each at the rent it produced for grazing purposes, a number of grass parks in the proprietor's occupation, which he farmed as one holding, on the ground that some of the parks might be included in a drainage district, which it was in contemplation to form, and would then have to be assessed separately. **Held** that the assessor's entry was wrong, and that the holding ought to be entered as a unum quid.

Maitland v Assessor for Midlothian, 1893, 20 R. 628; 30 S.L.R. 618.

(155)
House and lands not contiguous.
Held that the occupant of lands and a house in different parts of the same parish was not entitled to have them entered together as one holding with a view to their being jointly assessed for poor rates.

Glass, 1872, 11 M. 988; 44 J. 433; 9 S.L.R. 446.

(156)
Hotel and stables.
 A property, owned and occupied by a hotel-keeper, consisted of a hotel situated in a main street and, behind the hotel, stables and a stable yard opening on to a side street. There was no internal communication between the stables and the hotel, but the two back doors of the hotel opened into the stable yard. Ordinary hiring was done in the stables in addition to business immediately connected with the hotel. **Held** that the hotel and stables were rightly valued by the assessor as a unum quid.

Philip v Assessor for County of Elgin, 1912 S.C. 774; 49 S.L.R. 160; 1911, 2 S.L.T. 508.

(157)
Bank buildings with dwelling-houses occupied by bank officials.
 The premises of certain banks, including

the banking office and the dwelling-houses of certain bank officials, were entered in the valuation roll as a *unum quid* at one *cumulo* valuation. The banks appealed, and maintained that the offices and dwelling-houses ought to be separately valued for the purposes of the Valuation Acts, and in order to satisfy the purpose of a local Act which in authorising an assessment made a distinction between the assessment of dwelling-houses and offices. In the case of some of the banks the dwelling-houses were entirely detached from the bank buildings, in others they formed part of the bank buildings, but had no internal communication with the business premises; in others they formed part of the bank buildings, and were connected by internal communication with the business premises. The Court, while of opinion that the provisions of the local assessing Act had no effect upon the question of valuation, which must be ruled by the provisions of the Valuation Acts, **held** (1) in cases where the dwelling-houses were entirely detached from the bank buildings, that they ought to be separately valued; (2) where they formed part of the main building, and had internal communication with the business premises, that the whole ought to be valued as a *unum quid*.

Bank of Scotland v Assessor for Edinburgh, 1890, 17 R. 839; 27 S.L.R. 611.

Bank of Scotland v Assessor for Edinburgh, 1891, 18 R. 936; 28 S.L.R. 619.

(158)

Co-operative store, including separate industries.

St. Cuthbert's Co-operative Association v Assessor for Edinburgh, 1896, 23 R. 681; 33 S.L.R. 487; 3 S.L.T. 278, No. 316, *infra*.

(159)

Cumulo rent for two sets of premises—Part of rent declared to be interest on price of one set.

A lease of two contiguous sets of premises fixed a certain sum as rent, of which part was apportioned to one portion of the premises, and another part was declared to be interest on the price of the other portion, and on the cost of meliorations, which consisted in connecting the two sets of premises for business purposes. The connection was shut up and one of the sets of premises let to a sub-tenant. **Held** that the subjects were properly assessed at the total sum stipulated as rent, under deduction only of the rent stipulated in the sub-lease.

Riley, Webster & Borland v Assessor for Glasgow, 1883, 20 S.L.R. 321.

(160)

Public park—Houses and offices situated in and used in connection therewith.

Held that houses and offices situated in and used by the officials of a public park belonging to the Corporation of Glasgow did not fall to be separately entered and valued in the valuation roll, but that the park,

houses, and offices fell to be treated as a *unum quid*.

Glasgow Parish Council v Assessor for Glasgow, 1912 S.C. 818; 49 S.L.R. 315; 1912, 1 S.L.T. 157, 171.

(161)

Cemetery with superintendent's house and greenhouse — Assessment — Exemption of burial ground from assessments and rates—Rating Exemptions (Scotland) Act, 1874, sec. 1.

A house and greenhouse were situated within a cemetery, the only access being by the cemetery gate. The house was the residence and office of the superintendent, and the greenhouse was used for storing and forcing plants bedded out in the cemetery. **Held** that the cemetery, the house, and the greenhouse all fell to be entered in the valuation roll as a *unum quid*. **Observations** on the bearing of this decision upon the question whether the houses fell under the statutory exemption from assessments and rates conferred on burial grounds by the Rating Exemptions (Scotland) Act, 1874, sec. 1.

Edinburgh Parish Council v Edinburgh Magistrates, 1912 S.C. 793; 49 S.L.R. 307; 1912, 1 S.L.T. 129.

(162)

Asylum—Farm and houses occupied in connection therewith.

A parochial board erected a lunatic asylum for the treatment of pauper lunatics. They acquired at different periods land for farming purposes to afford occupation for the lunatics, and erected residences for the medical superintendent and the employees. The asylum, the medical superintendent's house, and the other houses, were separately entered in the valuation roll, and the lands continued also to be entered separately as they were before being acquired for asylum purposes. **Held** that, as the asylum had under the Lunacy Acts no other character than that of a lunacy ward of a poorhouse, the other subjects could not be regarded as pertinents thereof, and that the separate entries were right.

Barony Parochial Board v Assessor for Dumbartonshire, 1882, 10 R. 39; 19 S.L.R. 728.

(163)

In the case of an asylum for pauper lunatics **held** that all the asylum buildings and offices were rightly valued as a *unum quid*, but that a farm and plantation used as an adjunct to the asylum fell to be valued separately.

Govan District Lunacy Board v Assessor for Renfrewshire, 1899, 1 F. 591; 36 S.L.R. 603.

(164)

Two houses used as homes for incurables—Laundry—Farm land—Principle of valuation—Rate per bed.

An association owned a property, extending to about 48 acres, on which there were two houses used as homes for incurables, another house used as a laundry for the two

homes, and houses for employees. The assessor entered each of the two homes, the laundry, the employees' houses, and the farm land separately in the valuation roll—his aggregate valuation of the whole being £568. **Held** that the two homes and the laundry were to be valued as a *unum quid* at £400 (which was approximately £3 per patient's bed) instead of £467, the aggregate of the assessor's valuation of these three subjects, and that the other subjects had been rightly entered by the assessor.

Glasgow Association for the Relief of Incurables v Assessor for Dumbartonshire, 1907 S.C. 769; 44 S.L.R. 441; 14 S.L.T. 878.

(165)

School and playground.

Merchant Company Education Board v Assessor for Edinburgh, 1911 S.C. 948; 48 S.L.R. 387; 1911, 1 S.L.T. 233, No. 322, *infra*.

(166)

Oil-works and coalfield.

Held that oil-works connected with a coalfield were properly entered separately in the valuation roll.

Drumgray Coal Co., 1867, 11 M. 977.

(167)

Additional rent payable for ground taken for purposes of lease.

The tenants of shale, under a lease for thirty-one years, were entitled to take in addition ground for the purposes of the lease on payment "for all ground that may be occupied, used, or taken by them for any of the purposes before mentioned, and for all surface damages or other damages." **Held** that such ground being separately let for more than twenty-one years, the oil works erected thereon by the tenants fell to be separately valued on the footing of the tenants being proprietors.

Dalmeny Oil Co. v Assessor for Linlithgowshire, 1884, 11 R. 566; 21 S.L.R. 400.

(168)

Minerals and houses—Lease of minerals and houses for thirty-one years—Whether tenant to be separately entered as proprietor of houses.

By a lease for thirty-one years the minerals in certain lands were let to a tenant at a lordship of one-ninth of all the metals smelted. The subjects let also included "washing-floors, smelting-mills, houses, buildings, parks, and other grounds at Leadhills." The tenant was empowered to make certain additions to his works, and was bound to make certain improvements, and to maintain his houses in good condition during the currency of his lease. The subjects let were entered in the valuation roll at £1705 9s., being the amount of the lordship, but the duration of the lease being over twenty-one years, the tenant was, in accordance with sec. 6 of the Valuation of Lands Act, 1854, also entered as proprietor of the miners' houses, mansion house occu-

pied by the manager, &c., which were valued at £111 10s. The tenant objected to this valuation on the ground that the assessor in taking the miners' houses, &c., at their full value, and the minerals at the full amount of the lordship paid, had valued the houses twice over. On an appeal against the valuation, **held** that by the terms of the lease the lordship covered all the subjects let, and that no separate value should be entered for the miners' houses and mansion house.

Leadhills Silver, Lead Mining, and Smelting Co. v Assessor for Lanarkshire, 1886, 13 R. 827; 23 S.L.R. 611.

(169)

Mineral lease for thirty-one years with right to take surface for house on compensating agricultural tenant—Valuation of houses after termination of agricultural lease.

A company was entitled, under a lease of minerals for thirty-one years from Whitsunday, 1874, to take portions of the surface as sites for miners' houses on condition of compensating the agricultural tenant for damage during the agricultural lease which ended at Martinmas, 1891, and of thereafter paying a certain rent per acre for the ground to the end of the mineral lease. The company was to be entitled to remove the houses at the end of its lease. The company erected miners' houses at various dates prior to Martinmas, 1891. The assessor, regarding the company as tenant of the houses under a thirty-one years' lease, entered it in the valuation roll as proprietor of the houses, and entered the houses at their annual value. In an appeal, **held** that the company could only be regarded as tenant of the surface under a lease for the fourteen years from Martinmas, 1891, to the end of the mineral lease, and that being entitled to remove the houses at the end of the lease it could only be entered as tenant at the rent payable under the lease.

Merry & Cuninghame v Assessor for Lanarkshire, 1895, 22 R. 586; 32 S.L.R. 429.

(170)

Separate consideration for houses and stores—Whether deduction to be made from rent of minerals.

By a lease for thirty-one years the coal, ironstone, and other minerals in certain lands were let for a fixed rent or, at the landlord's option, for lordships, with right to the tenant to use and occupy the stores, manager's house, and dwellings for workmen situated on the lands, the tenant being taken bound to relieve the landlord of all feu-duties (which amounted to £78) payable to the landlord's superior in respect of some of those houses, and to pay to him a ground rent on an agricultural value for the remainder, which were built on ground belonging to the landlord himself, and also to relieve the landlord of his share of the taxes. **Held** that under the lease there was payable, in respect of the houses and stores, a consideration separate from the fixed rent or lordships, and that therefore, as the lease was

for more than twenty-one years, the houses and stores were to be separately entered in the valuation roll at their fair annual value independently of the lease.

William Dixon, Limited v Assessor for Lanarkshire, 1884, 11 R. 844; 21 S.L.R. 562.

(171)

Held subsequently that the fixed rent or lordships were payable solely for the minerals which fell to be entered at the full value without deduction of the value of the houses and stores.

William Dixon, Limited v Assessor for Lanarkshire, 1885, 12 R. 639; 22 S.L.R. 385.

(172)

Mill—Water power for which separate payment stipulated in feu contract.

The proprietors of a mill had right under their feu contract to the use of the water power derived from an aqueduct which passed through their grounds. For this use they were bound to pay their superiors "a rate or duty or ground annual," which was declared to be a real burden on the ground. This duty was entered in the valuation roll as part of the superior's property, and the millowners were also entered for the mill at a sum made up of the feu-duty, the water duty, and 6½ per cent. on the cost of the mill buildings. The valuation of the mill having been confirmed by the magistrates and town council, the millowners took a case, objecting to feu-duty and water duty being treated as part of the value, on the grounds that they were burdens, not privileges, and that the superior having been properly entered as owner of the water rights, to enter them as the property of the appellants was to subject them to double valuation. The valuation stood, the judges being divided in opinion, Lord Lee holding that the mode of valuation was right, while Lord Fraser held that it was erroneous, the statutory rule being to ascertain the rent a tenant would give for the mill with all its privileges.

Fleming, Reid & Co. v Assessor for Greenock, 1884, 11 R. 857; 21 S.L.R. 594.

See also James Alexander Weir, Limited v Assessor for Clackmannanshire, 1901, 4 F. 513; 33 S.L.R. 853, No. 356, *infra*.

(173)

Harbour and fixed machinery.

Ayr Harbour Trustees v Assessor for Ayr, 1894, 21 R. 807; 31 S.L.R. 726; 2 S.L.T. 47, No. 369, *infra*.

V. VALUE.

1. GENERAL PRINCIPLES OF VALUATION.

(174)

Private knowledge of valuation committee.

Observed that the Court will not disturb valuations reached by a valuation committee

in the light of their own local knowledge, unless there has been an error in principle.

Cadzow Coal Co. v Assessor for Hamilton, 1905, 7 F. 413; 42 S.L.R. 502; 12 S.L.T. 828.

(175)

Observed that the magistrates were not entitled to take into consideration facts regarding the private affairs of a firm or its partners, said to be within their personal knowledge, when these facts were neither admitted nor proved.

Craiks, Limited v Assessor for Forfar, 1909 S.C. 658; 46 S.L.R. 438; 1909, 1 S.L.T. 269.

(176)

Held that a valuation committee are not entitled to proceed upon facts not admitted or proved, but stated by them to be within their personal knowledge, unless these facts are public matters or matters of common knowledge; and that the accommodation of a public-house whose valuation is in question, its condition several years earlier, and the rents and other particulars of similar houses in the neighbourhood with which it is compared, are not matters that fall within that category.

Moyes v Assessor for Perth, 1912 S.C. 761; 49 S.L.R. 154; 1911, 2 S.L.T. 460.

(177)

Onus.

The Valuation Appeal Judges are unwilling to disturb the valuation approved by the valuation committee, when the committee appear to have proceeded on a sufficiently correct principle, and when they state that, having applied their minds to the question of the rent obtainable in the market, they are satisfied that the value entered could be obtained for the subjects in the market.

British Oil and Guano Co. v Assessor for Ross and Cromarty, 1900, 2 F. 605; 37 S.L.R. 659; 7 S.L.T. 387.

(178)

Matters of detail.

The Court will not interfere with a determination of the valuation committee on a question of detail where there is no question of principle involved, and where there is evidence before the committee which could support the determination.

Fortescue v Assessor for Kincardineshire, 1894, 31 S.L.R. 474.

(179)

Onus on assessor to justify increase of valuation.

Where an electric lighting undertaking had for five years been assessed at the same figure, and the assessor increased the valuation, held that the onus was on him to show cause why the valuation should be increased, and that as he had failed to do so, the valuation should remain as before.

North of Scotland Electric Light and Power Co. v Assessor for Brechin, 1909 S.C. 655; 46 S.L.R. 436; 1909, 1 S.L.T. 227.

(180)

**—Alleged general rise in prices—
Licensed premises.**

A burgh assessor, in valuing for the year 1920-1921 the hotels, public-houses, and licensed grocers' premises in the burgh in the occupation of their owners, added 33½ per cent. to the values which had appeared in the roll for several years previously. In appeals heard by the valuation committee the assessor led no evidence to justify the increase, and no rebutting evidence was led by the appellants. The committee, proceeding upon their knowledge that, during the preceding four or five years, prices in general had risen considerably, increased all the valuations by 30 per cent. **Held** (1) that a general rise in prices did not necessarily involve an increase in the value of the class of heritable subjects under consideration; and (2) that, as the assessor had not attempted to discharge the onus which lay upon him of proving that the value of the subjects had increased, the former values fell to be restored.

Maxwell v Assessor for Galashiels, 1921 S.C. 629; 58 S.L.R. 352; 1921, 1 S.L.T. 272.

(181)

—Bona fide lease—Statutory power to increase rent—Power not exercised—Act 1854, sec. 6—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The lease of a dwelling-house expired at Whitsunday, 1920, and was renewed by tacit relocation for the year to Whitsunday, 1921. By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which came into force in July of that year and applied to the house in question, the existing restrictions against raising the rents of such subjects were modified to the extent of permitting landlords to raise rents by 30 per cent. The landlord did not raise the rent for the remainder of the current lease, and stated that he did not intend to do so. The assessor entered the subjects in the valuation roll for the year 1920-1921 at a figure representing the increased rent which the landlord might have demanded under the Act. In an appeal the assessor referred to the provisions of the Act, but led no evidence. **Held** that the subjects fell, under sec. 6 of the Lands Valuation Act, 1854, to be entered in the roll at the rent payable by the tenant under the lease, the assessor having failed to discharge the onus that was upon him of showing that that rent was not a bona fide rent.

Anderson v Assessor for Peebles, 1921 S.C. 605; 58 S.L.R. 242; 1921, 1 S.L.T. 148.

(182)

—Owner-occupiers—Appeal committee fixing flat rate increase without evidence—Appellants called on to show that increase inapplicable in their cases—Ordinary subjects—Subjects falling under Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The valuation committees of the upper

and lower wards of Renfrewshire, in dealing with appeals by owner-occupiers for the year 1920-21, having in view the extraordinarily large number of appeals presented, adopted the following procedure. Having classified the cases in various categories, and having heard an argument in each class of case, the committees, without hearing any evidence, announced that, in the case of houses, shops, public works, and public buildings, they would add 20 per cent. to the valuations of the preceding year, except in any case in which the appellant could adduce good reason for taking his case out of the general category. Thereafter a number of individual cases were heard, and the appeals were dismissed, including a case relating to a dwelling-house of the class to which the Increase of Rent Acts, 1915 to 1920, applied. In none of the cases was any evidence led by the assessor. **Held** (by a majority of the Court) that the method adopted by the committee was illegal, the onus of proof being upon the assessor and not upon the appellants; and that, in the absence of proof by the assessor of any increase in values, the former valuations fell to be restored, except in the case of the dwelling-house above referred to, where it was legitimate to assume, in the absence of proof to the contrary by the appellant, that, had he desired to let his house, the statutory increase recently permitted under the Increase of Rent Act, 1920, might have been obtained.

Naismith v Assessor for Renfrewshire, 1921 S.C. 615; 58 S.L.R. 344; 1921, 1 S.L.T. 265.

(183)

Onus of proof on claimant for decreased valuation.

Where licensed premises, let under a lease, had been entered in the valuation roll in former years, without objection, at a certain figure, and no change of circumstances had supervened, except the assignment of the lease by the original tenant to another tenant, the assessor entered the subject in the roll at the former figure. **Held**, in an appeal at the instance of the new tenant, that the assessor had acted rightly, and that the onus of proving the valuation to be excessive lay upon the appellant.

Livingston v Assessor for Paisley, 1909, 46 S.L.R. 433; 1909, 1 S.L.T. 230.

(184)

Date at which value falls to be determined—Small dwelling-house let by month—Statutory increase of rent subsequent to Whitsunday—Landlord's failure to give necessary notice—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

In valuing, for the year Whitsunday, 1920, to Whitsunday, 1921, a miner's house let by the month, the assessor took for the first three months of the period the rent at which the house was let (the "standard" rent under the Rent Restrictions Acts), and for the remaining nine months the increased rent which the landlord would then be entitled

to exact under the Increase of Rent and Mortgage Interest (Restrictions) Act of 2nd July, 1920, and which he had intimated to the tenant he would demand. The assessor added these figures together, and entered the total as the yearly value of the subjects. **Held** (1) that the assessor was entitled to determine the market value of the subjects as at the date when he made up the roll (i.e., in August, 1920) instead of as at Whit-sunday, 1920, and, accordingly, was justified in taking into account the increased rent which had become exigible; (2) that the fact that the landlord might not have given a valid notice to the tenant to enable him to exact the additional rent did not affect the question.

M'Garrity v Assessor for Lanarkshire, 1921 S.C. 652; 58 S.L.R. 422; 1921, 1 S.L.T. 357.

(185)

Failure to supply assessor with adequate information.

Forrest's Factor v Assessor for Lanarkshire, 1920 S.C. 496; 57 S.L.R. 563; 1920, 2 S.L.T. 194, No. 235, *infra*.

Scouller v Assessor for Glasgow, 1912 S.C. 757; 49 S.L.R. 152; 1911, 2 S.L.T. 491, No. 331, *infra*.

Cowan & Sons v Assessor for Midlothian, 1894, 21 R. 812; 31 S.L.R. 733; 2 S.L.T. 48, No. 352, *infra*.

(186)

Subjects held under burden of restrictions

—Public hall erected by private person.

A proprietor conveyed a plot of ground to trustees, with directions to erect a public hall thereon for the use of a town of some 2000 inhabitants. There were a variety of restrictions as to the purposes for which the trustees might allow the hall to be used. They were empowered to impose such charges as they thought fit, and the revenue was to be applied to defray expenses. The hall was built at a cost of £4000, but, as managed by the trustees, it was carried on at a loss. The assessor entered the hall at £110, being somewhat less than 3 per cent. on the cost of its erection. The trustees appealed to the county valuation committee, and contended that the valuation should be on the principle of taking the net income after deducting expenses, but, as in the particular case that would result in the hall being treated as of no value at all, they stated that they were willing that value should be taken as £50. The valuation committee reduced the assessor's valuation to £80. The trustees having appealed, **held** that, in the circumstances, the committee were right.

Opinions as to the principle of valuation to be adopted in cases where the subjects are burdened with restrictions imposed by private persons.

Blyth Hall Trustees v Assessor for Fife, 1883, 10 R. 659; 20 S.L.R. 433.

[*Cf. Dee Salmon Fisheries Co. v Assessor for Aberdeen*, 1915 S.C. 790; 52 S.L.R. 178; 1914, 2 S.L.T. 457, No. 214, *infra*.]

(187)

—Road constructed by private proprietor for public use without power of making profit out of tolls.

A proprietor entered into an agreement with certain persons by which he agreed to construct, at his own expense, for their use and for that of the public, a private road passing through his lands, they contributing to the cost of its construction by paying for twenty-five years an annual sum to repay the cost of its construction and interest thereon. He had power to levy tolls for the upkeep of the road, but he was not to be entitled to "make any personal profit" out of such tolls. The road was duly made, and was entered by the assessor in the valuation roll at a rent equal to the annual payments. In an appeal, the proprietor maintained that no valuation should enter the roll. The Court sustained the valuation, holding that although by the agreement the proprietor had voluntarily placed himself under restrictions which prevented his deriving personal profit from the road, it was not thereby exempt from assessment.

Duke of Montrose v Assessor for Perthshire, 1890, 17 R. 854; 27 S.L.R. 632.

(188)

—Public park.

Though a person puts his lands under restrictions so that they cannot be made a source of profit, by making them a public park for behoof of the inhabitants of a burgh for all time, these lands are nevertheless liable to assessment, and should be entered in the valuation roll; and in ascertaining their value for the purposes of the valuation roll such restrictions must be disregarded.

Carnegie Dunfermline Trustees v Dunfermline Assessor, 1909 S.C. 678; 46 S.L.R. 451; 1909, 1 S.L.T. 286.

See also *Glasgow Abstiners' Union v Assessor for Argyllshire*, 1906, 8 F. 500; 43 S.L.R. 320; 13 S.L.T. 765, No. 363, *infra*.

(189)

Insanitary houses—Occupiers ordered by proprietors to quit—Occupiers remaining under Increase of Rent (Restrictions) Acts—No rent accepted by proprietors.

The proprietors of a number of miners' houses, being of opinion that the houses were insanitary and unfit for habitation, suggested to the local authority that they should either take over the houses as part of a housing scheme or pronounce a closing order with regard to them. The local authority, while admitting the bad condition of the houses, took no action in the matter, and the proprietors then issued notices to the occupiers of the houses requesting them to quit, and intimating that no rents would be accepted. These notices were disregarded, and, owing to the provisions of the Increase of Rent (Restrictions) Acts, the proprietors were debarred from ejecting the occupiers. The houses having been entered in the valuation roll at the rents formerly payable, the proprietors

appealed, contending that the subjects should not be entered in the roll at all, or, alternatively, that they should be entered at the value of nil. **Held** that the fact that the houses were occupied by persons who were legally entitled to occupy them and legally bound to pay rent showed that the houses had a lettable value at which they must be entered in the roll; and the valuations of the assessor sustained.

Alexander's Trustees v Assessor for Ayrshire, 1922 S.C. 453; 59 S.L.R. 343; 1922 S.L.T. 275.

Subjects unfinished or unfit for occupation.
[See 3 (2) (n), *infra*.]

2. SUBJECTS LET.

(1) WHETHER AGREEMENT IS LEASE.

(190)

Lease or joint-adventure with landowner.

The proprietor of a slate quarry entered into a lease for fifteen years, under which the tenant was to pay a fixed rent of £1000, or alternatively, in the option of the bankrupt, "a lordship or royalty" of one-half of the free profits of the tenant, after deducting interest on the capital which he had advanced for carrying on the works, and after paying the necessary expenses of working, and in addition to pay the sum of £400, provided that the profits of the tenant were not thereby reduced below the sum of £1000. One-half of the working plant was to be supplied by the proprietor and one-half by the tenant. The proprietor in one year elected to take the lordship, &c., by which he received £1870, which sum was entered as the value of the quarries in the valuation roll instead of the £1000 of fixed rent entered in previous years. The proprietor and the tenant took a case for the opinion of the Valuation Appeal Judges, maintaining (1) that the contract was partly a contract of lease at a fixed rent of £1000, which was to be taken as the value whether the landlord drew it or not, and partly a contract of joint-adventure; and (2) that, in any event, if a share of profits was regarded as rent, deduction must be allowed for tenants' profits, depreciation of plant, &c. The judges were of opinion that the contract was a proper contract of lease, and that £1870 had been rightly entered as the annual value.

Beresford's Trustee, &c. v Assessor for Argyllshire, 1884, 11 R. 818; 21 S.L.R. 544.

(191)

Agreement between town council and electricity supply company for construction and carrying on of electricity supply works—Whether annual payment by company to corporation was rent.

The town council of Bo'ness entered into an agreement with a company to construct and maintain suitable works for the supply and distribution of electricity, the company for a specified period of years to have the management and control of the undertaking, and to pay to the town council a

sum of 6 per cent. per annum on the amount of the capital expenditure by the town council. **Held** that the agreement did not, on a construction of its provisions as a whole, import a lease between the town council and the company, and that the annual payment made thereunder was not rent.

Bo'ness Magistrates v Assessor for Linlithgowshire, 1907 S.C. 774; 44 S.L.R. 437; 14 S.L.T. 888.

(192)

Lease for twenty-eight years with breaks—Duration of lease—Act 1854, sec. 6.

The Valuation of Lands (Scotland) Act, 1854, sec. 6, enacts that where heritable subjects are let for more than twenty-one years the yearly value shall be ascertained irrespective of the rent in the lease, and the lessee shall be deemed to be the proprietor. Where a shop was let for twenty-eight years, the lease providing (1) a break in favour of the tenant at the expiry of each period of seven years, (2) an increase of the annual rent periodically every seven years, **held** that until the tenant took advantage of a break, the lease must be regarded as one of more than twenty-one years' duration, and that the assessor was justified in disregarding the rent in the lease in valuing the premises.

Bishop v Assessor for Paisley, 1910 S.C. 821; 47 S.L.R. 372; 1910, 1 S.L.T. 158.

(2) WHETHER LEASE BONA FIDE.

[See also (3) (c), *infra*.]

(193)

Lease by pro indiviso proprietors to one of themselves as tenant—Public-house.

The pro indiviso proprietors of a public-house let it to one of their number at a rent of £16, and the tenant, without any obligation on him to do so, executed at his own expense any alterations and repairs required by the Licensing Court. The valuation committee disregarded the rent paid, and fixed the valuation at £34. **Held** that the committee were entitled to disregard the rent paid, not because the tenant executed all the repairs himself, which was not per se a ground for disregarding the rent, but because the position of the tenant as one of the pro indiviso proprietors gave him an undue influence in the fixing of the rent.

Higgins v Assessor for Lanarkshire, 1911 S.C. 931; 48 S.L.R. 357; 1911, 1 S.L.T. 135.

(194)

Tenant a company of which landlord a partner—Hotel—Adequacy of rent—Act 1854, sec. 6.

Where a hotel was bona fide let to a firm consisting of the owner and two other partners having equal interests in the profits of the hotel, **held** that the mere fact that the owner was one of the partners did not displace the rule that the rent stated in the lease was the measure of value.

M'Lachlan v Assessor for Ayr, 1897, 24 R. 734; 34 S.L.R. 618; 4 S.L.T. 297.

(195)

Lease to company of which landlords had controlling interest.

A firm, consisting of two partners, leased premises to a joint-stock company for a rent of £360. The capital of the company consisted of 2599 shares, of which each of the lessors held 1288 shares, the remaining 23 shares being held among five other persons. The assessor entered the subjects in the valuation roll at the yearly value of £730, and the magistrates confirmed the valuation, holding that the lease was not a bona fide lease. **Held** that the magistrates were right.

Bell v Assessor for Edinburgh, 1904, 6 F. 501; 41 S.L.R. 490; 12 S.L.T. 18.

(196)

Lease to nominee for behoof of landlord.

A public-house, let to a tenant at a rent of £130 on a lease current till 1913, was purchased in 1903 by a firm of wine merchants and a firm of brewers jointly, under burden of the lease. Subsequently the lease was assigned by the sitting tenant, with consent of the proprietors, to a new tenant, the rent being afterwards (in consideration of certain improvements on the premises) increased to £180. There was an agreement between the proprietors and the new tenant, the terms of which were not fully disclosed, but it appeared that the former advanced funds to enable the latter to purchase the goodwill, and in return received a share of the profits and interest on the advances; and also supplied the spirits and beer required, and controlled the banking of the tenant's drawings. **Held** that in these circumstances the assessor was entitled to disregard the lease and the stipulated rent in fixing the entry for the valuation roll, as the tenant appeared, on the information before the Court, to hold merely for behoof of the landlords.

Usher v Assessor for Edinburgh, 1911 S.C. 912; 48 S.L.R. 354; 1911, 1 S.L.T. 200.

(197)

Lease by husband to wife.

Heritable subjects were let by the proprietrix to her husband at a rent of £40. It appeared that this was not a bona fide letting at a rent conditioned as the fair annual value of the subjects, and the Court affirmed a valuation of £140, which the commissioners of supply, after inspecting the subjects and comparing them with those of a similar character immediately adjoining, had placed upon them.

Thomson v Assessor for Upper Ward of Renfrewshire, 1884, 21 S.L.R. 546.

(198)

Lease by father to son.

Held that the value of a farm let by a father to his son should be entered at the rent stated in the lease.

Bruce, 1868, 11 M. 978.

(199)

The proprietor of an estate let one of his farms to his son on a fifteen years' lease from Martinmas, 1896, at £133 of rent.

The assessor entered the farm in the valuation roll for 1901-1902 at £165. The proprietor appealed, pleading that the valuation ought to be £133—the rent in the lease. The assessor maintained that, as the lease was between near relatives, it could not be taken as conclusive as to rent, and he adduced the evidence of two valuers to the effect that £165 was the true yearly value. The valuation committee, while not doubting the bona fides of the lease, sustained the assessor's valuation. **Held** that the valuation committee were wrong.

Reid v Assessor for Orkney, 1902, 4 F. 543; 39 S.L.R. 854; 9 S.L.T. 508.

(200)

Sub-lease at increased rent.

A father let to his son for nineteen years, from Martinmas, 1873, lands which were at the time in the possession of many small tenants. The lease gave the son power to raise the rents, remove tenants, and generally to exercise all the powers of the landlord, subject to his father's approval. In return the son became bound to pay his father a rent of £1199, which at the date of the lease was £50 under the collective rents due by the small tenants, and in 1881 was £725 below the annual value. **Held** that the lands had not been let to the son at a "yearly rent conditioned as the fair annual value thereof without grassum or consideration other than the rent."

Bruce v Assessor for Zetland, 1882, 10 R. 34; 19 S.L.R. 590.

See also *Lawson's Representatives v Assessor for Edinburgh*, 1883, 10 R. 663; 20 S.L.R. 432, No. 218, *infra*.

(201)

Lease by father's trustees to son.

A deceased farmer's testamentary trustees (consisting of his widow, who was the life-rentrix, and her two sons) let the farm and shootings, which for many years had been entered in the roll at £235, to one of the sons at a rent of £175, without advertisement or any attempt to get another tenant. The lease contained, *inter alia*, a clause by which the tenant renounced any claims competent to him at the outgoing under the Agricultural Holdings (Scotland) Act, 1908, or at common law. The assessor having entered the subjects at £235, the trustees contended that the entry should be £175—the actual rent in the lease. The Court sustained the valuation of the assessor, **holding** that the relationship of the parties (though not in itself conclusive) was, in conjunction with the other facts narrated, sufficient to show that the rent stipulated in the lease was not the true annual value of the subjects.

Assessor for Dumfriesshire v Kirk's Trustees, 1912 S.C. 780; 49 S.L.R. 168; 1912, 1 S.L.T. 18.

(202)

Oral lease between brothers.

Held that the rent stipulated in an oral lease between two brothers fell to be entered in the valuation roll as the annual rent or value of the subjects. **Observed** that the

fact that the parties to a lease are near relatives may be an element for consideration when other circumstances go to show that the rent stipulated is not the true annual value of the subjects, but that by itself it is not important.

Bowman v Assessor for Inverberrie, 1900, 2 F. 607.

(203)

Lease to nephew.

A farm was let by a proprietor to his nephew, as tenant, at a rent which was fixed in the lease. **Held** (1) that the relationship between them did not per se constitute a "consideration other than the rent"; (2) that the rent stipulated in the lease must enter the valuation roll, unless in addition to the fact of relationship substantial evidence of its inadequacy was adduced; and (3) that the opinion of a valuator appointed by the valuation committee was not sufficient evidence that the stipulated rent was inadequate.

Alexander v Assessor for Kirkcudbrightshire, 1890, 17 R. 835; 27 S.L.R. 630.

(204)

Lease to nephew—Lease to son-in-law—Alleged inadequacy of rent—Failure to exact increase permitted under Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

Where lands or heritages are let upon a bona fide lease, the rent payable under the lease cannot be displaced as the measure of the yearly rent or value of the subjects for the purposes of the Valuation Acts merely because the landlord and the tenant are related. To effect this result, it must be further shown that the rent is substantially inadequate, in respect that the subjects could in fact have been let to another tenant at a substantially higher rent than that obtained from the relative. So **held** where a dwelling-house was let in one case by a nephew to his uncle, and in another by a father-in-law to his son-in-law. **Held**, further, that the fact that the landlords had not increased the rents for the year 1921-1922, although, owing to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, there had been a general increase of 33½ per cent. on similar rents in the neighbourhood, was not per se sufficient proof that the rents exacted from the relatives for the year 1921-1922 were substantially inadequate.

Smith v Assessor for Edinburgh, 1922 S.C. 441; 59 S.L.R. 290; 1922 S.L.T. 131.

(205)

Lease to old servant.

A proprietor granted a lease of a farm to an old servant at a rent of £50. After the proprietor's death the assessor entered the farm in the valuation roll at its true value, £71. The trustees of the proprietor appealed, on the ground that they only received £50 under the lease. **Held** that the entry was right.

Kerr's Trustees, 1871, 11 M. 983; 44 J. 431; 9 S.L.R. 444.

(206)

Lease to servant—Over-valuation objected to by third parties.

A house was let to a gardener by his master at £14 per annum. Objection at the instance of persons whose names were not on the valuation roll, that the entry was an over-valuation to give the gardener a vote, sustained.

M'Gregor, &c. v Menzies, 1874, 4 R. 1144.

(3) WHETHER RENT REPRESENTS "FAIR ANNUAL VALUE."

(a) Generally.

(207)

Absence of open competition—House let between terms—Criterion of value.

A company, having advertised and let a house at £14 a year, appealed to have the valuation of five similar houses which were occupied by their own workmen reduced from £20 to £14. The magistrates acting on their own knowledge fixed the value at £17. **Held** that the rent of £14 was not a fair criterion of value, in respect that the house was let between terms and not after open competition.

Cadzow Coal Co. v Assessor for Hamilton, 1905, 7 F. 413; 42 S.L.R. 502; 12 S.L.T. 828.

(208)

Shootings—Shootings let at nominal rent in consequence of war.

Where Highland shootings had been let for one year at a merely nominal rent, in consequence of the difficulty of finding tenants for such subjects due to the war, **held** that this rent, although "bona fide," was not "conditioned as the fair annual value" of the subjects in the sense of sec. 6 of the Lands Valuation (Scotland) Act, 1854, and accordingly could not be taken as representing the yearly rent or value of the subjects; and valuation fixed at one-half of the previous valuation.

Assessor for Inverness-shire v Grant, 1918 S.C. 608; 55 S.L.R. 236; 1918, 1 S.L.T. 139.

(209)

Where Highland shootings were bona fide let for the season at a nominal rent owing to the difficulty of finding tenants for such subjects due to the war, **held** that the nominal rent could not be taken as representing the yearly rent or value of the subjects; which the Court fixed at one-half of the previous valuation.

Assessor for Inverness-shire v Macpherson's Trustees, 1918 S.C. 615; 55 S.L.R. 241; 1918, 1 S.L.T. 139.

(210)

Shootings let for season only.

Where shootings are let for the season only, and not for the year, the rent payable under the lease is not per se con-

clusive of the yearly rent or value to be entered in the valuation roll.

Assessor for Inverness-shire v Macpherson's Trustees, 1918 S.C. 615; 55 S.L.R. 241; 1918, 1 S.L.T. 139.

(211)

Lease for part of year—Grass parks let for eight months of year.

Grass parks were entered in 1877 at £135. The proprietors and occupiers sought to have them entered at £119 10s., being the rent obtained for the parks by public roup in 1877. The average of the rents obtained by such letting for seven years ending with 1877 was £126 7s. 10d. The proprietors stated that £135 was about 27s. 6d. per acre, and that two adjacent farms were let for cropping, one for about 28s. (considered high), and the other for about 21s. 6d., and these had extensive farm steadings, &c. The lettings for the seven years ending 1887 were for eight months of the year. When the parks were let for a complete year, as they had been from 1863 to 1870, the rent was £160; but, as the appellants stated, that was for cropping purposes. **Held** that the entry was right.

Ker's Trustees, 1878, 9 R. 1236.

(212)

—Farm let for part of year as grazings and otherwise unlet.

A farm which was entirely laid out in grass was let annually for part of the year—from Whitsunday to Martinmas—as grazings, and during the rest of the year was in the proprietor's own hands. For the year 1887 the rent of the grazings was £301, and the valuation of the farm as fixed by the valuation committee £400. On appeal, **held** (per Lord Lee) that the valuation of the valuation committee was right; (per Lord Fraser) that the valuation ought to be reduced to £301, the rent received for the grazings. The judges being divided in opinion, the valuation stood.

Berwick v Assessor for Fife, 1888, 15 R. 629; 25 S.L.R. 460.

(213)

—Grass parks let for season only—Permanent pasture let for course of four years' cropping—Act 1854, sec. 6.

A farm laid out in pasture was, prior to 1918, entered in the valuation roll as a unum quid at the yearly rent or value of £170. In 1918 the proprietor let a portion of the farm as grass parks for the grazing season of six months, and the remainder in five separate lots on leases for four years which provided for a crop being taken off the ground every year. For the year 1918-19 the assessor made six separate entries in the valuation roll, assessing the value of the grass parks at the grazing rental and the values of the remaining lots at the yearly rents stipulated in the leases. The total values amounted to £386 10s. The proprietor contended that no alteration should have been made upon the previous entry in the roll. **Held** that the assessor was right—(1) With regard to the grass parks, because

the rent obtained for the grazing season was, in the circumstances, the best criterion of their annual value; (2) with regard to the remaining lots, because the rents were bona fide rents of the subjects in their actual state, and no deductions could be made in respect of the fact that, owing to the unusual and destructive course of cropping, the subjects could not be restored to their former condition without considerable outlay on the part of the proprietor.

Duffus v Assessor for Aberdeenshire, 1919

S.C. 484; 56 S.L.R. 115; 1919, 1 S.L.T. 59.

(214)

Fishings restricted to rod fishing in interest of upper proprietors and let at nominal rent—Lands and heritages "from which revenue is actually derived" — Act 1854, sec. 42.

Held that in the list of "lands and heritages" given in sec. 42 of the Valuation of Lands (Scotland) Act, 1854, the qualifying words "from which revenue is actually derived" do not apply to "fishings." Fishing by net on the salmon fishings in the tidal waters of a river was discontinued in the interest of the proprietors of the salmon fishings on the upper reaches. The rod fishing on the tidal waters, which was almost valueless, was thereafter let for a merely nominal rent. **Held** that the assessor was right in disregarding this rent and in continuing to enter the fishings at a figure which represented the rent at which they might reasonably be expected to let to a person exercising the full rights of salmon fishing in the ordinary way. **Observations** (per Lord Salvesen) on the right of the proprietors of upper salmon fishings, who incur expense in removing nets from lower fishings, to treat for purposes of valuation such expense as part of the expense incurred by them in obtaining the rents for their fishings.

Dee Salmon Fisheries Co. v Assessor for Aberdeen, 1915 S.C. 790; 52 S.L.R. 178; 1914, 2 S.L.T. 457.

(215)

Oyster fishing—Interest on value of stock of oysters.

A landed proprietor had under his titles a grant from the Crown of the right to cultivate, and to fish, drag, or dredge for oysters in Lochryan, an arm of the sea, the solum of which remained the property of the Crown. By lease, dated 19th December, 1899, the proprietor let these rights to a fishery company for a period of twenty-one years, at an annual rent of £350. By a separate agreement, dated 27th December, 1899, on the narrative that he had sold to the company "the whole stock of oysters which, on 1st July, 1899, were, or have since been, or are now in the loch of Lochryan," the company agreed to pay him annually the sum of £350 "as and by way of interest on the value of the stock of oysters in the said loch and sold to the company by these presents." **Held** that as the

proprietor had no right of property in the oysters, and simply a right of taking them, the fishery was "lands and heritages," and that £700, being the amount annually payable by the company for the exercise of this right, had properly been entered in the roll as the annual rent or value of the subjects.

Wallace v Assessor for Wigtownshire, 1902, 4 F. 515; 39 S.L.R. 570; 9 S.L.T. 515.

(216)

Houses let by railway company to employees—Flat rate for rents—Act 1854, sec. 6.

The Caledonian Railway Company let houses by agreement to their employees at a rent fixed upon a general scale for their whole system, and having no relation to the values of similar houses in the locality. **Held** that the rent was not "conditioned as the fair annual value" of the houses, and that the assessor was justified in disregarding it and in fixing the valuation by comparison with the rent of similar houses in the locality.

Caledonian Railway Co. v Assessor for Lanarkshire, 1896, 23 R. 691; 33 S.L.R. 521; 3 S.L.T. 333.

(217)

Houses—Sub-let to workmen.

Held that the rent paid by the principal tenant was to be entered.

Buchanan, 1874, 4 R. 1145.

(218)

—Sub-let at increased rents.

Houses were let, under a lease for less than twenty-one years, at a rent of £80 for the whole, and were in part sub-let at increased rents. The assessor entered the whole at a value which included the increase, but he did not allege that the principal lease was not bona fide, or that the rent of £80 was not conditioned as the fair annual value of the subjects. The magistrates confirmed the assessor's valuation. **Held** the magistrates were wrong, and that the value should be entered at £80.

Lawson's Representatives, &c. v Assessor for Edinburgh, 1883, 10 R. 663; 20 S.L.R. 432.

See also Hay & Co., 1869, 11 M. 981.

Cowdenbeath Coal Co. v Assessor for Fife, 1891, 18 R. 948; 28 S.L.R. 622, No. 77, supra.

(219)

Crofter—Fair rent—Crofter proprietor—Crofters Holdings (Scotland) Act, 1886, sec. 6.

A crofter, the rent of whose farm had been fixed at a fair rent by the Crofters' Commission, purchased his holding. The assessor, assuming that the fair rent represented only the landlord's interest in the croft, added thereto, in fixing the valuation, a sum representing the annual value of permanent improvements on the holding. **Held** that the valuation was right.

Mackay v Assessor for Sutherlandshire, 1897, 24 R. 737; 34 S.L.R. 621; 4 S.L.T. 296.

See also Ferguson v Assessor for Invernessshire, 1912 S.C. 768; 49 S.L.R. 158; 1911, 2 S.L.T. 505, No. 66, supra.

(220)

Renewal of lease.

Before the expiry of an improving lease, under which the rent of a farm was fixed at £11, a renewal of the lease was taken at £15. **Held**, in the special circumstances, that the farm was properly entered in the valuation roll at £15, and not at the assessor's valuation of what it was worth by the year.

Fraser, 1867, 11 M. 976.

(221)

Market dues.

Held that the rent of market dues leviable by a burgh which were let to a tacksman, and not the estimated value of the area of the market, must be taken as the annual value of the subject.

Magistrates of Inverness, 1874, 4 R. 1144.

Magistrates of Inverurie, 1875, 4 R. 1147.

(b) Rent or Lordship in Mineral Leases.

(222)

Lease for less than thirty-one years — Sub-lease—Different fields worked by one pit—Wayleave.

The appellant was proprietor of certain mineral seams and also had leases for less than thirty-one years of adjacent seams at a fixed rent of £240 or a lordship. He let the whole to a company for £700, or a lordship. After deducting what he paid for lordship to the proprietors of the leased seams there remained £1275 15s. as rent of his own minerals and the surplus rent of the others. The assessor contended and the commissioners **held** that the valuation should be upon the basis of the lordships. The appellant contended that the valuation should be on the basis of the fixed rents, viz., for the seams owned by him the rent (£700) paid by the company less the rent (£240) paid by him to the owner of the seams which he leased. **Held** that the commissioners were wrong. The valuation of minerals and pits owned by the appellant was fixed at £460.

Wallace, 1880, 9 R. 1238.

(223)

Wasting subject — Mode of valuation for year in which minerals exhausted—Royalties or fixed rent—Subjects valued for series of years at royalty paid for last completed year.

A lease of a blaes heap for nineteen years from Martinmas, 1890, was renewed by tacit relocation until Martinmas, 1916, when it terminated, the blaes having been exhausted by 30th September of that year. The rent under the lease was a fixed sum per annum, or, in the option of the landlord, a royalty on the output. For a number of years the subjects were entered in the valuation roll for the valuation year (viz., Whitsunday to Whitsunday) at the amount of the royalty paid under the lease for the last completed year of the lease (viz., Martinmas to Martinmas). When the assessment for the year Whitsunday, 1916, to Whitsunday, 1917, fell to be made, it was known that the blaes would be exhausted in the course of the

year, and it was ascertainable as a fact that the amount of royalties payable thereon would not exceed £160. The assessor, continuing the former practice, entered the subjects in the roll at £312 3s., being the amount of royalty paid for the year Martinmas, 1914, to Martinmas, 1915, and his decision was upheld by the valuation committee. **Held** that, notwithstanding the previous practice, the figure of £160, as being the actual rent exigible for the year of assessment, fell to be entered in the roll.

Hurll v Assessor for Glasgow, 1917 S.C. 494; 54 S.L.R. 242; 1917, 1 S.L.T. 106.

(224)

Wayleave.

Where adjacent mineral fields, though separately owned, were let as one undertaking, and the minerals from one field were carried through and brought to the surface within the other, **held** that wayleave was an interest which fell to be taken into account in valuing the fields through which the wayleave was granted.

Barr, Higgins & McCulloch, 1881, 9 R. 1245.

(225)

Minerals let, but not wrought—"Mine" and "minerals"—Valuation Act, 1854, sec. 42.

Minerals belonging to three different proprietors were let by one lease at a cumulo fixed yearly rent, or, in the option of the proprietors, at a lordship, the rent being payable whether the tenants worked or refrained from working the minerals. One of the mineral fields had never been opened up, and the assessor in consequence did not enter it in the roll. On an appeal to the Valuation Appeal Court, **held** that the portion in question was also to be entered in the roll at the fixed rent, on the ground that the rent paid in respect of the unwrought minerals was to be regarded as the rent of "minerals" in the sense of the Act, and not of a "mine," and consequently that the exemption contained in the 42nd section did not apply. **Opinion** (per Lord Lee) that the subjects let under the lease were to be regarded as a whole for the purposes of the Valuation Acts. Minerals which had been let on lease for a fixed rent or lordships had been worked during the first part of the lease, but had for some years not been wrought. The tenant continued to pay the fixed rent. **Held** that, as there was no evidence that the minerals had been exhausted, the tenant was to be regarded as paying rent for "minerals," and not for a "mine," and that consequently the subjects were to be entered in the valuation roll at the fixed rent.

Blantyre Parochial Board v Assessor for Lanarkshire, 1883, 10 R. 773; 20 S.L.R. 511.

(226)

Fixed rent or royalty—No return from minerals.

A company were tenants of minerals under

a lease at a fixed rent, and, in the event of the minerals being worked, on payment of stipulated royalties. Prior to the commencement of the year of valuation, owing to depression in trade, the company had ceased to work the minerals, and there was no likelihood of working being resumed during the year. The assessor entered the company as tenant of the minerals at the amount which had been paid by them as royalties in the previous year. **Held** that, it being admitted that no royalty would be paid during the year of valuation, the fixed rent stipulated in the lease fell to be taken as the annual value of the minerals.

Hermand Oil Co. v Assessor for Midlothian, 1893, 20 R. 633; 30 S.L.R. 662; 1 S.L.T. 30.

(227)

Commencement of lease of freestone quarry after valuation roll for year made up—Whether quarry to be entered for year succeeding termination of lease during which no working—Act 1854, sec. 42.

A freestone quarry was let on a lease for eight years from Martinmas, 1885, with a break in favour of the tenant at any term of Whitsunday or Martinmas after Martinmas, 1886, at a fixed rent of £100, or a lordship in the option of the landlord. The tenant did not enter into possession till after the valuation roll for 1885-6 had been made up, and the quarry was not entered for that year. It was entered at £100 for 1886-7, in terms of the landlord's return. The lordship paid at Whitsunday, 1886, was £92 10s., and at Martinmas, 1886, £89 10s. The quarry ceased to be worked at Martinmas, 1886, but the tenant remained in possession till Whitsunday, 1887, when he took advantage of the break and brought the lease to an end. The excavations were filled up, and the ground restored. At Whitsunday, 1887, the tenant paid the half-yearly fixed rent of £50. He had thus paid in all £232, but only £100 of that having been entered in the valuation roll, the assessor entered the balance of £132 in the roll for 1887-8, although the quarry had not been worked and nothing had been paid during that year. **Held** that under the Lands Valuation Act, 1854, sec. 42, the valuation was wrong.

Lord Elphinstone v Assessor for Middle Ward of Lanarkshire, 1888, 15 R. 637; 25 S.L.R. 466.

(228)

Where lease terminates at Martinmas—Exhausted minerals.

Mineral tenants gave up possession at Martinmas, 1883, under a power to break their lease. The minerals were then exhausted. **Held** that the subjects were to be entered in the valuation roll for the year 1883-84 at the annual value of £359 16s. 4d., being the amount of the half-year's rent payable at Martinmas, 1883.

Coltness Iron Co. v Assessor for Lanarkshire, 1884, 11 R. 513; 21 S.L.R. 395.

(c) Considerations Other than the Rent.

(i.) Method of Valuation.

(229)

Addition of yearly value to rent.

Where a lease contains in addition to the rent considerations of a comparatively trifling character and capable of valuation, and where the rent added to those considerations is bona fide conditioned as the fair annual value of the lands, the proper mode of valuing the lands is not to disregard the lease altogether and value the subjects as they stand, but to value the considerations and add their yearly value to the rent.

Macdonald, Fraser & Co. v Assessor for Glasgow, 1893, 20 R. 624; 30 S.L.R. 615.

(230)

Value of additional considerations difficult to estimate.

Where a lease contained stipulations binding on the tenant of an unusual character, and of a kind difficult to estimate with precision in money value, held that the rent in the lease fell to be disregarded altogether in fixing the valuation of the subjects, and that the subjects had rightly been valued by a comparison with the letting value of similar subjects in the neighbourhood.

Clark v Assessor for the Middle Ward of Lanarkshire, 1901, 3 F. 455; 38 S.L.R. 489.

(ii.) Obligation on Tenant to Execute Repairs or Repay their Cost.

(231)

Obligation to execute repairs.

Question, whether an obligation by a tenant to execute all necessary repairs was a consideration other than rent.

Morrison's Trustees v Assessor for Coatbridge, 1893, 20 R. 616; 30 S.L.R. 610.

See also Lowson's Judicial Factor v Assessor for Arbroath, 1900, 2 F. 608; 7 S.L.T. 466, No. 279, infra.

(232)

Obligation to erect buildings—Restrictions imposed upon use of buildings—Power of landlord to resume possession if restrictions contravened.

In a lease of a plot of building ground it was stipulated, *inter alia*, that the buildings to be erected by the tenants should be of a certain height, and that the tenants should not use the subjects for the sale of cattle, or as depots for manure, or as a place of amusement, or for purposes of trading on Sundays. Buildings were erected. Held that the assessor was wrong in disregarding the rent as conclusive of the valuation, and in taking into consideration in his valuation the yearly value of the whole buildings upon the ground, since these conditions showed no "consideration other than rent."

Magistrates of Dundee v Assessor for Dundee, 1886, 23 S.L.R. 611.

(233)

Agreement by tenant of farm to erect farmhouse.

The tenant under the lease of a farm agreed to rebuild the farmhouse and offices which the landlord was to take over at a valuation at the termination of the lease. The lease was broken during its currency and a new lease was entered into, under which the landlord bound himself to take over the buildings at the end of the second lease. The Court held that the stipulation was a consideration other than the rent, and that the rent in the lease was to be disregarded; and affirmed a value fixed by the valuation committee in the light of their local knowledge.

Davidson v Assessor for Peeblesshire, 1905, 7 F. 422; 42 S.L.R. 504; 12 S.L.T. 829.

(234)

Meliorations by tenant to be repaid at ish of lease.

The value of a farm fixed at the rent in the lease with the addition of interest at 5 per cent. on £150 expended by the tenant on the house and offices for which he had a claim of repetition from the landlord at the end of the lease.

Skene, 1867, 11 M. 976.

(235)

Tenant undertaking repairs—Obligation to keep houses wind and water tight.

An agreement for the lease of certain property consisting of dilapidated miners' houses contained a stipulation that, in the event of underground workings rendering any of the houses "unsafe for habitation or uninhabitable with ordinary repairs . . . ordinary repairs being ordinary wear and tear," the annual value of such house or houses should be deducted from the annual rent of the property. It was further provided that the lessor should not be "bound to incur any expenses whatever" in connection with the property, and that the lessee should "keep the houses wind and water tight where necessary, where the defects are caused by ordinary wear and tear." Held (1) that, as the lessee had undertaken to relieve the lessor of the common law obligations of a landlord as to repairs, the lease was for a consideration other than the rent; (2) that the proper method of valuing the subjects was to ascertain the actual annual value to the lessor of the lessee's obligation, and to add it to the stipulated rent; but (3) that, as the lessor and lessee had failed to furnish the assessor with materials for valuing this obligation, the assessor was justified in taking it to be the difference between the rent paid to the lessor by the lessee and the amount of the rents obtained by the latter from his subtenants.

Forrest's Factor v Assessor for Lanarkshire, 1920 S.C. 496; 57 S.L.R. 563; 1920, 2 S.L.T. 194.

(236)

Alterations by tenant—Conversion of shop for purposes of a café—Decorations.

The lease of a shop stipulated that the tenants should fit up the subjects as a café at their own expense, and that the alterations should become the property of the landlord at the end of the lease without compensation.

Held (1) that the stipulation was a "consideration other than the rent," and (2) that the yearly value had been rightly fixed by dividing the cost of the alterations by the number of years in the lease, and adding the dividend to the rent.

Held further that the cost of decoration, not being expenditure which the tenants were bound by the lease to incur, fell to be deducted in calculating the cost of the alterations.

Liverpool, China, and India Tea Co. v Assessor for Edinburgh, 1905, 7 F. 415; 42 S.L.R. 500; 12 S.L.T. 854; 1906, 8 F. 493; 43 S.L.R. 303; 13 S.L.T. 768.

(237)

Public-house — Obligation by tenant to carry out at his own expense alterations required by licensing authority.

The lease of a public-house took the tenant bound "to carry out any alterations or improvements which the licensing authority may from time to time require to be made upon the premises" at his own expense. **Held** that this obligation constituted a consideration other than the rent incapable of being estimated in money value; and consequently that the valuation committee were justified in disregarding the rent stipulated in the lease altogether, and in fixing the annual value according to their personal knowledge of the lettable value of such property in the locality.

Angus v Assessor for Lanarkshire, 1905, 7 F. 411; 42 S.L.R. 499; 12 S.L.T. 767.

(238)

Obligation on tenant to execute alterations.

Held that the assessor was not justified in disregarding the rent fixed by a lease, under which the tenant was obliged to execute alterations, but that the proper mode of valuation was to take the rent and add to it the cost of the alterations, spreading this latter sum over the years which the lease had to run.

Shiel v Assessor for Hawick, 1898, 25 R. 592; 35 S.L.R. 665; 5 S.L.T. 331.

(239)

Tenant bound to execute repairs—Money advanced by landlord.

The lease of a public-house provided that all alterations and repairs (the landlord's consent being always required) should be executed by the tenant, and should thereupon become the property of the landlord without compensation. At the time the lease was entered into the landlord lent £6000 to the tenant at 5 per cent., for which the latter granted a bill at three months, to be renewed till the money was

repaid. This loan was to enable the tenant to purchase the goodwill. The rent in the lease was £99 per annum, but the assessor entered the subjects in the roll at £150. **Held** that in the let of the subjects there were considerations other than the rent, and that the assessor was right in disregarding the stipulated rent. **Opinions** as to whether or not the aforesaid loan was an element to be taken into account in valuing the premises.

Mackay & Co. v Assessor for Leith, 1911 S.C. 935; 48 S.L.R. 367; 1911, 1 S.L.T. 145.

(240)

Payment by tenant towards cost of alterations—Transfer of licence conditional on alterations.

The tenant of a public-house sold the goodwill, but the magistrates refused a transfer of the licence unless certain structural alterations were made. The incoming tenant undertook to contribute to the landlord £100 towards the alterations on condition of getting a renewal of the lease at the old rent.

Held that the £100 was a consideration other than rent to be taken into account in valuing the subjects.

Assessor for Greenock v Bullen, 1901, 3 F. 452; 38 S.L.R. 499; 8 S.L.T. 410.

(241)

Alterations by tenant to meet licensing requirements—No alteration in rent.

The tenant of a public-house, to meet objections by the licensing court, executed an alteration on the premises at the cost of £25. The rent remained unaltered. The assessor continued the previous valuation, but added a new entry in respect of the alterations—"Part of public-house, £60."

Held that the new entry fell to be deleted from the roll in respect that there was no evidence that the alterations had increased the letting value of the premises.

Observed (per Lord Stormonth-Darling) that under sec. 4 of the Act of 1895 the mere fact that alterations had been made on the subjects did not open the way to revision on general grounds.

Peggie v Assessor for Kirkcaldy, 1901, 3 F. 462; 38 S.L.R. 492; 8 S.L.T. 409.

(242)

Obligation to erect additional buildings.

In a lease of urban subjects for twenty-one years, it was stipulated that the tenant should have "power and liberty" to erect buildings on a vacant piece of the ground. It was further provided that "the buildings so to be erected shall be erected within two years from the date hereof, . . . and shall be of the value of at least £500 sterling, . . . and shall be the property of" the landlord. Buildings were erected. **Held** that the assessor was right in disregarding the rent set forth in the lease, and taking as his valuation the yearly value of the whole subjects actually on the ground.

Gosnell, &c. v Assessor for Edinburgh, 1885, 12 R. 571; 22 S.L.R. 367.

(243)

During the currency of a mineral lease for thirty-one years, under which the rent payable by the tenants was a royalty on the output of coal, the landlord and tenants entered into an agreement with a view to extend the mineral workings, under which the tenants were to erect certain additional miners' houses upon the lands belonging to the landlord, but then let to an agricultural tenant. The mineral tenants were to be entitled to repay themselves the cost of erection by retaining the royalties over and above a certain sum per annum, on condition of erecting an equal number and value of houses on ground belonging to themselves. The houses on the landlord's property were to be maintained and insured against fire by the tenants, who were also to settle the claims of the agricultural tenant for the land taken for the houses, and to relieve the landlord of certain assessments. At the termination of the lease the houses, so far as paid for out of the royalties, were to be left to the landlord, and quoad ultra he was to have the right to take them over at a valuation, and, failing his doing so, the tenants were to be entitled to remove the materials. Houses were erected on the landlord's lands under this agreement, and were in the occupation of miners, who paid a rent to the tenants. The assessor entered them at that rent as the property of the tenants. The Court held that the entry was wrong, being of opinion (1) that the agreement fell to be read as part of the lease; (2) that it contained no consideration other than the rent, with the exception of the sum paid for insurance; and therefore. (3) that with the exception of the latter sum the subjects were covered by the royalty payable under the mineral lease.

Cowdenbeath Coal Co. v Assessor for Fife, 1891, 18 R. 944; 28 S.L.R. 622.

(244)

Obligation on tenant to erect a chimney-stalk—Additional buildings erected under liberty to build—Obligation on tenant to insure buildings.

A lease of a printfield let at a fixed rent contained obligations on the tenants forthwith to erect "a suitable and substantial chimney-stalk," and to keep the buildings, &c., insured against loss by fire on behalf of the proprietor. If the tenants failed to pay the premiums, the proprietor was authorised to pay them, and to charge them against the tenants as additional rent. Any additional buildings erected by the tenants were to be insured by them in name of the proprietor, and were to become his property at the expiration of the lease without charge, but the tenants during its currency might, for the exigencies of their trade, take down, alter, or remove such additional buildings. The tenants erected an additional building in the shape of a store. Held (1) that the obligations to erect a chimney-stalk and to insure were "considerations other than the rent," and fell to be taken into account in fixing the annual value of the subjects; but

(2) that the store did not fall to be taken into account, as it was not erected under obligation, was not in any event to become the property of the landlord until the expiration of the lease, and might never become so.

Patrick v Assessor for Renfrewshire, 1890, 17 R. 852; 27 S.L.R. 610.

(245)

Obligation to erect a wooden circus removable by tenant.

A lease of a plot of ground at a fixed rent contained an obligation on the tenant, within two months of his entry, to erect and complete a wooden circus upon the ground. The tenant was further to be entitled to remove his buildings at the termination of his lease, but he was bound to leave the site clear and free from all rubbish and debris. Held that the obligation to erect the circus, although a security to the landlord for the rent, was not a "consideration other than the rent" within the meaning of the Act.

Martin v Assessor for Leith, 1889, 16 R. 799; 26 S.L.R. 531.

(246)

Power to tenant to erect buildings or make improvements.

In the lease of a shipbuilding yard it was stipulated that the landlord (harbour trustees) should be entitled to make erections into the river during the currency of the lease without being liable to compensate the tenants, while the tenants were empowered to erect the necessary buildings, which the landlord was entitled to take at a valuation. They were further bound to pay interest on the sum expended on a boundary wall. In a question which arose as to the valuation of the subjects after the expiration of the lease, the tenant holding by tacit relocation, and the buildings having been erected, held that the assessor was right in disregarding the rent as conclusive of the valuation, and in taking into account in his valuation the yearly value of the whole subjects actually upon the ground.

Observations by Lord Fraser as to the character of stipulations in a lease in favour of the landlord, which are to be regarded as considerations other than rent.

Dundee Harbour Trustees v Assessor for Dundee, 1886, 13 R. 829; 23 S.L.R. 607.

(247)

Terms of a lease conferring "power" on the tenant to make improvements on a harbour which was the subject of the lease, which were held to provide for a consideration other than the rent in the sense of the statute.

Prestongrange Coal and Firebrick Co. v Assessor for Haddingtonshire, 1887, 14 R. 589; 24 S.L.R. 452.

(248)

A lease of a vacant piece of ground at a rent of £50 contained stipulations to the effect that the tenant should be at liberty

to erect buildings for the purposes of his business, and that the landlord should, on the expiration of the lease, be at liberty to acquire such buildings at a valuation, or to insist on the tenants removing them. The tenants were also taken bound during the lease to keep the ground properly fenced. Buildings were erected by the tenant, and the subjects were entered in the valuation roll at £120 as their value, including the buildings. In an appeal by the proprietor, **held** that the subjects should be entered at £50, the rent stated in the lease, as the other stipulations did not amount to a "consideration other than the rent."

North British Railway Co. v Assessor for Glasgow, 1890, 17 R. 846; 27 S.L.R. 608.

(249)

Buildings and plant erected by tenant—Obligation on landlord to take buildings over at end of lease.

A chemical manufacturing company held the site of their works as tenants of an iron foundry company, at a rent which was admitted to be the fair annual value of the site. The iron foundry company, in consideration of certain additional payments, supplied the chemical company with furnace gases used in their chemical processes. The tenants had erected valuable buildings and plant on the site, which on the termination of the lease were to be taken over at a valuation by the landlord. The assessor entered the iron foundry company as proprietors, and the chemical company as tenants of the "site and erections thereon." **Held** that the entry must be limited to the actual rent paid for the site exclusive of the works in respect that the iron foundry company derived no benefit from the buildings erected by the tenant, and that the payments other than the rent of the site were considerations for the use of the gases, and not for the use of the site.

Furnace Gases Co. v Assessor for Lanarkshire, 1894, 31 S.L.R. 739; 2 S.L.T. 60.

(250)

Payment by incoming tenant of sum due by landlord to outgoing tenant for meliorations.

The incoming tenant of a farm let to him for nineteen years at a rent of £500 paid to the outgoing tenants a sum of money for meliorations payable to them by the landlord under the expiring lease. His lease contained the stipulation that he should be entitled at its termination to repayment from the landlord of the sum so paid by him, or of such other sum, not exceeding it, as the meliorations should then be valued at. **Held** that as the payment by the tenant relieved his landlord of an obligation which he would otherwise have had to meet, there was a consideration other than the rent, and that a sum equivalent to 4 per cent. on it fell to be added to the rent contained in the lease.

Duke of Fife v Assessor for County of Elgin, 1891, 18 R. 941; 28 S.L.R. 625.

(251)

Interest on landlord's outlay for sheep drains and wire fencing.

By the lease the rent of a farm was £205, with £160 as interest on outlay on wire-fencing and open sheep drains, and the tenant accepted the erections and fences and drains as in good repair, and bound himself to keep and leave them in like condition. The total sum of £365 was entered in the roll. The tenant contended that wire-fencing and sheep drains were only temporary improvements, and that the entry should be restricted to £205. Proof was led as to the duration of wire-fences. **Held** that the entry was right.

Hamilton, 1881, 9 R. 1245.

(iii.) Obligation to Insure.

(252)

Tenant bound to repay to landlord insurance premium—Landlord bound to expend insurance money on rebuilding.

Under the lease of a farm the landlord was bound to insure the buildings, and the tenant was bound to repay to the proprietor the premium on the insurance at the term of Whitsunday along with the rent then payable. In the event of the total or partial destruction of the buildings by fire, the landlord was bound to expend any sum recovered from the insurance company on restoring the buildings. **Held** that the tenant's obligation to repay the premium was a "consideration other than the rent" within the meaning of sec. 6 of the Lands Valuation (Scotland) Act, 1854, and fell to be added to the rent in fixing the valuation.

Usher v Assessor for Roxburghshire, 1915 S.C. 768; 52 S.L.R. 119; 1914, 2 S.L.T. 426.

See also Cowdenbeath Coal Co. v Assessor for Fife, 1891, 18 R. 944; 28 S.L.R. 622, No. 243, *supra*.

Patrick v Assessor for Renfrewshire, 1890, 17 R. 852; 27 S.L.R. 610, No. 244, *supra*.

(253)

Tenant bound to insure.

Where in a lease of workmen's dwellings to a company the company were bound to slate certain of the houses, to put the whole subjects into habitable and tenantable repair, and to insure, **held** that these were considerations other than rent, and that the assessor had acted rightly in disregarding the amount of rent stipulated in the lease as conclusive of the value, and considering in his valuation the obligations laid upon the tenants of the lease.

Cunninghame v Assessor for Lanarkshire, 1886, 23 S.L.R. 605.

(iv.) Payment for Goodwill.

(254)

General principles applicable.

Held that a sum paid by the tenant of a public-house to the landlord at the outset of the lease in name of goodwill is "a consideration other than the rent," and that the

assessor is not bound in that case to take the rent as the yearly value of the subject.

Drummond v Assessor for Leith, 1886, 13 R. 540; 23 S.L.R. 385.

(255)

Opinions (per Lord Johnston and Lord Salvesen) that the method of dividing half the price of goodwill by the number of years in the lease was a useful rule of thumb, but not a fixed and exclusive rule of practice.

Mark v Assessor for Edinburgh, 1911 S.C. 974; 48 S.L.R. 379; 1911, 1 S.L.T. 241.

(256)

A public-house was let on lease for seven years from 1896, the landlord not being bound to admit assignees of the tenant. In January, 1898, the tenant transferred the business and received £3000 from the incoming tenant in name of goodwill and as the price of furniture and fittings. It was a condition of the purchase that the outgoing tenant should assign his right under the lease, and that the landlord should accept the incoming tenant. The outgoing tenant paid the landlord a sum of £750 in consideration of his accepting the incoming tenant and granting the assignation. The assessor valued the subjects by dividing the £750 by the number of the remaining years of the lease, and adding the dividend to the rent in the lease. In an appeal by the tenant, the magistrates, "having considered the whole circumstances," sustained the valuation. The Valuation Appeal Judges declined to alter the determination of the magistrates.

Paton v Assessor for Hamilton, 1899, 1 F. 588; 36 S.L.R. 601; 6 S.L.T. 326.

(257)

Value of similar premises in same district.

A public-house was let for ten years at a rent of £24 per annum, and upon payment to the proprietor and previous occupant of £550 in name of goodwill. The assessor, in fixing the valuation, took one-half of the £550 paid in name of goodwill as representing the goodwill attaching to the house as a heritable subject, and spread it over the period of the lease at the rate of £27 10s. a year, making with the rent stipulated in the lease £51 10s. as the annual value entered in the roll. In an appeal by the proprietor, held that, in fixing the valuation, there ought to be taken into consideration, not merely the amount paid for goodwill, but also the rents or valuations of similar licensed premises in the neighbourhood.

Crawford v Assessor for Haddington, 1896, 23 R. 685; 3 S.L.T. 278.

(258)

Obligation by landlord not to commence rival business.

In addition to a rent of £48 yearly named in the lease of a hotel for seven years, the tenant agreed to pay to the landlord a sum of £220 in name of goodwill, the landlord who had previously been in occupation of

the hotel becoming bound not to commence business as a hotel-keeper in opposition to the tenant. Held that this obligation by the landlord was a valuable consideration, apart from the occupation of the premises, for which compensation was due by the tenant, and, consequently, that a proportion was to be deducted from the sum of £220 before making any addition to the rent named in the lease in terms of the above rule.

Observed (per Lord Fraser) that a sum of money paid by a tenant to his landlord in name of "goodwill," on obtaining a lease of premises previously occupied by the landlord, is in the general case to be regarded as "a consideration other than the rent," named in the lease paid for the occupation of the premises, and as such is to be divided by the number of years for which the lease is to run, and the quotient added every year to the rent.

Assessor for Lanark v Selkirk, 1887, 14 R. 579.

(259)

The proprietor of a public-house, who had carried on business there, let the premises to a tenant on a ten years' lease, the tenant paying a sum for goodwill, and the proprietor undertaking not to commence business as a spirit dealer in the same town during the currency of the lease. The assessor, in valuing the premises, took the rent stipulated in the lease, and added thereto the sum paid for goodwill divided by the number of years of the lease. The tenant appealed to the valuation committee, and stated that he was willing that the goodwill should be valued at half the sum taken by the assessor, and offered to prove that the valuation so arrived at was greater than the lettable annual value of the subjects, with all their advantages. The committee refused to hear evidence, and adopted the assessor's valuation. Held that their determination was wrong, in respect (1) that they had failed to ascertain duly what proportion of the sum effeired to the premises; and (2) that the obligation by the proprietor not to carry on a rival business was a valuable consideration in favour of the tenant, not effeiring to the premises, which should have been deducted from the value of the goodwill before any addition was made in respect thereof to the rent in the lease.

Observations upon the elements which may be assumed to enter into the goodwill of a publican's business formerly carried on by the proprietor of the premises and sold by him to his tenant under a lease.

Hughes v Assessor for Stirling, 1892, 19 R. 840; 29 S.L.R. 625.

(260)

Sum paid in name of goodwill to former tenant—Former tenant also joint proprietor.

A sum paid by the incoming to the outgoing tenant in name of goodwill is not to be taken into account in reaching the value of the subjects, even when the outgoing tenant is one of the joint proprietors of the subjects.

Assessor for Kilmarnock v Allan, 1887, 14 R. 581.

(261)

Sale by pro indiviso proprietrix, who was also tenant—Transaction between tenant and tenant.

N and L were pro indiviso proprietors of a tenement, part of which was let as a public-house to L's husband at an annual rent of £19 10s.; on his death L purchased the business from his trustees; on her death her trustees sold the business and tenant's fittings, goodwill, &c., to M for £1000; L's trustees and the other pro indiviso proprietor N then granted a lease to M for seven years at the annual rent of £40. **Held** that the transaction was a sale between tenant and tenant, that there was no consideration other than the rent, and therefore that £40, the amount of the rent, was to be taken as the annual value.

Nicolson v Assessor for Port-Glasgow, 1886, 23 S.L.R. 603.

(262)

Annual payment for goodwill over and above rent.

A store kept by an iron company in connection with their works was let at a rent of £90, with an additional annual payment of £60 for goodwill. **Held** that both sums fell to be included in the valuation as rent.

Glasgow Iron Co., 1873, 11 M. 989; 10 S.L.R. 661.

(263)

Payment to landlord—Assignment of lease—Payment of same sum by assignees to original tenants.

A took a lease of licensed premises from B at a certain stipulated rent, and at the same time paid B a sum in respect of the goodwill of the business. Subsequently A assigned the lease to C, who paid A the same sum for the goodwill. **Held** that the stipulated rent did not represent the true annual value of the premises.

Livingston v Assessor for Paisley, 1909, 46 S.L.R. 433; 1909, 1 S.L.T. 230.

(264)

Break in lease — Sale of public-house—New proprietor taking advantage of break to raise rent.

The proprietor of a public-house sold the goodwill of the business in 1897 to Ostler for £650, in consideration of which he granted to Ostler a lease of the premises for fifteen years at a rent of £39 per annum, with a break in the option of either party at Whitsunday, 1905. From the date of the lease down to Whitsunday, 1905, the subjects were entered in the roll at £59, that sum being made up of the rent in the lease, £39, and an annual sum of £20, arrived at by deducting £50 for shop fittings from the sum of £650 paid for goodwill, and spreading half of the remaining £600, viz., £300, over the fifteen years of the lease. The premises were purchased by Ormston in 1899, under burden of the lease. In 1905 Ormston availed himself of the break to enter into an agreement with Ostler, the tenant, whereby the rent was raised to £49,

but the lease was not terminated, the only term of it modified by the agreement being the rent. The assessor entered the subjects in the roll at £69, being the amount of the rent as increased by the agreement, plus the sum of £20 arrived at as above explained. Ormston, the proprietor, appealed, and maintained that as he had not received any part of the payment made for goodwill, that payment was not a consideration other than the rent received by him, and that the subjects fell to be entered in the roll as of the annual value of £49, being the rent at which they were bona fide let to Ostler under the agreement. **Held** that the subjects having been acquired by Ormston under burden of the lease, and the lease not having been terminated by him at the break in 1905, the consideration of £650 for which the lease had been granted was still to be taken into account in valuing the subjects, and that they had rightly been entered at £69.

Ormston v Assessor for Greenock, 1906, 8 F. 497; 43 S.L.R. 318; 13 S.L.T. 766.

(265)

Death of landlord — Reduction of valuation.

A proprietor let a shop in which his wife had a life interest if she survived him to a tenant on a seven years' lease with the consent and concurrence of his wife, at the rent of £39 per annum, but the tenant paid on entering on his lease a sum of £700 for the goodwill of the business. The premises stood in the valuation roll at £89 per annum, being £50 additional to the stipulated rent, on the ground that this was the proportion of the sum of £700 that was applicable yearly to the heritable subjects. On the death of the proprietor the commissioners of supply reduced the valuation to £39. **Held** that the commissioners were wrong, as the £700 was a grassum or consideration other than the rent, and the widow must be held to have shared in the benefit of it.

Wilson v Assessor for Lower Ward of Renfrewshire, 1884, 21 S.L.R. 545.

(266)

Sum paid as goodwill to representatives of former proprietor and occupier.

The proprietor and occupier of a public-house having died intestate leaving a son and daughter, both in minority, his law agents, acting generally in the interests of the heir and executor, accepted an offer of £660 for the goodwill of the business, shop fittings, &c., made on condition of the offerer obtaining a transfer of the licence and a five years' lease of the premises at £80 per annum. The rent of £80 was a full rent for the premises when used as a licensed public-house, the value of the premises without the licence being about £30. The value of the shop fittings, &c., was £150. The £510 paid for goodwill had not been apportioned between the heir and the executor, and there was no evidence that any part of

it belonged to the heir. **Held** that as it had not been proved that any part of the £510 belonged to the heir, the latter sum could not be regarded as a consideration other than the rent stipulated for in the lease, and therefore that the premises fell to be valued at £80.

M'Farlane & Dailly v Assessor for Dundee, 1891, 18 R. 939; 28 S.L.R. 621.

(267)

Payment to landlord for grant of new lease of public-house.

M offered to take the premises of which Mrs. B was tenant, under lease of which three years were yet to run, and to pay her £400 in name of goodwill, provided the proprietor would cancel her lease and grant him a new one for seven years. The proprietor would consent only if he received £50 from M and £70 from Mrs. B. M and Mrs. B agreed to these terms, and a new lease for seven years was granted at the old rent. **Held** that both the £50 and the £70 so received by the proprietor were considerations other than the rent, to be taken into account in reaching the valuation of the subjects.

Assessor for Kilmarnock v M'Nally, 1887, 14 R. 582.

(v.) Tied Houses.

(268)

Tenant bound to buy stock of liquor from landlord.

Where the tenant of an inn, let at a rent of £14, was bound to purchase her stock of ale and beer from the proprietors, who were brewers, **held** that the annual value was properly fixed at £20.

Jerdan, 1876, 4 R. 1148.

(269)

A public-house was verbally let at a rent of £14 15s., the tenant being bound to take all his liquor from the landlord. **Held** that this obligation was a consideration other than the rent, and that the premises fell to be valued at their proper value.

Assessor for Peterhead v Milne, 1890, 17 R. 851; 27 S.L.R. 611.

(270)

A public-house was let on lease at a certain rent, and the tenant was also bound to take part of his supplies of wine, spirits, and beer from firms in which the landlord was a partner, "but that only so long as the said goods are of good quality and are supplied at the most favourable current prices, and on the usual trade terms." **Held** that this obligation formed a consideration other than the rent, which displaced the rent in the lease altogether as a criterion of annual value, and that the magistrates had rightly ascertained that value by reference to the rents of similar premises, and by forming their own judgment as to the

probable rent which the public-house would fetch in the open market.

Annan v Assessor for Leith, 1899, 1 F. 586; 36 S.L.R. 600.

(271)

Tenant not under obligation to buy stock of liquor from landlord, but in fact buying it.

A had for many years occupied a public-house in Edinburgh, belonging to U & Son, a firm of brewers, as a yearly tenant, without a written lease, at the rent of £49. In 1904 the public-house was rebuilt under a municipal improvement scheme, and another public-house which had stood next door was abolished. A was allowed to enter into possession of the new public-house as a yearly tenant under U & Son, without a written lease, and at the old rent of £49. A was not under any obligation to take beer from U & Son, but as a matter of fact he did receive a good deal of beer from them. **Held** that the rent of £49 was not the "yearly rent conditioned as the fair annual value" of the public-house within the meaning of sec. 6 of the Valuation of Lands (Scotland) Act, 1854, and that the magistrates were justified in disregarding that rent in fixing the value of the subjects.

Usher & Son v Assessor for Edinburgh, 1906, 8 F. 488; 43 S.L.R. 310; 13 S.L.T. 761.

See also *Usher v Assessor for Edinburgh*, 1911 S.C. 912; 48 S.L.R. 354; 1911, 1 S.L.T. 200, No. 196, *supra*.

(272)

A public-house belonging to a firm of brewers was let for a term of years at a yearly rent of £90 to a new tenant, who paid £3000 in name of goodwill to the outgoing tenant. The new tenant took some of his supply of beer from the landlord, but it was not proved that he was under any obligation to do so.

Held that the magistrates were wrong in disregarding the lease, and that the valuation should be £90—the rent in the lease.

Mackay & Co. v Assessor for Edinburgh, 1907 S.C. 766; 44 S.L.R. 435; 14 S.L.T. 817.

(273)

A public-house, owned by a firm of brewers, was let by them on a lease for a term of years at a rent of £45. The lease expired at Whitsunday, 1905, but the tenant continued to occupy by tacit relocation. From the beginning of the lease the subjects had been entered in the roll as of the yearly value of £45, but the assessor, disregarding the lease, entered them in the roll for the year ending at Whitsunday, 1909, at £90. It was proved that the tenant was under no obligation to take his supplies from the landlords, but that in fact he did so to some extent.

Held that the assessor was not justified in disregarding the lease, and that the subjects ought to be entered in the roll at £45.

Mackay & Co v Assessor for Edinburgh, 1909, 46 S.L.R. 430; 1909, 1 S.L.T. 225.

(vi.) Special Stipulations in Lease.

(274)

Lump sum paid at commencement of lease for surface damage.

At the commencement of their tenancy the lessees of minerals, in accordance with a provision of the lease, paid to the lessors a lump sum in full of possible damage to surface and non-restoration thereof at the termination of the lease. The rent or royalties had not been fixed at an unduly low figure in consideration of this payment. **Held** that the payment was not a grassum or consideration other than rent, and did not fall to be taken into account in fixing the annual value of the subjects let.

Duke of Hamilton's Trustees v Assessor for Lanarkshire, 1918 S.C. 624; 55 S.L.R. 248; 1918, 1 S.L.T. 172.

(275)

Payment by mineral tenant for right to bring down surface.

The proprietor of a colliery who had acquired from the proprietor of the surface the right to bring down the surface in consideration of an annual payment on the output, assigned this right to the tenant of the mine, who undertook in future to relieve him of the payment. **Held** that the annual payment thus made by the tenant constituted a consideration other than rent, and fell to be added to the lordships received by the proprietor from the tenant in estimating the annual value to be entered in the valuation roll, and there being nothing to show how much of the payment represented surface damages, for which the tenants would have been liable, no deduction could be made on that account.

Harvie v Assessor for Upper Ward of Lanarkshire, 1894, 21 R. 803; 31 S.L.R. 731.

(276)

Tenant entitled to sub-let — Sub-rents greater than rent under the lease.

In a lease of a farm it was agreed that the tenant should have the privilege of sub-letting plots of ground on the farm as fishing stations on payment of a small rent for each to the proprietor. He sub-let such plots at rents considerably above those that he paid to the proprietor, and in addition he received a royalty on each cran of herrings cured on each plot. **Held** that the assessor was entitled to disregard the lease and assess the fishing stations at a fair annual value.

Nicolson v Assessor for Zetland, 1884, 21 S.L.R. 547.

(277)

Obligation on tenant to cede possession without compensation.

A piece of ground was let for ten years at an annual rent, with liberty to the landlord to resume possession at any term of Whitsunday without compensation, and to the tenant to erect buildings on the ground, for which buildings no additional rent was to be payable. Buildings having been erected, they were entered in the valuation

roll at their admitted value as being lands and heritages, the property of the landlord. The magistrates confirmed the valuation. On appeal, Lord Lee was of opinion that the determination of the magistrates was wrong, and that the valuation ought to be the rent payable under the lease, and Lord Fraser was of opinion that the determination was right, on the ground that the obligation on the tenant to remove without compensation formed a "consideration other than the rent" within the meaning of the 6th section of the Lands Valuation (Scotland) Act, 1854. The judges being thus divided in opinion, the determination of the magistrates stood.

North British Railway Co. v Assessor for Leith, 1884, 11 R. 558; 21 S.L.R. 398.

(278)

Obligation on tenant to remove at any time.

A piece of ground belonging to a railway company was let for £2 a year, on the condition that the tenant should be bound to remove at any time on one month's notice. The magistrates held that £97 10s. was the fair annual value. **Held** that the ground was not bona fide let for a yearly rent conditioned as its fair annual value, and that the lease consequently fell to be disregarded.

Glasgow and South-Western Railway Co. v Assessor for Greenock, 1898, 25 R. 1229; 35 S.L.R. 943; 6 S.L.T. 148.

(279)

Lease terminable on three months' notice — Tenant to uphold machinery.

Opinions reserved as to how far either stipulation displaced the rent in the lease as the criterion of value.

Lowson's Judicial Factor v Assessor for Arbroath, 1900, 2 F. 608; 7 S.L.T. 466.

(280)

Annual payment from previous tenant for being allowed to renounce lease.

A tenant who paid a rent of about £600 renounced his lease under an agreement with the landlord, by which he paid him £100 a year as part of the difference between that rent and the rent paid by the succeeding tenant. **Held** that this sum could not be taken into consideration in assessing the value of the subjects.

Sharp v Assessor for Caithness-shire, 1887, 24 S.L.R. 313.

(281)

Club—Landlord appointed clubmaster at a salary.

Subjects, consisting of three rooms and a bar, were let to a working man's club for six months, at the rate of £30 per annum of rent. The landlord was appointed clubmaster and manager of the club at £2 a week, provided that there was profit to that amount. **Held** that the payment of £2 weekly was a consideration other than the rent.

Rintoul v Assessor for Dunfermline, 1902, 4 F. 532; 39 S.L.R. 568; 9 S.L.T. 420.

(281a)

In December, 1899, Stevenson let to the Kelty Workmen's Club, at £15 a year, part of certain premises belonging to him. He resided in the flat above, also belonging to him. The club premises were entered by the assessor in the valuation roll for 1901-1902 at £40. The flat above was separately entered. Stevenson appealed against the valuation of the club premises at £40, contending that it should be £15, the rent in the lease. He deposed that £15 a year was all that he had received from the club, until three months before the date of the appeal, when he was appointed clubmaster at £2 a week. The valuation committee sustained the assessor's valuation, being satisfied that the club had from the first been managed by Stevenson, and being of opinion that he could get a rent of £40 for the club premises. The Judges refused to alter the determination of the valuation committee.

Stevenson v Assessor for Fife, 1902, 4 F. 534; 39 S.L.R. 585; 10 S.L.T. 6.

(4) ABATEMENTS AND DEDUCTIONS.

(282)

Deduction from rent for tenant's outlay on drainage.

Held that deductions from the rent of a farm allowed to the tenant to be spent in drainage fell to be included as part of the rent in the valuation roll.

Udny, 1872, 11 M. 987; 44 J. 432; 9 S.L.R. 446.

(283)

Diminished rent stipulated for first two years of lease.

A farm was let for nineteen years, the rent for the first two years being one-half of the rent for the remaining years. It was stated that the farm was in bad order. Held, in regard to the second year of the lease, that the rent actually paid fell to be entered in the roll.

Buchan Hepburn, 1876, 4 R. 1148.

(284)

Abatements stipulated by the lease not to be deducted, the lease not stating that the farm was in bad condition, and the assessor being therefore justified in assuming that the abatements were to be spent on permanent improvements.

Kinloch, 1876, 4 R. 1148.

(285)

Abatement of rent for two years.

A farm was let on lease for fifteen years from Whitsunday, 1874, at £340. In consequence of the low price of agricultural produce, an agreement was entered into reducing the rent from Martinmas, 1879, to Martinmas, 1881, to £300 per annum. The assessor entered £340 for 1880-81. Held that the entry was wrong.

Maxwell, 1881, 9 R. 1243.

(286)

Voluntary reduction of rent.

A landlord is not entitled to have a farm entered in the valuation roll at a lower rent than that stipulated for on the ground that he has granted a reduction of the rent, unless he can produce conclusive evidence to show that he has bound himself to grant the reduction.

Menzies v Assessor for Perthshire, 1889, 16 R. 805; 26 S.L.T. 688.

(287)

Landlord's outlay of year's rent for improvements.

A landlord bound himself, within the first year of the currency of a lease of a farm, to expend £1065 (the amount of one year's rent) on buildings. Held that in the valuation of the farm deduction should be made from the first year's rent of a year's interest of £1065, as the first year's rent must be regarded as a payment in excess of the value of the farm without the improvements.

Maitland v Assessor for Midlothian, 1893, 20 R. 628; 30 S.L.R. 618.

(288)

Repairs at mutual expense of landlord and tenant.

In a lease of a farm it was provided that the buildings and fences should be kept in repair at the mutual expense of the landlord and tenant. Held that in valuing the farm a deduction fell to be made from the rent payable under the lease in respect of the amount paid by the landlord as his share of the expense of keeping the buildings and fences in repair.

Macpherson v Assessor for Berwickshire, 1895, 22 R. 594; 32 S.L.R. 434; 2 S.L.T. 569.

(289)

Sum paid by landlord to tenant for lime applied to farm.

Where the landlord of a farm, in implementation of an obligation in the lease, repaid to his tenant one-half of the cost of the lime put upon the land by the latter in a certain year, held that in entering the farm in the valuation roll for the succeeding year the assessor was bound to deduct the sum so repaid from the rent specified in the lease.

Miller's Trustees v Assessor for Berwickshire, 1911 S.C. 908; 48 S.L.R. 352; 1911, 1 S.L.T. 199.

(290)

Resumption of land for planting.

A farm was let at £3 per acre, the landlord to allow £5 for each acre he might resume for planting. The landlord having resumed and planted eleven acres, held that the tenant's rent should be entered in the roll at the rent actually paid, and that the land which had been resumed should be entered as woodland at £3 only per acre, contrary to the contention of the assessor, which was that the rent of the farm should

only be reduced by £3 per acre for the land resumed, or the full sum of £5 per acre given as the value of the woodland.

Mitchell Innes, 1875, 4 R. 1147.

(291)

House rents not exceeding £5—Rates laid on owners without relief from tenants—Deduction claimed of rates from rents.

A proprietor was assessed for houses at rents above £4 and not exceeding £5. By the General Police Act, 1862, sec. 81, and the Greenock Police Act, 1877, sec. 49, the owners in place of occupiers were to be assessed for police rates in the cases of houses at or under £5, a deduction of one-fourth being allowed from the assessment. No right of relief was given to the owner against the tenants. The proprietor claimed deduction of the police and local rates from the rents. **Held** that the entry was wrong.

Hamilton, 1881, 9 R. 1244.

(292)

Lease of furnished houses—Deduction in respect of use of furniture.

Observed (per Lord Trayner)—“It is the custom of assessors—and it appears to be so reasonable a custom that I should be sorry to disturb it—that where furnished houses are let, one-half of the rent is taken as the rent of the house and the other half as the rent of the furniture.”

Maxwell Scott v Assessor for Roxburghshire, 1890, 17 R. 833; 27 S.L.R. 606.

(293)

House let furnished — Comparison with other houses.

A house in Glasgow was let furnished at £200. It was entered at £130. The assessor stated facts to show that the entry was warranted by the average floorage rent of let houses in the district. The appellant stated that in the case of furnished houses it was usual to take half of rent for the house and half for the furniture. The commissioners reduced the valuation to £100. **Held** that the commissioners were wrong.

Skinner, 1879, 9 R. 1237.

(294)

Abatement of rent — Lease of hotel and furnishings — Apportionment of abatement between hotel and furnishings.

A furnished hotel in Nairn was let to a tenant from March, 1912, to May, 1917, at a yearly rent of £350, £200 of which was described as rent of the premises, and £150 as rent of the furnishings. In October, 1914, the tenant was interned as an alien enemy, and, although released in January, 1915, he was not permitted to reside in Nairn. For the year ending Whitsunday, 1916, the landlord granted an abatement of £115, a memorandum, endorsed on the lease and signed by both parties, bearing that the abatement from the stipulated rent of the premises was granted because of the special circumstances affecting the hotel consequent upon the war. In the valuation roll

for that year the assessor entered the hotel at the yearly rent or value of £200, the rent stated in the original lease.

Held (1) that the assessor ought to have given effect to the abatement, there being no evidence to show that it had been granted in view of extraneous considerations, and not in view of market value; but (2) that the whole abatement did not fall to be attributed to the rent of the premises, but must be divided proportionately between the rent of the premises and the rent of the furnishings.

M'Gregor v Assessor for Nairn, 1916 S.C. 659; 53 S.L.R. 478; 1916, 1 S.L.T. 73.

(295)

Mansion-house—Deductions for furniture and keeping up of garden.

Duke of Richmond, 1868, 11 M. 978.

(296)

Use of furniture and upkeep of garden.

In a lease of a mansion house, garden, and grounds to a yearly tenant at a cumulo rent, it was provided that the tenant should have the use of the furniture in the house and the garden produce, but the wages of the gardeners and the expense of keeping up the garden were to be paid by the proprietor. The assessor having entered the subjects at the value at which they had stood in the valuation roll for fifteen years, while unlet and in the occupation of the proprietor, the proprietor appealed and maintained that the house, garden, &c., having been actually let, the rent ought to be taken as the basis of valuation, under deduction of the annual cost of the services provided by him. The valuation committee sustained the assessor's valuation. In an appeal, **held** that as it was admitted that the services of the gardeners supplied by the proprietor were required for other parts of the estate as well as for the garden and grounds let to the tenant, and as it was impossible to ascertain precisely to what extent they were given to the let and to the unlet parts of the estate, the valuation committee were justified in the circumstances in adhering to the former valuation, and the assessor's valuation affirmed.

Colville's Trustees v Assessor for Fife, 1894, 21 R. 799; 31 S.L.R. 470; 1 S.L.T. 533.

(297)

Mansion-house let with deer forest—Rent—Deductions—Use of furniture—Servants' labour—Horses—Carriages.

A proprietor appealed against the valuation of a deer forest and mansion house which he had let for one year without a written lease. The tenant had the use of the proprietor's establishment of horses, furniture, and the labour of the outdoor and indoor servants, and there was no evidence that this establishment was in excess of the tenant's requirements. **Held** that the valuation of the deer forest and mansion house was to be taken at the sum paid by the

tenant, under deduction of the cost of the establishment to the proprietor, as for the whole year, and not merely for the shooting season.

Lord Middleton v Assessor for Ross-shire, 1882, 10 R. 28; 19 S.L.R. 564.

(298)

Deductions from rent—Grass parks—Grass parks let for season—Expenses of roup—Discount for prepayment of rent.

In assessing the yearly value of grass parks let for the grazing season, it is not legitimate to make deductions from the rent payable by the tenant either in respect of the expenses of the roup of the grass parks or in respect of discount paid by the landlord to the tenant for prepayment of the rent.

Lockhart v Assessor for Lanarkshire, 1922 S.C. 450; 59 S.L.R. 295; 1922 S.L.T. 212.

(299)

Sum paid for right to cause surface damage—Deduction from mineral rent.

The proprietor of a colliery objected to its being entered in the valuation roll at the royalty received by him from his tenants, and claimed deduction of a royalty paid by him to the proprietor of the surface for liberty to bring down the surface, or otherwise deduction of the sum which he received from his tenants as their contribution thereto. **Held** that no deduction fell to be made.

Harvie v Assessor for Upper Ward of Lanarkshire, 1893, 20 R. 630; 30 S.L.R. 613.

(300)

Public-house—Increase in licence duty—Decrease in profits—Revision of valuation—Finance (1909-10) Act, 1910, secs. 43, 44, sched. I. (c).

Mark and Scott were respectively tenants of two public-houses leased for a term of years at stipulated rents. The tenant in each case paid his landlord a sum for goodwill, and Mark was also taken bound to take his supply of spirits from the landlord. In each case the assessor had, in valuing the premises at the commencement of the leases, divided the sum paid for goodwill equally between landlord and tenant, and after dividing the landlord's half by the number of years in the lease, had added the figure thus arrived at to the stipulated rent. The valuations so brought out were appealed against (the leases being still current) on the ground that an increase in the licence duty and a decline in drawings had reduced the profits. **Held** (1) that such a valuation could be competently reconsidered during the currency of the lease if there was a material change of circumstances; (2) that the diminution in drawings was not traceable to any permanent cause and did not afford ground for a revision of the valuation, but that the increase in licence duty was a material and presumably permanent change of circumstances which did afford such ground; (3) that the valuation in each

case should be reduced by an amount equal to half the increase in the licence duty; and the appeals sustained.

Mark v. Assessor for Edinburgh—Scott v Assessor for Edinburgh, 1911 S.C. 974; 48 S.L.R. 379; 1911, 1 S.L.T. 241.

[See also 3 (2) (f), *infra*.]

3. SUBJECTS IN OWNER'S OCCUPATION.

(1) METHODS OF VALUATION.

(a) Contractor's Principle.

Shops and offices.

[See Nos. 315-318, *infra*.]

Theatres and public halls.

[See No. 321, *infra*.]

Schools.

[See Nos. 322, 323, *infra*.]

Hotels and public-houses.

[See Nos. 324, 326, *infra*.]

Factories and other industrial subjects.

[See (2) (g) (i), *infra*.]

Asylums and hospitals.

[See Nos. 357, 359-363, *infra*.]

Harbours and piers.

[See Nos. 375, 376, *infra*.]

Gas and electric light undertakings.

[See Nos. 384, 385, *infra*.]

Waterworks and sewers.

[See No. 400, *infra*.]

(b) Revenue Principle—Tenant's Profits.

Theatres and public halls.

[See Nos. 320, 321, *infra*.]

Hotels and public-houses.

[See Nos. 326, 329, 331, *infra*.]

Factories and other industrial subjects.

[See No. 335, *infra*.]

Cemeteries.

[See No. 365, *infra*.]

Harbours and piers.

[See Nos. 367-369, 372-379, *infra*.]

Gas and electric light undertakings.

[See Nos. 380-393, *infra*.]

Waterworks and sewers.

[See Nos. 394-396, *infra*.]

Tramways.

[See No. 436, *infra*.]

Canal.

[See No. 448, *infra*.]

(c) Comparison with Similar Subjects.

Dwelling-houses.

[See Nos. 302, 303, *infra*.]

Shops and offices.

[See Nos. 315, 317, 318, *infra*.]

Hotels and public-houses.

[See Nos. 327, 328, *infra*.]

Asylums and hospitals.

[See No. 358, *infra*.]

(2) PARTICULAR SUBJECTS.

(a) Dwelling-houses.

(301)

Tenant purchasing subjects.

Held that when a tenant becomes proprietor of the subjects let, and improves them, the rent stated in the lease cannot be taken as the annual value.

Grant, 1873, 11 M. 989; 10 S.L.R. 661.

(302)

Dwelling-house in town—Comparison with houses of same class in neighbouring street.

Macfarlane, 1872, 11 M. 985; 44 J. 432; 9 S.L.R. 445.

Binning, 1872, 11 M. 988; 44 J. 433; 9 S.L.R. 497.

(303)

—Comparison with subjects let for a period of years.

Houses in the occupation of their owners were entered at £155 and £140. Two houses in the same terrace were let on lease for three and three and a half years at £140, and one on three years' lease at £145. The owners contended that the Act required unlet houses to be entered at the rent at which they might be expected to be let on yearly sets, and that this would be less for houses of this class than where there were leases for a lengthened period, on account of considerations as to carpets and furnishings. The commissioners restricted to £135 and £120 respectively. **Held** that the commissioners were wrong.

Muir, 1878, 9 R. 1237.

(304)

Official residences—Professors' houses.

University of Glasgow, 1872, 11 M. 985; 44 J. 432; 9 S.L.R. 445.

(305)

Mansion-house.

Gladstone, 1872, 11 M. 986; 44 J. 432; 9 S.L.R. 446.

(306)

—Special value to proprietor.

An assessor, in valuing a mansion-house in the country occupied by the proprietor, based his valuation on the view that it must be held to have a peculiar value to the proprietor which it would not have to a stranger, and that therefore it fell to be valued at what, with all its surroundings, it was worth to the proprietor, and not at what an outsider would pay for it unfurnished. **Held** that the assessor's basis of

valuation was unsound, and that the house fell to be valued at the rent which it would fetch if put into the market in its present condition.

Forbes Irvine v Assessor for Aberdeenshire, 1893, 20 R. 626; 30 S.L.R. 617.

(307)

Mansion - house with shootings attached.

A large mansion-house, with expensive gardens and policies attached, was situated on an estate which was small in comparison with the size of the house, and on which the shootings were not of much value. The house was occupied by the proprietor, and had never been let. It had cost £17,000 to build, and was valued by the valuation committee at a yearly rent or value of £190. The proprietor sought to have this valuation reduced to £115, and led evidence to show that, owing to the expense of upkeep and the unattractiveness of the shootings, the house, if lettable at all, could not be let at such a rent as would give a net return of anything approaching £190. The Court sustained the valuation of the committee. **Observations** on the methods of arriving at the valuation of mansion-houses which are unlet; and on the regard to be had to enhanced rents obtainable for country houses which have valuable shootings attached. **Opinion** (per Lord Johnston) that, as one of the factors in valuing a mansion-house which has not been let, an assessor is entitled to take the proprietor as a potential tenant, and to consider what rent he would have to pay for a residence appropriate to the size and rental of his estate.

Scott v Assessor for Kincardineshire, 1914 S.C. 655; 51 S.L.R. 172; 1914, 1 S.L.T. 8.

(308)

Land adjoining villa—Owner occupier of both.

The proprietor and occupier of a house and grounds, and entered as such at £87, owned and occupied about 3 acres of land adjoining, which were separately entered at £51. He also owned another portion of land, also adjoining, which was let and entered at £9. He claimed that the valuation of the adjoining land in his own occupancy should be restricted to £11 7s. 6d., as being the same valuation in proportion to extent as the let portion. **Held** that the entry was wrong, and that the adjoining lands in the proprietor's occupancy should be valued at £5 per acre.

Laird, 1881, 9 R. 1245.

(b) Farms, Shootings, and Fishings.

(309)

Increase in valuations of farms—General rise in agricultural rents—Farms recently bought and occupied by owners—Purchase prices.

Increases in the valuations of two farms in East Lothian, which had been purchased in recent years and were occupied by the purchasers, were sanctioned for the year Whitsunday, 1921-1922, by the valuation com-

mittee. **Held** that the increases were justified having regard (1) to the fact that in every case in which a farm had been let in the county during 1921 and 1922 an increase of rent, averaging 20 per cent., had been obtained; and (2) to the prices paid by the present owners of the farms when they purchased them in 1915 and 1921 respectively.

Wyllie v Assessor for East Lothian, 1922 S.C. 445; 59 S.L.R. 293; 1922 S.L.T. 214.

(310)

Shootings—Unlet deer forest—Whether lands to be entered also at their value as grazing ground—Act 1886, secs. 6 and 7.

Lands in the occupation of the proprietor were used as a deer forest only, there being neither other game nor farm stock thereon. **Held** (per Lord Fraser, agreeing with the determination of the valuation committee) that the lands fell to be entered in the valuation roll at their value as a deer forest only; (per Lord Lee) that looking particularly to the terms of the Sporting Lands Rating Act, 1886, secs. 6 and 7, there ought to be a double entry of the lands at their value as grazing ground, and at their value as a deer forest. The judges being divided in opinion, the determination of the valuation committee stood.

Assessor for Argyllshire v Stuart, 1888, 15 R. 588; 25 S.L.R. 315.

(311)

—Shootings unlettable in consequence of war.

Where Highland shootings were unlet in consequence of the difficulty of finding tenants for such subjects due to the war, the Court confirmed the valuation of the assessor by which the subjects had been entered in the roll at one-half of their previous valuation.

Perrins v Assessor for Ross-shire, 1918 S.C. 602; 55 S.L.R. 258.

(312)

—Shootings unlettable in consequence of war.

Where Highland shootings were unlet in consequence of the difficulty of finding tenants for such subjects due to the war, the valuation committee entered the subjects in the roll at one-half of their previous valuation. The Court, in the circumstances, confirmed the decision of the committee; but **observed** that the case of Perrins did not lay down a hard-and-fast rule for fixing the rate of reduction to be allowed in consequence of depreciation due to the war. **Opinion** (per Lord Johnston), that, although the subjects were for the time being unlettable, they nevertheless had a capital value which fell to be considered in fixing the yearly value. **Opinion contra** (per Lord Salvesen).

Grant v Assessor for Inverness-shire, 1918 S.C. 620; 55 S.L.R. 244; 1918, 1 S.L.T. 146.

(313)

Deer forests.

The valuation committee for the county

of Argyll fixed the value of an unlet deer forest at a sum equal to £20 per stag on the average number of stags killed in the season. The proprietor founded on previous decisions as settling the valuation as at £15 per stag. The Court sustained the committee's valuation, and **held** that there was no general principle applicable to the valuation of all unlet deer forests in Scotland.

Marquis of Breadalbane v Assessor for Argyllshire, 1890, 17 R. 837; 27 S.L.R. 635.

(314)

Fishings.

Assessor for County of Elgin v Duke of Richmond and Gordon, 1905, 7 F. 424; 42 S.L.R. 512; 12 S.L.T. 831, No. 107, supra.

Assessor for Aberdeenshire v Lady Cowdray, 1911 S.C. 970; 48 S.L.R. 395; 1911, 1 S.L.T. 231, No. 104, supra.

Dee Salmon Fisheries Co. v Assessor for Aberdeen, 1915 S.C. 790; 52 S.L.R. 178; 1914, 2 S.L.T. 457, No. 214, supra.

Don District Fishery Board v Burnett, 1918 S.C. 37; 55 S.L.R. 90; 1917, 2 S.L.T. 183, No. 105, supra.

Wallace v Assessor for Wigtownshire, 1902, 4 F. 515; 39 S.L.R. 570; 9 S.L.T. 515, No. 215, supra.

(c) Shops and Offices.

(315)

Offices in city owned and occupied by statutory body—Comparison of rentals.

Held that the proper method of valuing a large building centrally situated in Glasgow, the property of the parish council of Glasgow and occupied by them as their offices, was by a comparison with the rentals of premises of a similar character in the neighbourhood; and that the mere fact that the owners and occupiers were a statutory body, in whose place it might not be possible to find a similar tenant, was not a reason for adopting the "contractor's principle" of valuation. **Observed** that the "contractor's principle" could only be legitimately adopted if the method of comparison were wholly inapplicable, or for the purpose of checking a valuation otherwise arrived at.

Glasgow Parish Council v Assessor for Glasgow, 1914 S.C. 651; 51 S.L.R. 148; 1913, 2 S.L.T. 435.

(316)

Co-operative store—Separate industries in same range of buildings—Whether to be taken as unum quid.

Premises belonging to a co-operative association consisting of a range of buildings which included a bakery, workshops, stables, and a refrigerator, were valued by the assessor as a unum quid, by taking a percentage on the cost of erection. There was no other building within the burgh of a similar construction and applied to similar purposes. The proprietors maintained that the several portions of the premises fell to be valued as separate subjects by comparison

with the value of similar subjects in the burgh. **Held** that the assessor was right in valuing the premises as a *unum quid* by taking a percentage of their cost.

St. Cuthbert's Co-operative Association v Assessor for Edinburgh, 1896, 23 R. 681; 33 S.L.R. 487; 3 S.L.T. 278.

(317)

Valuation by floorage area—Rate based on comparison with rent of neighbouring shops let—Re-valuation where no change of circumstances.

Jenner & Co. were the owners of a large block of buildings in Princes Street, Edinburgh, occupied in connection with their business of drapers, &c., the main floors being used as shops and saloons, and the upper floors as workrooms and a boarding residence for the employees. For two years after their completion the buildings had been entered in the valuation roll at the yearly rent or value of £7250. In 1907 the assessor entered the buildings at £8780, a sum reached by taking the floorage area of each floor and applying thereto a varying rate per square foot, the rates being based upon an analysis of rents actually paid for neighbouring shops in Princes Street. *Jenner & Co.* appealed and maintained that the re-valuation was not justified by any change of circumstances. The magistrates reduced the valuation to £8000. **Held** that the magistrates were wrong, and that the valuation should be reduced to £7250.

Jenner & Co. v Assessor for Edinburgh, 1908 S.C. 601; 45 S.L.R. 493; 15 S.L.T. 917.

(318)

Insurance office—No similar office in same street—Valuation by comparison with shops.

A large recently built office in Princes Street, Edinburgh, belonging to and occupied by an insurance company was entered by the assessor at £5500, a sum reached by taking the floorage area, and applying thereto varying rates per square foot, the rates being derived from an analysis of rents actually paid for shops in Princes Street. There was no similar insurance office in Princes Street. The company appealed and maintained that the valuation ought to be on the basis of the valuation of other insurance offices in Edinburgh, e.g., in George Street or St. Andrew Square. The magistrates reduced the valuation to £5000. On appeal the judges declined to interfere with the determination of the magistrates, as it was not shown to be unreasonable.

North British and Mercantile Insurance Co. v Assessor for Edinburgh, 1908 S.C. 601; 45 S.L.R. 493; 15 S.L.T. 917.

(319)

Insurance company's premises.

In the valuation of shops in Princes Street, Edinburgh, the assessor was in the practice of valuing the front part, extending 50 feet back from the street, at the rate of 10s. per square foot of floorage, and the back part

at half that rate. In the case of an insurance office where the street floor was above the level of the street, the assessor fixed the rate for the front part at 7s. 6d., and the same rate for the back part. In an appeal by the insurance company **held** that the back part should have been valued at one-half the rate fixed for the front part.

North British and Mercantile Insurance Co. v Assessor for Edinburgh, 1910 S.C. 814; 47 S.L.R. 368; 1910, 1 S.L.T. 169.

(d) Theatres and Public Halls.

(320)

Theatres in occupation of owners—Increase in valuations — Attendance — Drawings—Profits.

The theatres of a city were all occupied by the companies which owned them, so that valuation by the method of comparison with the rentals of other theatres in that area was impossible. An increase in their valuations was made by the assessor based upon a large (and probably permanent) increase in the attendance and drawings at the theatres, and in the profits of the companies or the value of their shares, taken in conjunction with the fact that, owing to the great increase in the cost of building, the erection of new theatres was improbable in the near future. **Held** that the assessor's increase was justified. **Observations** as to the circumstances in which profits derived from the occupation of heritable subjects may be taken into consideration as a factor in determining their yearly value for valuation purposes.

Howard & Wyndham v Assessor for Edinburgh, 1920 S.C. 502; 57 S.L.R. 246; 1920, 1 S.L.T. 195.

(321)

Masonic halls—Halls let for social purposes—Revenue-producing capacity—Floorage area.

A masonic institution owned premises consisting, *inter alia*, of two halls, which were let out for balls and social functions and were also occasionally used for masonic meetings. The assessor, upon a calculation based solely upon a comparison of the floorage area with that of similar premises in the neighbourhood, valued the premises at £450 per annum, which was sustained by the valuation committee. **Held** upon appeal that the committee should also have considered the revenue-producing capacity of the premises; that their determination was wrong; and that £350 was a fair valuation. **Observations** upon the reliability of valuation by floorage area when applied to such premises, and as to how far revenue-producing capacity should be considered.

Supreme Grand Royal Arch Chapter of Scotland v Assessor for Edinburgh, 1911 S.C. 962; 48 S.L.R. 375; 1911, 1 S.L.T. 227.

See also *Blyth Hall Trustees v Assessor for Fife*, 1883, 10 R. 659; 20 S.L.R. 433, No. 186, *supra*.

(e) Schools.

(322)

Proprietary secondary schools—Accommodation—Pupil space—Hypothetical tenant—Playgrounds—Prospective feuing value—Charitable and educational trust.

The education board of the Merchant Company of Edinburgh were proprietors of four large day schools, which gave chiefly secondary education, though each had elementary classes. The board charged fees, and earned grants, to obtain which latter they had to conform to the regulations of the Scotch Education Department. The receipts from fees and grants were insufficient to meet the expenditure, the annual deficit being met from the educational trust endowments of the company. Under the regulations of the Education Department the number of pupils permissible per room, and consequently the available pupil space, had been since 1892 compulsorily and progressively reduced. The previous assessments having been increased, **held** (1) that the prime factor in valuing such schools was the available pupil space, which regulated the probable rent which the local education authority, regarded as a hypothetical tenant, would be likely to offer for the schools in question; (2) that the method of taking a percentage upon structural value was misleading in the case of such schools; (3) that in dealing with the playgrounds attached to such schools, the whole subjects must be taken as a unum quid, and the estimated feuing value of such playground areas could not be considered in assessing the annual value; and assessments reduced.

Merchant Company Education Board v Assessor for Edinburgh, 1911 S.C. 948; 48 S.L.R. 387; 1911, 1 S.L.T. 233.

(323)

New high-class school for girls—Pupil space—Fees paid by pupils—Contractor's principle.

A non-profit-earning company, which conducted a high-class school for girls, left their old premises and built a new school upon land which they acquired. While no expenditure was incurred upon mere ornament or architectural embellishment, the building and grounds were planned and equipped upon the most modern and approved principles, and afforded much better accommodation than that required by the Education Department. There was no other school of a similar character in the neighbourhood. **Held** that, in the absence of any similar school for comparison, the yearly rent or value fell to be ascertained on the "contractor's principle" by charging a percentage on the capital cost of each pupil space; and the valuation of the valuation committee, which was equivalent to somewhat less than 4 per cent. on such capital cost, but was considerably higher than the corresponding figure for board schools in the district, approved. **Opinion** that the scale of fees paid in a school is a factor which falls to be taken into consideration if it is

necessary to estimate the rent which might be obtained from a hypothetical tenant.

St. George's School v Assessor for Edinburgh, 1916 S.C. 675; 53 S.L.R. 487; 1916, 1 S.L.T. 99.

(f) Hotels and Public-houses.

(324)

Railway hotel—Floorage area—Profits—Accommodation.

The North British Railway Company's hotel in Edinburgh was entered in the valuation roll at the yearly rent or value of £11,950. The assessor reached this sum by taking the floor space and applying thereto varying rates per square foot, and comparing the accommodation with that of other hotels in the city. The railway company maintained that the basis of valuation should be the profits of the hotel business, or alternatively the number of lettable bedrooms. **Held** that no single method of valuation was reliable, and in the whole circumstances that the valuation should be reduced to £7000.

North British Railway Co. v Assessor for Edinburgh, 1905, 7 F. 435; 42 S.L.R. 508; 12 S.L.T. 859.

(325)

Special value to railway company—Recent valuation—Prospective success overestimated—Revision of valuation.

The valuation of the North British Railway Hotel, Edinburgh, was fixed by the Court upon appeal in 1905 at £7000. In 1911 the company again appealed, maintaining that the prospective success anticipated when that valuation was fixed had not been realised; that the hotel was not fairly comparable with others owing to disadvantages of structure; and that the Finance (1909-10) Act, 1910, had greatly increased the burdens on the premises. The annual gross profit of the hotel (exclusive of manager's salary, or any sum for tenant's profits or for rent) amounted on an average to £4496 only. The company proposed a valuation of £5500. The valuation committee fixed it at £7000. **Held** that the valuation of 1905 should be revised, and that, in the circumstances, and keeping in view the consideration that the hotel was an important adjunct to the company's system, the valuation should be fixed at £6000.

North British Railway Co. v Assessor for Edinburgh, 1911 S.C. 939; 48 S.L.R. 369; 1911, 1 S.L.T. 203.

(326)

Hydropathic establishment—Contractor's principle—Comparison with similar establishments—Compelling disclosure of profits—Act 1854, sec. 10.

The valuation (on the basis of capital cost) of a hydropathic establishment in the occupation of its proprietor reduced, on a comparison with the valuation of similar establishments throughout Scotland, from £1120 to £850. **Opinion** (per Lord Fraser) that the proper method of valuing such an

establishment, when in the occupation of its proprietor, was to ascertain the profits which he made, and that under the 10th section of the Lands Valuation Act, 1854, he might be compelled to disclose these profits, and to produce his books. **Opinion** on this point reserved by Lord Lee.

Philp v Assessor for Rothesay, 1888, 15 R. 627; 25 S.L.R. 462.

(327)

Public-house.

A publican transferred his business to new premises, which he had purchased, and which were a few yards distant from his old premises. He made considerable alterations on the new premises to fit them for the business. The assessor valued the new premises by comparing them with similar premises within the burgh in respect of rental per superficial yard. The publican maintained that the premises ought to be valued on the basis of the cost of the property and of the alterations. The magistrates, "taking the whole circumstances, with the situation of the premises, into consideration and from their knowledge generally," affirmed the assessor's valuation. **Held** that the determination of the magistrates was right.

Noble v Assessor for Leith, 1899, 1 F. 584; 36 S.L.R. 599.

(328)

Observations on the valuation of licensed premises by means of comparison with the rentals for similar adjoining premises.

Scouller v Assessor for Glasgow, 1912 S.C. 757; 49 S.L.R. 152; 1911, 2 S.L.T. 491.

(329)

Revenue principle.

The magistrates of a burgh fixed the yearly rent or value of a public-house, occupied by the owner, at 7 per cent. of the drawings, of which a statement had been voluntarily tendered by the owner. Neither he nor the assessor adduced any evidence as to the rents paid for leased public-houses in the neighbourhood; but it was proved that the method applied by the assessor had been adopted by him under agreement with about sixty other publicans in the burgh who owned and occupied their own premises. **Held** that, in the particular circumstances of the case, the magistrates' decision fell to be sustained. **Observations** as to the valuation of public-house premises on a basis of drawings or turnover.

Haggart v Assessor for Leith, 1912 S.C. 784; 49 S.L.R. 163; 1911, 2 S.L.T. 502.

(330)

Increased licence duty—Onus of proof as to value.

Two appellants, each of whom was both proprietor and occupier of licensed premises, claimed reductions of the former valuations of their respective premises on account of the increased licence duty imposed by the Finance (1909-10) Act, 1910, sec. 43. **Held** that the increase in the duty established a

prima facie case for reduction of the valuations, and that as the assessor had not discharged the onus of proving that the annual letting value of the premises had not been diminished, the valuations should be reduced. In the circumstances the Court reduced each valuation by half the amount of the increase in the duty.

Deards v Assessor for Edinburgh—Clark v Assessor for Edinburgh, 1911 S.C. 918; 48 S.L.R. 360; 1911, 1 S.L.T. 148. See also *Mark v Assessor for Edinburgh*, 1911 S.C. 974; 48 S.L.R. 379; 1911, 1 S.L.T. 241, No. 300, supra.

(331)

Increased licence duty—Presumption as to value—Onus of proof—Refusal to produce statement of drawings.

Held that the presumption that the increased licence duty imposed by the Finance (1909-10) Act, 1910, had reduced the annual letting value of licensed premises could not be pleaded by a publican who refused a request by the assessor for the production of a comparative statement of his drawings for the three previous years, in respect that the request was a reasonable one to enable the assessor to prove that the value of the premises had not been diminished.

Scouller v Assessor for Glasgow, 1912 S.C. 757; 49 S.L.R. 152; 1911, 2 S.L.T. 491.

(332)

Change of circumstances—Statutory curtailment of hours of business—Onus of proof as to value.

Held that the curtailment of the hours during which licensed premises may be open introduced by the Temperance (Scotland) Act, 1913, did not per se establish a prima facie case for reduction of the valuation of a public-house, or throw upon the assessor the onus of proving that the annual letting value of the premises had not been diminished.

Maxwell v Assessor for Galashiels, 1915 S.C. 765; 52 S.L.R. 117; 1915, 1 S.L.T. 18.

For cases of public-houses let to tenants, see V. 2 (3) (c) (ii.) (iv.) and (v.), supra.

(333)

Licensed grocer's premises — Increased licence duty—Presumption as to value.

Held that the increased licence duty imposed on a grocer's shop by the Finance (1909-1910) Act, 1910, established a prima facie case for the reduction of the valuation, and the valuation reduced by half the amount of the increase of the duty.

Robertson v Assessor for Perth, 1912 S.C. 761; 49 S.L.R. 154; 1911, 2 S.L.T. 460.

(g) Factories and other Industrial Subjects.

(i.) Contractor's Principle.

(334)

Contractor's principle.

The cost of construction should be taken only as a basis for valuation subject to

modification by other considerations, and not as a final test of value.

M'Vitie v Assessor for Edinburgh, 1898, 25 R. 601; 35 S.L.R. 666; 5 S.L.T. 385.

(335)

Contractor's principle — Observations on revenue principle.

In oil works retorts and other apparatus for the treatment of shale and for the refining of crude oil are subject to rapid deterioration, and require to be frequently renewed to keep the works in an efficient state. **Held** that such works, when in the occupation of the owners, should be entered in the valuation roll at the annual rent or value brought out by taking $10\frac{1}{2}$ per cent. on the capital value of the works and adding thereto feu-duty, insurance, and landlord's taxes.

Observed (per Lord Kyllachy) that to fix the rent of ordinary trading or manufacturing premises by reference to the profits of the trade or business would be wrong in principle, but that in a limited class of cases, such as railways, harbours, or waterworks, where there was a monopoly or quasi-monopoly, the returns or profits might reasonably be treated as really revenue from the heritable subjects, and their valuation fixed accordingly.

Oakbank Oil Co. v Assessor for Midlothian, 1902, 4 F. 520; 39 S.L.R. 581; 9 S.L.T. 471.

(336)

—New factory built with special regard to comfort and welfare of employees — Rate of interest on unremunerative portion of expenditure.

A firm of manufacturers erected a new factory in the neighbourhood of Glasgow upon enlightened and modern lines. Its equipment and accommodation were superior to the standards required by the Factory Acts, and in addition it contained, on a generous scale, accommodation for the rest, recreation, and refreshment of the employees.

Held (1) that, in the absence of any other factory built upon a similar plan which might have been used for the purpose of comparison, the factory had been rightly valued upon the "contractor's principle"; but (2) that, although such items of the expenditure as had been incurred in raising the factory above the standard of an ordinary well-equipped factory could not be regarded as wholly unremunerative, a lower rate (in the circumstances of the case approximately one-half) ought to be charged upon these items.

Wallace, Scott & Co. v Assessor for Glasgow, 1916 S.C. 670; 53 S.L.R. 484; 1916, 1 S.L.T. 70.

(337)

—Grain mill.

Held that the value of a grain mill was rightly entered in the valuation roll at $8\frac{1}{2}$ per cent. on the price.

Thomson, 1871, 11 M. 984; 44 J. 431; 9 S.L.R. 444.

(338)

—Profits of business—Paper mills—Revaluation.

A large paper mill in Fife had appeared in the valuation roll at the same yearly rent or value from 1911 to 1920, although during that period extensive additions had been made to the buildings and machinery. The subjects had last been valued as a whole in 1884, and between that date and 1911 the valuation had been increased from time to time on the basis of the cost of additions and improvements made upon the subjects. In 1920 no paper mill in Scotland was the subject of a lease; and the other paper mills in Fife had likewise not been revalued for a long period of years. **Held** (1) that in making up the roll for the year 1920-1921 the assessor was justified in revaluing the whole subjects, including the machinery, *de novo*; (2) that, as comparison with the rentals of other paper mills was impossible, and comparison with the existing valuations of similar mills was useless in the circumstances, the contractor's principle fell to be applied; and the valuation fixed at a figure representing 6 per cent. upon the capital value of the buildings, and $7\frac{1}{2}$ per cent. on the capital value of the machinery, as ascertained at pre-war rates and prices. **Opinion** (per Lord Hunter) that, where comparison with the rents obtained from similar subjects was impossible and the valuation proceeded upon the contractor's principle, profits, as affecting the rent obtainable from a hypothetical tenant, were an element which might legitimately be taken into account in fixing the valuation. **Opinion contra** (per Lord Salvesen), except in a case where the main profits of the business depended upon the situation and character of the heritable subjects.

Guardbridge Paper Co. v Assessor for Fife, 1921 S.C. 634; 58 S.L.R. 425; 1921, 1 S.L.T. 360.

(339)

—Revaluation—Steel works—Collapse of trade consequent on war—Reduction granted on ascertained values.

In making up the valuation roll for the year 1921-22 the assessor for Lanarkshire made a complete revaluation of the steel, bar-iron, and sheet works in the county, none of which had been subjected to a complete detailed valuation since 1901, the values of the individual works having been merely varied from year to year as the subjects were added to or altered. All of these works being occupied by the owners, and there being no example in Scotland of any such works being let to a tenant, the assessor, following the principles laid down in *Guardbridge Paper Co. v Assessor for Fife*, 1921 S.C. 634, proceeded upon the contractor's principle, applying pre-war rates and prices. As a result of the revaluation the works were entered in the roll for the year 1921-1922 at approximately three times the value at which they had hitherto been entered. **Held** (1) that the assessor was justified in making a revaluation of the whole subjects, and that the principle upon which

he had proceeded and the method of its application were correct; but (2) that the valuation committee were justified in reducing the figures at which he had arrived by 30 per cent., it having been established that, as a result of the abnormal conditions produced by the war, the steel and iron industries were, owing to over-capitalisation and increased competition at home and abroad, suffering from a collapse of trade which must inevitably continue for a prolonged period. The case of a merely temporary depression in an industry distinguished.

Colville & Sons v Assessor for Lanarkshire, 1922 S.C. 460; 59 S.L.R. 347; 1922 S.L.T. 294.

(340)

—Flax mill.

Valuation of several flax-spinning mills in Arbroath, in the occupation of their owners, which had been reached by taking $7\frac{1}{2}$ per cent. on the capital value of the buildings (as ascertained on the basis of a rate of from 1d. to 2d. per cubic foot of the contents), and on the capital value of the heritable machinery—sustained.

Webster & Sons v Assessor for Arbroath, 1902, 4 F. 539; 39 S.L.R. 578; 9 S.L.T. 445.

(341)

—Linen manufactory—Value of buildings and steam-power.

Valuation on the basis of 5 per cent. on the cost price and steam-power, the latter being capitalised at £45 per horse-power. *Shields*, 1875, 4 R. 1146.

(ii.) Comparison with Similar Subjects.

(342)

Comparison with similar subjects.

Circumstances in which the Valuation Appeal Judges refused to interfere with the valuation of a distillery in the hands of its proprietors, which had been reached by comparison with the valuations of other distilleries in the country.

Observations (per Lord Fraser) on the modes of valuing manufactories in the occupation of the proprietor.

Assessor for Argyllshire v Islay Distillery Co., 1884, 11 R. 841; 21 S.L.R. 563.

(343)

—Recent sales of similar property in vicinity.

In fixing the capital value of spinning mills, in the occupation of their owners, as the basis for reaching the yearly rent or value of the mills, it is legitimate to take into consideration the prices obtained at a number of recent sales of these and similar mills in the same town.

Webster & Sons v Assessor for Arbroath, 1908 S.C. 613; 45 S.L.R. 508; 15 S.L.T. 996.

(344)

Two mills, one empty, the other with machinery in it, but not going.

Two cotton mills were entered, the one at £90, and the other at £800. The

machinery, &c., were removed from the former. When worked it was entered at £120. The appellant contended that, as the mill at present consisted only of bare walls, £20 was the full annual value. The other mill contained the whole machinery, a man being employed to oil and keep it, as far as possible, from deteriorating. It could be set in motion at any time. £800 was the sum at which it had stood while being worked. The appellant stated the mill could not now be worked to profit, as the machinery wanted the modern improvements, and for other reasons, and that attempts had been made to sell or let it without success. He contended that it should be valued as a storehouse for machinery, and that £80 would be a full value as such. The commissioners refused the appeal as regarded the first-mentioned mill, and reduced the other to £400, as fair and reasonable in the whole circumstances. Both parties appealed. **Held** that the commissioners were right.

Barbour, 1878, 9 R. 1236.

(345)

Recent sale of subjects.

In the case of a flax mill which in the previous year had been sold privately at the upset price after being thrice exposed to public sale, **held** that the value to be entered was $7\frac{1}{2}$ per cent. on the price paid for the subjects (deducting the value of the moveable machinery) plus the feu-duty.

Andrew Lowson, Limited v Assessor for Arbroath, 1901, 3 F. 466; 38 S.L.R. 496; 8 S.L.T. 470.

(346)

Forced sale—Price obtained on test of market value—Valuation based on capacity of machinery—Local knowledge.

After a mill had been exposed four times unsuccessfully for sale, it was sold by private bargain by a trustee for creditors at a much reduced figure. **Held** that the price so obtained could not be taken as the basis of valuation upon which to assess the true yearly value, and valuation for one year fixed at a figure arrived at by taking £1 per loom as the yearly value.

Craiks, Limited v Assessor for Forfar, 1909 S.C. 658; 46 S.L.R. 438; 1909, 1 S.L.T. 269.

(iii.) Output Basis.

(347)

Output.

Held that in the case of distilleries occupied by their owners it is a lawful mode of ascertaining the annual value to fix a rate per bushel of mashing capacity.

Sheriff v Assessor for Argyllshire, 1885, 12 R. 919; 22 S.L.R. 608.

(348)

The valuation of a distillery was appealed against on the ground that a comparison of its output with that of other distilleries formed the proper basis of valuation, and that upon that basis it had been overvalued.

Held that the output was not a proper basis of valuation, and appeal dismissed.

North British Distillery Co. v Assessor for Edinburgh, 1890, 17 R. 845; 27 S.L.R. 617.

(349)

Probable rent.

Held that a paper mill in possession of the proprietor should be valued at the probable rent, and not exclusively according to either output or cost of erection.

Annandale & Son, 1867, 11 M. 977.

(iv.) Miscellaneous Questions.

(350)

Increased licence duty—Distillery.

Where a distillery company's premises had been entered in the valuation roll at the same figure as in previous years, although the Finance (1909-10) Act, 1910, had largely increased the licence duty payable by the company, **held**, upon appeal by the company, that the increased licence duty did not fall to be taken into account in valuing the subjects, the circumstances of a distillery being different from those of public-house premises.

North British Distillery Co. v Assessor for Edinburgh, 1911 S.C. 927; 48 S.L.R. 365; 1911, 1 S.L.T. 144.

(351)

Compulsory stoppage of manufacture—Distillery—War.

Distilleries, occupied by the proprietors, were entered in the valuation roll for the year ending Whitsunday, 1919, at the yearly rents or values at which they had been assessed since 1910, and which were based upon their productive capacities. The proprietors appealed, and claimed a two-thirds reduction, on the ground that the Government had, for the present, imposed a total prohibition upon distilling. Most of the distilleries held large stocks of whisky, which had greatly increased in value. No accounts of profits or losses were produced by the appellants. The valuation committee dismissed the appeals, on the ground that the appellants had failed to establish that the temporary stoppage of distilling had reduced the amounts for which, one year with another, the distilleries might be reasonably expected to let. **Held** that the decision of the committee was right.

Bulloch, Lade & Co. v Assessor for Argyllshire, 1919 S.C. 478; 56 S.L.R. 119; 1919, 1 S.L.T. 56.

(352)

Floor area.

An assessor valued the buildings of a paper mill at a uniform rate per square yard of floor space. **Held** in an appeal by the proprietor, that, as he did not propose to give information as to the profits of his business, but merely stated the alternative of valuation by cost of construction, the assessor's valuation was right.

Cowan & Sons v Assessor for Midlothian, 1894, 21 R. 812; 31 S.L.R. 733; 2 S.L.T. 48.

(353)

Mill temporarily silent.

The proprietor of a weaving factory kept a spinning mill, which formed part of the factory, standing from reasons of temporary expediency, and made no attempt to obtain a return from the mill by letting it, or otherwise. **Held** that it was properly entered in the valuation roll by the assessor at its full yearly value as a going mill.

Fraser & Sons v Assessor for Arbroath, 1889, 16 R. 796; 26 S.L.R. 545.

(354)

Factory not fully completed.

Where a chocolate factory was almost completed, but could have been let in its incomplete state, the assessor valued the premises as a completed factory. **Held**, on appeal by the proprietor, that the valuation of the assessor was wrong, and that the factory fell to be entered at the rent it would probably fetch in its incomplete condition.

Schulze v Assessor for Edinburgh, 1910 S.C. 804; 47 S.L.R. 376; 1910, 1 S.L.T. 159, No. 412, infra.

(355)

Necessity for revaluation—Depreciation—Additions to plant—Act 1902, sec. 1.

Oil works for the distillation of shale oil, belonging to and in the occupation of an oil company, were for the year 1901-2 directed by the Valuation Appeal Judges to be entered at the yearly value of £4264. This sum was reached by taking 10½ per cent. on the capital value of the works and adding thereto feu-duty, insurance, and landlord's taxes. The 10½ per cent. consisted of 4½ per cent. as reasonable interest on the capital value and 6 per cent. as being the average sum which the owners, if the works were let, would require to spend annually in order to fulfil the landlord's obligation to keep the works in an efficient state of renewal, such works being subject to rapid deterioration. In 1904 the company added largely to the number of the retorts in their works, and the assessor in consequence raised the valuation to £6700. The assessor reached this sum by taking the value as fixed for 1901-2 by the judges, and adding thereto a sum to cover the value of the new retorts. The company appealed, and maintained that the value should be £3000, in respect (a) that the original works having depreciated in value they ought to be re-valued; (b) that the assessor had much over-estimated the value of the new retorts; and (c) that portions of the plant included in the valuation fell to be excluded under the Lands Valuation (Scotland) Amendment Act, 1902. The valuation committee adopted the principle on which the assessor had proceeded, but reduced the valuation to £5800. The committee found that the works had been kept in a not less efficient state than they were in 1901. In an appeal by the company the judges **held** that the valuation committee were right, in respect that the original works having been kept in

an efficient state of renewal, there was no necessity for a revaluation; that the sum fixed by the committee as the value of the new retorts was reasonable; and that there was not sufficient evidence to show what, if any, portions of the works fell to be excluded under the Act of 1902.

Pumpherson Oil Co. v Assessor for Linlithgowshire, 1905, 7 F. 438; 42 S.L.R. 505; 12 S.L.T. 851.

(356)

Discretion—Annual cost of water supply—Paper mill.

Paper mills, in the occupation of the owners, were entered at an annual value reached by taking a percentage on the capital value. The owners claimed to deduct £150, being the rent which they paid under a lease with a neighbouring proprietor for their water supply. **Held** that the owners were not entitled to the deduction claimed.

James Alexander Weir, Limited v Assessor for Clackmannanshire, 1901, 4 F. 513; 38 S.L.R. 853.

See also *Fleming, Reid & Co. v Assessor for Greenock*, 1884, 11 R. 857; 21 S.L.R. 594, No. 172, *supra*.

(h) Asylums and Hospitals.

(357)

Lunatic asylum—Principle of valuation—Valuation fixed on the basis of £4 per bed—Valuation based on accommodation.

Barony Parochial Board, 1877, 4 R. 1149.

(358)

Asylum established by private mortified funds, and managed with the object of making it merely self-supporting, but not to return a profit—Valuation fixed by comparison with the accommodation in similar institutions elsewhere.

Directors of Murray's Royal Lunatic Asylum, 1875, 4 R. 1145.

(359)

Valuation on basis of number of beds.

A valuation committee in valuing an asylum in a burgh took £900 to be the value of the asylum and certain outbuildings. They reached this value having regard to the normal accommodation of 224 beds, and the value of £4 per bed, such value appearing to the committee to be in no way out of proportion to the capital expenditure on the asylum, including outbuildings. The outbuildings being separately entered at £120, the committee deducted that sum from the £900, and entered the asylum at £780. During the year of valuation the accommodation of the asylum had been temporarily increased to 276 beds by converting the chapel into a dormitory. The burgh commissioners appealed against the entry, maintaining that the valuation ought to be £1600, on the basis of the actual bed accommodation, including that in the chapel, and that the whole value reached on that basis ought to be taken as

the value of the asylum proper. **Held** that no ground had been shown for increasing the valuation.

Melrose Burgh Commissioners v Roxburgh, Berwick, and Selkirk District Lunacy Board, 1898, 25 R. 586; 35 S.L.R. 662.

(360)

Contractor's principle—Accommodation—Floorage.

In fixing the valuation of an asylum for pauper lunatics recently completed according to the best principles of construction, a county valuation committee took into account, on the one hand, the character of the building as shown by the structural cost, the dormitory accommodation, and the floor space; while on the other hand, they had regard to the fact that the administrative block of buildings had been built on a larger scale than was necessary for the present dormitory accommodation with a view to the future extension of the dormitory accommodation. In an appeal, **held**, rejecting the view that dormitory accommodation was to be taken as sole guide, that these elements were all proper considerations in arriving at the rent which such an establishment might be expected to bring if let from year to year, and appeal refused.

Govan District Lunacy Board v Assessor for Renfrewshire, 1899, 1 F. 591; 36 S.L.R. 603.

(361)

Asylum built on "segregate" or "villa" system—Contractor's principle—Accommodation.

A pauper lunatic asylum was constructed on a new system called the "segregate" system, i.e., the asylum consisted of a number of separate villas or residences. The assessor entered the asylum in the valuation roll for the year ending Whitsunday, 1907, at the yearly rent or value of £3250. The valuation committee sustained the assessor's valuation. **Held** that the committee were wrong, and that the valuation should be £2400, which was approximately £5 per bed, or 2 per cent. on the cost of construction, £5 per bed being a fair rate, keeping in view that, owing to the system of construction adopted, a rent higher than in the case of an asylum constructed on an older system might reasonably be expected.

Aberdeen District Lunacy Board v Assessor for Aberdeenshire, 1907 S.C. 737; 44 S.L.R. 429; 14 S.L.T. 792.

(362)

Sanatorium — Contractor's principle — Revenue principle.

A sanatorium for the treatment of pulmonary diseases was erected in 1901, and was sold to a company for £53,000. The assessor entered the sanatorium at the yearly value of £1300, proceeding either on the principle of taking a percentage on the cost of construction, or on the principle of taking the profits earned by the company, as the basis of valuation—the two methods in the particular case bringing out substantially the same result. The company appealed, and maintained that

the value should be reached by comparison with other sanatoria and with hydropathics, and should be £500. The judges **held** that, having regard to all the circumstances, the valuation should be reduced to £800.

Nordrach-on-Des Sanatorium v Assessor for Kincardineshire, 1905, 7 F. 419; 42 S.L.R. 503; 13 S.L.T. 23.

(363)

Convalescent home—Valuation per bed or at a percentage on cost of erection.

A convalescent home was erected on ground held under a feu disposition containing conditions which precluded it from being let to a tenant or used for any other purpose than the erection thereon and maintenance of a home for the convalescent poor. The home, as originally erected, cost £3000, and was capable of accommodating sixty-four patients; and it was entered in the valuation roll for over twenty years at the annual value of £120, which was at the rate of about £2 per bed, or of 4 per cent. on the cost of erection. In 1904 additional accommodation was provided, at a cost of £750, for seven additional patients, and the assessor increased the annual value from £120 to £150, or at the rate of £2 2s. per bed, or a little over 4 per cent. upon the cost of erection. The proprietors appealed, and maintained that, in view of the restrictions, and in the whole circumstances, the valuation should be £80. The valuation committee, with personal knowledge of the buildings, reduced the valuation to £140. **Held** that the restrictions were to be disregarded in ascertaining the annual value, and that the valuation committee had rightly valued the subjects at £140.

Glasgow Abstiners' Union v Assessor for Argyleshire, 1906, 8 F. 500; 43 S.L.R. 326; 13 S.L.T. 765.

See also *Glasgow Association for the Relief of Incurables v Assessor for Dumbartonshire*, 1907 S.C. 769; 44 S.L.R. 441; 14 S.L.T. 878, No. 164, *supra*.

(i) Cemeteries.

(364)

Hypothetical rent.

A cemetery company bought land which they laid out as a burial-ground. They derived an annual income from giving off lots for burial purposes, the right of the allottees being one of perpetual use. **Held** that the valuation of the land ought to be based upon the rent at which in its actual state it might be expected to let to a tenant to be used by him as it had been used by the company, and not at its agricultural value.

Craigton Cemetery Co. v Assessor for Lower Ward of Lanarkshire, 1889, 16 R. 802; 26 S.L.R. 527.

(365)

Revenue principle.

Held that one-half of the net profits of a cemetery company was a reasonable sum to take as representing the annual value of the

land belonging to the company and used as a cemetery.

Aberdeen Cemetery Co. v Assessor for Aberdeen, 1891, 18 R. 936; 28 S.L.R. 619.

(366)

Cemetery owned by public authority for discharge of statutory duty—Subjects not in fact yielding profit—Burial Grounds (Scotland) Act, 1855.

A cemetery was owned and carried on by the magistrates of a city in fulfilment of a statutory duty imposed by the Burial Grounds (Scotland) Act, 1855. Under statute they had power to sell lairs and to receive fees in respect of interments, but the expenditure on the cemetery, as a rule, exceeded the income. **Held** that the cemetery had an annual lettable value in respect that the possession of it enabled the magistrates to discharge a statutory duty, and accordingly that it fell to be entered in the roll at that value and not at a merely nominal figure.

Edinburgh Parish Council v Edinburgh Magistrates, 1912 S.C. 793; 49 S.L.R. 307; 1912, 1 S.L.T. 129.

(j) Harbours and Piers.

(367)

Revenue principle.

The value of a harbour fixed at the gross revenue, less 20 per cent. for collection and maintenance, and 20 per cent. for tenants' profits.

Clyde Navigation Trustees, 1868, 11 M. 979.

(368)

Allowance for tenants' profits—Interest upon mortgages.

The trustees of a harbour, which under its statute could not be let for profit, were entered in the roll at a sum which was made up by taking the gross revenue, and deducting therefrom taxes and current expenses, and expenses of management. The trustees claimed that in addition interest on the mortgages over the harbour and 20 per cent. on the balance for tenants' profits should be allowed. **Held** that the entry was right.

Kirkwall Harbour Trustees, 1881, 9 R. 1243.

(369)

Deductions—Tenants' profits.

The trustees of Ayr harbour were 'by statute empowered to administer the harbour, and to levy rates upon vessels and cargoes using the harbour, and were bound to apply the revenue derived from the rates, (1) in payment of costs of management and maintenance; (2) in payment of interest on borrowed money; (3) in prescribed payments to a sinking fund; and (4) the surplus, if any, in paying off borrowed money, or in improving or otherwise for the benefit of the undertaking. The assessor, in estimating the annual value of the harbour for the valuation roll, deducted from the gross revenue derived from the harbour rates the charges and expenses necessary to earn that revenue, including interest on moveable

plant and floating capital, together with the expenses of collection and management. The trustees maintained that they were entitled to a further deduction in name of tenants' profits. **Held** that as the whole surplus revenue was devoted by statute to other purposes, there could be no tenants' profits.

Ayr Harbour Trustees v Assessor for Ayr, 1894, 21 R. 807; 31 S.L.R. 726; 2 S.L.T. 47.

(370)

—Deductions — Waterway — Whether part of dues to be deducted in respect of waterway.

Harbour trustees claimed a deduction from the valuation of a harbour, in respect that part of the dues received were received in respect of an incorporeal right of waterway. The Court, without expressing any opinion as to whether a deduction ought to be made from the valuation of a harbour, refused any deduction in the present case, in respect the case did not furnish any materials for deciding what proportion of the gross harbour dues should be deducted, assuming that the deduction fell to be made.

Inspector of Poor for Dundonald v Irvine Harbour Trustees, 1893, 30 S.L.R. 660; 1 S.L.T. 31.

(371)

—Deductions — Waterway—Proportion of dues to be deducted in respect of waterway.

In 1866 the Valuation Appeal Court held that the waterway of the river Clyde was not an assessable subject, and that in respect thereof one-third of the harbour dues fell to be excluded from the valuation applicable to the two lower stages of the river, and one-third of the remainder of the dues from the valuation applicable to the remaining or uppermost stage. In a question raised in the Valuation Appeal Court in 1910, **held** (1) that with regard to the uppermost stage, in view of a material change of circumstances in an increased area of the waterway having been converted into harbour works, the former deduction for waterway of 33½ per cent. had become inequitable and should be reduced to 15 per cent.; (2) that as regards the two lower stages no sufficient cause had been shown for altering the proportion of dues deducted.

Clyde Navigation Trustees v Assessor for Lanarkshire, 1910 S.C. 840; 47 S.L.R. 384; 1910, 1 S.L.T. 265.

(372)

Revenue—Sum paid by tenant as penalty for failure to implement condition of lease.

The commissioners of a harbour leased a portion of the subjects belonging to them under a condition that, if the lessees had not, by a certain date, formed a company for the purpose of constructing a graving dock thereon, the lease should be null and void, and the lessees should forfeit a certain sum to the lessors. The lessees failed to form the company, and paid the forfeit.

Held that the assessor, in determining the yearly value of the harbour undertaking for the following year upon the revenue principle, was not entitled to include in revenue the sum paid as forfeit to the harbour commissioners.

Burntisland Harbour Commissioners v Assessor for Burntisland, 1913 S.C. 697; 50 S.L.R. 91; 1912, 2 S.L.T. 386.

(373)

—Statutory restrictions as to application of revenue—Profit-earning—Deductions—Tenant's floating capital — Leith Harbour and Docks Act, 1892, sec. 80.

The commissioners of the harbour and docks of Leith were the proprietors and occupiers of Leith harbour and docks. By their private Act the commissioners were empowered to levy dock rates on shipping up to certain prescribed limits, and the revenue so obtained was directed to be applied, after payment of the expense of maintaining the harbour and docks "in or towards the expense of executing further improvements on or additions to and extensions of the harbour and docks, and works connected therewith." The rates actually levied were much below the statutory limits, but were in excess of the cost of maintenance. In valuing the undertaking the assessor proceeded according to the "revenue" method. **Held** that the undertaking was to be valued as a profit-earning subject; that consequently the only expenditure to be deducted from the gross revenue was tenant's expenditure; but that a sum in name of tenant's profits ought also to be deducted. **Held** that in the circumstances the sum allowed by the magistrates as tenant's profits, viz., 10 per cent. on tenant's capital, was fair and reasonable.

The commissioners claimed that the whole expense of dredging the harbour and docks ought to be deducted from the gross revenue. The magistrates, being of opinion that the expense of dredging the waterways and accesses to the docks was landlord's expenditure, held that only the expense of dredging inside the docks was to be deducted. The magistrates further allowed as deductions 60 per cent. of the expenses of management and half of the expenses of an inquiry by the Home Office with a view to regulations as to loading. The commissioners maintained that 80 per cent. of the expenses of management and a larger proportion of the expenses of the inquiry ought to be deducted. The magistrates further fixed the tenant's floating capital at one-third of the tenant's expenditure. The commissioners maintained that two-thirds ought to be taken. **Held** that there was no ground for altering the determination of the magistrates on any of these points.

Leith Docks Commissioners v Assessor for Leith, 1907 S.C. 751; 44 S.L.R. 444; 14 S.L.T. 930.

(374)

—Profit-earning undertaking — Statutory restrictions on appropriation of profits—

Clyde Navigation Acts—Deductions—Dredging.

Under their private Act the Clyde Navigation Trustees may make profits, though they are restricted in the application thereof. Out of profits they have not only expended on their undertaking much more than has been raised as capital, but have also made payments into a sinking fund and a reserve fund. **Held** (1) that the undertaking fell to be treated as profit-earning, and (2) that a deduction in respect of tenants' profits, being the proportion of expenditure applicable to a tenant, ought to be allowed, which allowance, quoad dredging, was fairly represented by a deduction of the cost of dredging the river for 75 feet out from the quays.

Clyde Navigation Trustees v Assessor for Lanarkshire, 1910 S.C. 840; 47 S.L.R. 384; 1910, 1 S.L.T. 265.

(375)

Contractor's principle.

In 1863 it was held by the Court of Session that the Clyde Navigation Trustees were not assessable as proprietors of the waterways of the port and harbour of Glasgow, the incorporeal right of harbour not being vested in them, and that they were assessable only as proprietors of the wharfs, quays, and other structures in the harbour. In 1866 the Valuation Appeal Judges in fixing the yearly value of the undertaking of the Clyde Trustees gave effect to the judgment of the Court of Session by deducting from the dues payable to the trustees a proportion as being applicable to the waterways of the port and harbour. The undertaking continued to be valued on that basis for more than forty years. In 1908 the assessor for Lanarkshire proposed to value the portion of the undertaking within the county either (a) on the basis of taking into account the whole or a much larger proportion of the dues paid to the trustees, or (b) on the "contractor's" principle, i.e., by taking a percentage on the structural cost of the quays, &c. **Held** (a) that there was no such change of circumstances as to warrant a change in the method of dealing with the dues, and (b) that the contractor's method was inapplicable.

Assessor for Lanarkshire v Clyde Navigation Trustees, 1908 S.C. 620; 45 S.L.R. 501; 15 S.L.T. 970.

(376)

Contractor's principle—Harbour and docks undertaking—Undertaking habitually valued at revenue of preceding year—Proposed change of method where preceding year showed no revenue.

A harbour and docks belonging to commissioners were for over thirty years valued by the assessor upon the revenue principle, by entering the value of the subjects each year at a figure equal to the net revenue of the undertaking for the preceding year. In valuing the subjects for the year 1920-21 the assessor found that, during the preceding year, the undertaking had been carried on

at a loss. He, however, refused to enter the subjects at a value of nil, but entered them at a substantial figure, which he sought to justify by an application of the contractor's principle, or, alternatively, by an application of the revenue principle, taking as his basis, not the net revenue of the preceding year, but the average net revenue of a number of years. **Held** (1) that the revenue principle was the proper method of valuation for such subjects; (2) that the assessor was not entitled to depart from his former method of ascertaining the revenue from the net revenue of the preceding year; and, accordingly, that the subjects fell to be entered in the roll at a value of nil.

Burntisland Harbour Commissioners v Assessor for Burntisland, 1921 S.C. 609; 58 S.L.R. 294; 1921, 1 S.L.T. 263.

(377)

Pier with refreshment bar.

The proprietors of a pier, which had upon it a saloon, stage, refreshment bar, and cafe, objected to the subjects being entered in the valuation roll at a value above £40 per annum, and produced to the valuation committee profit and loss accounts for the two preceding years, showing that no profit had been realised. For many years the valuation had stood at £250, a sum originally fixed as being the average rent for which the pier had been previously let for sixteen years, and as being also rather less than $7\frac{1}{2}$ per cent. on the cost of construction. The pier had been unlet for some years. The magistrates having found that it was a lettable subject, and having fixed the valuation at £200, the Court on appeal affirmed the valuation, holding that the mere fact that the profits for two years had been much below that sum was insufficient to show that the magistrates' valuation was wrong.

Question, whether the proper mode of valuing such a pier was not by profits.

Galloway Saloon Steam Packet Co. v Assessor for Portobello, 1895, 22 R. 584; 32 S.L.R. 427; 2 S.L.T. 569.

(378)

Private pier—Deductions for non-heritable subjects—Carting business—Tenants' profits.

Where a private pier was in the possession of its proprietors, **held** (1) that sums received by the proprietors for carting goods to and off the pier, and commission received from railway companies and steamboat proprietors for collecting freights and selling tickets, did not fall to be reckoned as revenue derived from the pier; and (2) that 20 per cent. on the net revenue from the pier was to be regarded as tenants' profits, to be deducted in estimating its value as a heritable subject.

Hunter's Trustees v Assessor for Argyllshire, 1882, 10 R. 36; 20 S.L.R. 435.

(379)

A private pier was entered in the valuation roll on the principle of taking as the value the difference between income and expenditure, deducting also 20 per cent.

for tenants' profits. As part of the income the assessor included "dues on carts using the pier, £156 10s. 0d." The assessor's valuation was, on appeal, confirmed by the valuation committee, who granted a case. From the case it appeared that the proprietors of the pier carried on the business of carting, and had under their bye-laws the exclusive right of bringing carts with horses upon the pier; that the public generally might, and, in point of fact, frequently did, bring upon the pier, for the purpose of removing goods, carts without horses, and other vehicles; and that no charge was in fact made for this use of the pier. The assessor contended that, in these circumstances, the proprietors had such a practical monopoly of the carting business attached to the pier that the revenue which they might exact from other persons sending carts on to the pier (which he estimated at £156 10s.) ought to be taken into account in assessing the value of the pier. **Held** that the valuation committee were wrong, and that the valuation of the pier ought to be reduced by £156 10s.

Hunter's Trustees v Assessor for Argyllshire, 1883, 10 R. 666; 20 S.L.R. 435.

(k) Gas and Electric Light Undertakings.

(380)

Revenue principle—Statutory gasworks—Non-profit-earning undertaking—Tenants' profits—Repairs and replacements—Floating capital.

The commissioners administering the Dundee gasworks were constituted by statutes, under which they were required to fix the price of gas &c. for the year, so that the revenue for the year should, as nearly as possible, meet the expenditure. There was to be a sinking fund, and also a contingent fund, to meet risks and losses by fire, &c., and for permanent additions and improvements. The assessor entered the total valuation at £14,907 11s. 8d. This was arrived at by taking the revenue of the previous year, not including therein meter rents, and deducting the expenditure, exclusive of repairs of buildings and meters, annuities, interest on mortgages and loans, and payments toward the sinking fund and contingent fund; also exclusive of the salaries of the clerk and the auditor, and premiums of insurance to the extent of £100. The magistrates allowed a further deduction of $\frac{4}{4}$ per cent. on the floating capital, £15,000, necessary to carry on the concern (that having ultimately been conceded by the assessor). The judges affirmed the determination of the magistrates, but reserved their opinion as to whether the $\frac{4}{4}$ per cent. on the floating capital had been properly deducted.

Dundee Gas Commissioners, 1881, 9 R. 1240.

(381)

Non-profit-earning undertaking—Deductions—Expenses of management—Edinburgh and Leith Corporations Gas Acts, 1888 to 1902.

Gas commissioners were empowered by

their private Acts to supply gas at a price which would cover expenses, and provide a reserve fund to meet any deficiency of income or extraordinary claims or renewals, but no more. In assessing on the "revenue principle," the assessor allowed as a deduction the share of expenses of management applicable to a tenant, but not that applicable to a landlord. **Held** that the undertaking fell to be valued as a non-profit-earning subject, and that the whole expenses of management ought to be deducted.

Edinburgh and Leith Gas Commissioners v Assessor for Edinburgh, 1909 S.C. 664; 46 S.L.R. 442; 1909, 1 S.L.T. 307.

(382)

Non-profit-earning undertaking—Deductions—Fen-duities—Landlords' taxes.

Held that, in valuing on the "revenue principle" a gasworks undertaking carried on by statutory commissioners under a prohibition against making profit, although the whole expenses of management fell to be deducted, fen-duities and landlords' taxes could not be deducted.

Edinburgh and Leith Gas Commissioners v Assessor for Edinburgh, 1912 S.C. 790; 49 S.L.R. 311; 1912, 1 S.L.T. 132.

(383)

Non-profit-earning undertaking—Deductions—Income tax.

In valuing upon the revenue principle the non-profit-earning undertaking carried on by statutory gas commissioners, **held** that it was not permissible in ascertaining the revenue to deduct the amount paid as income tax.

Edinburgh and Leith Gas Commissioners v Assessor for Edinburgh, 1916 S.C. 667; 53 S.L.R. 481; 1916, 1 S.L.T. 69.

(384)

Contractor's principle—Gasworks belonging to private company.

In an appeal as to the valuation of gasworks belonging to and in the occupation of a private gas company Lord Lee thought that, except in unusual cases, as where it had been shown that the capital had been unprofitably expended, the annual value of the subjects was to be determined by taking such a percentage on the capital sunk in the heritable property as a prudent speculator would charge against himself before beginning to estimate profits; and Lord Fraser thought that the value was to be taken at the income of the company, under deduction of (1) the annual expenditure; (2) a percentage on capital invested in moveable property; and (3) a sum for tenants' profits, to be estimated at a percentage on the net income after deducting expenditure. The two methods, in the particular case, brought out substantially the same results.

Assessor for Falkirk v Falkirk Gas Co., 1883, 10 R. 651; 20 S.L.R. 427.

(385)

Allowance for tenants' profits.

Gasworks, the property of a gas company, were valued by the assessor on the principle

of taking the cost of the company's works, less an allowance for depreciation, and assessing the annual value at a percentage on the balance. The company maintained that the works ought to be valued on the principle of taking the revenue of the company for their preceding financial year, and deducting therefrom the expenses (excluding capital expenses), and also deducting 5 per cent. on the expenses in name of tenants' profits—the balance being taken as the value of the subjects. The magistrates confirmed the assessor's valuation. The company appealed. The judges being divided in opinion (in accordance with their respective opinions in the Falkirk case, 1883, 10 R. 651), the valuation stood.

Edinburgh Gas Light Co. v Assessor for Leith, 1887, 14 R. 583; 24 S.L.R. 420.

(386)

Allowance for tenants' profits.

Held that the annual value of the works of a gas company had been properly fixed by ascertaining the amount of excess of revenue over working expenses, under deduction of an allowance for tenants' profits.

Kinross and Milnathort Gas Light Co. v Assessor for Kinross-shire, 1890, 17 R. 850; 27 S.L.R. 631.

(387)

Deductions—Income tax—Tenant's capital—Meters—Cooking stoves.

Gasworks belonging to and in the occupation of a private company were entered in the valuation roll at an annual value brought out on the principle of taking the income of the company and deducting (1) the annual expenditure; (2) 5 per cent. on a sum in name of tenant's capital for carrying on the business; and (3) a sum for tenant's profits, estimated at 20 per cent. on the net income after deducting expenditure and the percentage on tenant's capital. Held that the value of gas meters, owned by the company and hired out to customers, was to be regarded as tenant's capital, such meters being necessary for carrying on the business; but (2) that the value of cooking stoves, owned by the company and hired out to customers, was not to be regarded as tenant's capital, the hiring out of cooking stoves being a branch of business which a hypothetical tenant might or might not find it expedient to carry on. Held further, that a deduction from the net income did not fall to be made in respect of income tax on tenant's profits.

Kirkcaldy Gas Light Co. v Assessor for Kirkcaldy, 1905, 7 F. 430; 42 S.L.R. 510; 12 S.L.T. 844.

(388)

Deductions—Tenants' capital—Depreciation.

Where the works of an electric supply company were valued on the revenue principle, held (1) that the expenses of obtaining the company's provisional order and licence, under the Electric Lighting Acts, was not to be included in tenants' capital; and (2) that an overhead rate of 10 per

cent. on tenants' capital fell to be allowed for interest and repairs and depreciation of tenants' machinery.

Coatbridge and Airdrie Electric Supply Co. v Assessor for Coatbridge, 1907 S.C. 780; 44 S.L.R. 454; 14 S.L.T. 937.

(389)

Whether income to be taken on an average of years.

In valuing a gas company's undertaking the assessor adopted the "revenue" principle, and took as the revenue the average income for the preceding five years, in one of which the income was exceptionally large. Held that the assessor had rightly estimated the income by taking an average of years; that five years was a fair period to average; and that the circumstance that the income for one of the five years was exceptionally large was not a ground for treating the case exceptionally.

Melrose Gas Co. v Assessor for Roxburgh-shire, 1908 S.C. 600; 45 S.L.R. 500; 15 S.L.T. 892.

(390)

Whether profits of last year or average of three years to be taken.

Circumstances in which the Court affirmed the valuation of an electric light undertaking based upon the profits of one year. Opinion that assessors, in valuing on the "revenue" or "profits" principle, are not bound to base their valuation on the average profits of a series of years, but may proceed on the profits of the preceding year only.

Arbroath Electric Light and Power Co. v Assessor for Arbroath, 1915 S.C. 816; 52 S.L.R. 252; 1915, 1 S.L.T. 53.

(391)

Deductions—New plant instead of repairs.

A gas company, whose works were valued for assessment on the revenue principle, and who had hitherto been allowed deductions from profits in respect of repairs, erected a new bench of retorts at a cost of £2117, and demolished their existing bench of retorts. The company claimed a deduction of £700, as the proportion of said expenditure which it would have cost to repair the old retorts. Held that the company were not entitled to the deduction claimed.

Bellshill Gas Co. v Assessor for Lanark-shire, 1909 S.C. 652; 46 S.L.R. 432; 1909, 1 S.L.T. 228.

(392)

Electric lighting works belonging to a trading company.

Electric lighting works in a burgh, and mains connected therewith, belonging to a trading company, were valued on the "revenue" or "profits" principle of valuation. The undertaking had been in operation for only two and a half years. Held that the revenue or profits principle was the proper method of valuation.

Hawick Parish Council v Urban Electric Supply Co., 1906, 8 F. 504; 43 S.L.R. 448; 13 S.L.T. 931.

(393)

—Electric light undertaking belonging to municipal corporation—Deductions—Depreciation—Tenant's capital.

The electric light undertaking of the city of Edinburgh was carried on by the corporation under a provisional order. The corporation owned the power stations, the whole machinery and plant therein, and the mains, &c., throughout the burgh. Under the provisional order the corporation were entitled to make profit, subject to certain limitations, and had power, subject to certain conditions, to let or transfer the undertaking. The assessor, proceeding on the "contractor's method," entered the corporation as the proprietors and occupiers of the undertaking at the yearly value of £45,269. Held (1) that the proper method of valuation was the "revenue method"; (2) that an allowance for depreciation of heritable subjects ought not to be made; (3) that interest at 6 per cent. ought to be allowed on tenant's capital partly consisting of floating capital and partly invested in moveable chattels; and (4) that a deduction of 10 per cent. on the balance obtained after deducting expenditure and interest upon tenant's capital from the gross revenue should be allowed for tenant's profits. The valuation was increased to £61,923. **Opinions** that were the undertaking to be valued on the "contractor's method," the value of wayleaves should be included.

Edinburgh Parish Council v Assessor for Edinburgh, 1906, 8 F. 521; 43 S.L.R. 435; 13 S.L.T. 891.

(1) Waterworks and Sewers.

(394)

Revenue principle—Waterworks—Deductions.

Held that public waterworks erected under a statute which conferred powers of assessing for outlay only fell to be valued at the net income, after deduction of the expenses of management and interest on such part of the capital expended as would have had to be provided by a tenant had the subjects been let.

Police Commissioners of Dalbeattie v Assessor for Kirkcudbrightshire, 1882, 10 R. 23; 19 S.L.R. 568.

(395)

—Waterworks yielding no profit—Deductions—Tenant's rates and taxes—Working expenses—Law charges.

Held that in valuing waterworks which belonged to a corporation who were by their statutes debarred from making a profit out of the undertaking, deduction ought to be allowed of (1) a proportion of the rates and taxes paid in respect of the subjects, such proportion being that which would be payable by a tenant; (2) a deduction of working charges, such as salaries of officials, &c., and expenses of maintenance; but (3) that deduction of law and parliamentary charges ought

not be allowed, these being *prima facie* landlord's and not tenant's charges.

Inspector of City Parish of Glasgow v Assessor of Railways and Canals, (O.H.) 1885, 24 S.L.R. 3.

(396)

—Deductions.

Held that waterworks erected by a corporation under a statute which gave powers of assessment to the extent of the annual outlay only, were to be valued, and that the value to be taken was the amount of the rate levied under the statutory power, with deduction of all necessary outlays for management, maintenance and repairs, but without deduction either of the sum of perpetual annuities paid by the corporation to the shareholders of companies whose undertakings they had by this statute acquired, or of a sum apportioned to a sinking fund for discharge of debt.

Magistrates of Glasgow, (O.H.) 1884, 12 R. 3; 22 S.L.R. 10.

(397)

—Annual revenue—Interest on structural cost.

Held that, in fixing the yearly rent or value of corporation waterworks for the purpose of the valuation roll, the assessor of railways and canals was not entitled to include in his computation of the yearly revenue of the undertaking a sum representing interest on the structural cost of the works and pipes which had been paid off.

Aberdeen Magistrates v Assessor of Railways and Canals, (O.H.) 1919 S.C. 739; 56 S.L.R. 480; 1919, 2 S.L.T. 33.

(398)

—Unfinished waterworks—Partial supply.

Held that unfinished waterworks did not fall to be entered in the roll, although water was being supplied to a limited extent within the district and charged for, and a public water rate was being levied, the Court being of opinion (1) that the charge for water supplied was not shown to exceed the cost of the necessary connections, and (2) that the public water rate was a contribution towards the cost of construction.

Avondale Parish Council v Middle Ward District Committee of Lanarkshire County Council, 1898, 25 R. 594; 35 S.L.R. 668; 5 S.L.T. 384.

(399)

Public sewer—Burgh sewer passing through adjacent county.

An underground sewer, belonging to and serving a burgh but yielding no profit, was laid for a portion of its length in the adjoining county. Held that the portion so laid fell to be entered in the valuation roll of the county at its fair yearly value, fixed, in the circumstances of the case, at a figure representing 5 per cent. of the cost of construction plus a sum of £50 payable for wayleave.

Magistrates of Dundee v Assessor for Forfarshire, 1912 S.C. 848; 49 S.L.R. 333; 1912, 1 S.L.T. 175.

(400)

Public sewers—Method of valuation—Contractor's principle.

Held that sewers, owned and occupied by a statutory body of commissioners, fell to be entered in the valuation roll at the yearly rent which a hypothetical statutory tenant would give for the sewers; and that that rent was represented by a sum made up by taking $\frac{3}{4}$ per cent. on their total capital cost, and adding thereto, in addition to landlord's rates and the average annual charge which would fall on a landlord for maintenance, such a percentage on the cost of the sewers (as distinct from land and wayleaves) as, paid annually into a sinking fund, would provide for their complete renewal in 100 years. Held further (1) that, in calculating the capital cost of sewers constructed by the commissioners under their statutory powers, lands purchased by the commissioners were to be taken at the full prices paid, and that there also fell to be included the legal and engineering expenses incurred in acquiring the lands, but not the parliamentary expenses of obtaining the Act, nor sums paid as compensation for disturbance; (2) that the capital cost of existing sewers acquired and utilised by the commissioners was to be taken as the additional sum which would have had to be expended on new sewers by the commissioners had the existing sewers not been available.

Water of Leith Sewerage Commissioners v Assessor for Midlothian; 1914 S.C. 664; 51 S.L.R. 177; 1914, 1 S.L.T. 24.

Assessor for Aberdeen v Magistrates of Aberdeen; Assessor for Lanark v Magistrates of Lanark, 1913 S.C. 712; 50 S.L.R. 244; 1913, 1 S.L.T. 38, No. 94, supra.

Inveresk Paper Co. v Assessor for Musselburgh, 1907 S.C. 747; 44 S.L.R. 433; 14 S.L.T. 790, No. 96, supra.

(m) Public Parks.

(401)

Hypothetical rent — Deduction for servitudes.

Where a municipal corporation allows land held by it to be used for public recreation, it should be entered in the valuation roll at an annual value equal to the rent which might be obtained if the lands were let and the public excluded, but if the land is held subject to servitudes of way or other restrictions which are binding on the corporation, the land should be valued at the rent which might be obtained for its use subject to these restrictions.

Ferrier v Assessor for Edinburgh, 1892, 19 R. 1074.

See also Carnegie Dunfermline Trustees v Dunfermline Assessor, 1909 S.C. 678; 46 S.L.R. 451; 1909, 1 S.L.T. 286, No. 188, supra.

(402)

—Dedication by statute to public use — Lands yielding no profit.

Held (1) that public parks in Edinburgh and Glasgow dedicated by statute to public use, which yielded no profit, fell to be entered in the valuation roll at a nominal figure; and (2) that the fact that the corporation holding a public park dedicated to public use had power to sell it, when no longer required for this purpose, did not affect its non-rateability so long as it was used as a park.

Parish Council of Edinburgh v Assessor for Edinburgh, 1910 S.C. 823; 47 S.L.R. 414; 1910, 1 S.L.T. 290.

(403)

—Parks owned and regulated by corporation under statutory powers — Lands yielding no profit.

The corporation of Glasgow were empowered by certain statutes to lay out and maintain, on lands already acquired, or to be acquired, by them under the statutes, parks for the use of the public of Glasgow. The statutes, which contained no express dedication of the lands to the use of the public generally or of the public of Glasgow in particular, empowered the corporation to make rules and bye-laws regulating the use of the parks, and also to sell, feu, or lease such portions as they considered unnecessary for the purposes of the Acts. Held that parks, both within and without the limits of the city, owned and maintained by the corporation in terms of these statutes and yielding no profit, fell to be entered in the valuation roll, not at a merely nominal figure, but at the rent which a hypothetical tenant might be expected to give for them in their actual condition, irrespective of any limitations on their use in the hands of their present proprietors. Opinion that the proper entry in the valuation roll under the head "occupier" was "the corporation" and not "the public."

Glasgow Parish Council v Assessor for Glasgow, 1912 S.C. 818; 49 S.L.R. 315; 1912, 1 S.L.T. 157, 171.

(404)

—Land leased by burgh authorities for golf course—Lands yielding no profit.

The magistrates of a burgh, acting under statutory powers, obtained a forty years' lease of a piece of ground outside the burgh at a rent of £523, and laid out and maintained the ground as a golf course for the use of the inhabitants of the burgh. They levied charges for playing golf, but these did not cover the cost of upkeep. Held that the subjects fell to be entered in the valuation roll at their fair annual value, and not at a merely nominal figure. Opinion that the magistrates and not the general public were the "occupiers."

Edinburgh Parish Council v Magistrates of Leith, 1912 S.C. 812; 49 S.L.R. 336; 1912, 1 S.L.T. 173.

(405)

Public buildings in public parks—Art galleries—Museums—Winter palace—Private house in public park—Official residence of superintendent.

Where the public parks of Glasgow were severally entered in the valuation roll at a nominal value of £1 each per annum, as being dedicated by statute to public uses, the assessor included in that nominal value, as adjuncts of the parks in which they were situated, (1) certain municipal museums, art galleries, and a winter palace; (2) a house used as the official residence of the superintendent of all the city parks. Upon a complaint and appeal by the parish councils of Glasgow and Govan, **held** (1) that the museums, art galleries, and winter palace fell to be separately entered at their fair annual value in respect that, though no charges for admission were actually made, the corporation was entitled to levy reasonable charges; (2) that the superintendent's residence did not fall to be separately entered, but was properly to be regarded as a *unum quid* with the park in which it stood, and included in the relative nominal value of £1 per annum.

Parish Council of Glasgow v Assessor for Glasgow, 1911 S.C. 988; 48 S.L.R. 677; 1911, 1 S.L.T. 453.

(n) Subjects Unoccupied, Unfinished, or Unfit for Occupation.

(406)

House unoccupied, and partially unfinished internally.

An unoccupied house was entered at £280. The appellant pleaded it was in an unfinished state. The assessor stated he could not get access to the house, but it had the appearance of being ready for occupation, and was in the roll last year, and it was a common practice to leave the internal decoration of such houses incomplete, to allow the purchaser to exercise his own taste. The commissioners reduced the value to the nominal sum of £20. **Held** that the commissioners were wrong, and the value fixed at £230.

Paterson, 1878, 9 R. 1237.

(407)

Buildings unlet and unfit for occupation.

A piece of ground in the neighbourhood of a large manufacturing town was let to the Crown for ninety-four years, and buildings thereon were occupied as military barracks. On the expiration of this lease the buildings reverted to the proprietor, and were unoccupied. They were entered in the roll at £305, the rent at which they were entered when occupied by the Crown. It was proved that they could not be let without considerable outlay being made to alter their condition. The Court reduced the valuation to £100, consented to by the proprietor.

Observed (per Lord Wellwood) that the valuation might fall to be increased if the proprietor delayed in the future to render the subjects fit for occupation.

Earl of Home v Assessor for Dundee, 1891, 18 R. 934; 28 S.L.R. 827.

(408)

House hitherto let on repairing lease—Tenant's failure to keep subjects in repair—Renunciation of lease—Whether rent under lease still the measure of value.

A house and grounds were let for ten years, the tenant being bound to maintain them in the state in which she received them. During the earlier part of the lease she did so, and executed improvements, but subsequently left the premises and allowed them to fall into disrepair. While the lease had some years to run, the landlord accepted a renunciation thereof, on payment of a sum in respect of his claims for rent and damages for the disrepair, and the premises stood empty. The assessor valued the premises for a year subsequent to the renunciation at the rent in the lease. The landlord appealed, maintaining that the rent at which the premises would let in their actual state was the proper valuation. Lord Lee **held** that the valuation was right in respect of the circumstances attending the renunciation of the lease. Lord Fraser **held** that the valuation should be reduced, on the ground that the rent at which the subjects would let in their present condition was alone conclusive of the valuation. The judges being thus divided in opinion, the valuation stood.

Craufurd v Assessor for Cunningham District of Ayrshire, 1886, 23 S.L.R. 606.

(409)

Vacant workmen's houses.

An oil company having ceased to do business, a range of houses which had been erected for the use of the employees became, with a few exceptions, unoccupied, and from their position it was improbable that they would be again fully let. **Held** that they fell to be valued by taking the actual rent received for the houses which were let, and adding a nominal sum of £1 per house for those which were unlet.

Burntisland Oil Co. v Assessor for Fife, 1895, 23 R. 683; 33 S.L.R. 488; 3 S.L.T. 279.

(410)

Ground belonging to a railway company not yet occupied for the purposes of the undertaking, and not included in the railway assessor's valuation.

A railway company appealed against the entries relating to two pieces of ground acquired by them but not yet occupied for the purposes of their undertaking. The ground was not let to tenants. In the one case the magistrates stated that, from their own knowledge, they were of opinion that the ground might be reasonably expected to let at £153 15s. The appellants maintained that the ground was in its present state unlettable, but no facts were stated in the case to support the contention. Decision of the magistrates affirmed.

In the other case, from evidence led, it appeared that the ground had been recently let in the open market for £16 a year, and there was no counter evidence; but the magistrates affirmed the assessor's valuation of £207 as the fair rent which it might be

expected to fetch. **Held** that the rent of £16 was *prima facie* its true value in its actual state, and that, in the absence of counter evidence, the magistrates were not justified in disregarding it; and valuation reduced to £16.

Glasgow and South-Western Railway Co. v Assessor for Greenock, 1898, 25 R. 1229; 35 S.L.R. 943; 6 S.L.T. 148.

See also Forth Bridge Railway Co. v Assessor for Linlithgowshire, 1888, 15 R. 595; 25 S.L.R. 320, No. 429, *infra*.

(411)

Unfinished waterworks.

A district committee, who were erecting waterworks under statutory authority, had completed several miles of the main pipes of the system, and were supplying water to several hundred houses through connections with their pipes. The water so supplied was not taken from the reservoir authorised by the statute, the reservoir not being finished, but from a temporary source during the pleasure of a riparian proprietor. The district committee made a charge for the water so supplied; and they also levied a public water rate. **Held** that the unfinished waterworks did not fall to be entered in the valuation roll, in respect that the charge made for the water supplied was not shown to exceed the cost of the necessary connections, and that the water rate was a contribution towards the cost of construction.

Avondale Parish Council v Middle Ward District Committee of Lanarkshire County Council, 1898, 25 R. 594; 35 S.L.R. 663; 5 S.L.T. 384.

(412)

Factory not fully completed.

Where a chocolate factory was almost completed, but could have been let in its incomplete state, the assessor valued the premises as a completed factory. **Held**, on an appeal by the proprietor, that the valuation of the assessor was wrong, and that the factory fell to be entered at the rent it would probably fetch in its incomplete condition.

Schulze v Assessor for Edinburgh, 1910 S.C. 804; 47 S.L.R. 376; 1910, 1 S.L.T. 159.

(413)

Buildings unfinished at date of valuation.

Buildings unfinished at the date when the valuation roll is made up do not fall to be entered in the roll, except where in ordinary course they will be completed within the year, in which case it is the duty of the assessor to estimate their rental value for the period during which they will be available for occupation.

Guardbridge Paper Co. v Assessor for Fife, 1921 S.C. 634; 58 S.L.R. 425; 1921, 1 S.L.T. 360.

(414)

Premises unoccupiable owing to closing order—Premises in course of demolition.

Held that premises in a burgh, which at Whitsunday, 1915, could not be occupied

owing to a closing order of the magistrates, and which by September were in course of demolition, and could not reasonably be expected to earn any rent before Whitsunday, 1916, had no value for the year ending Whitsunday, 1916, and fell to be entered in the valuation roll for that year at nil.

Bouik's Trustee v Assessor for Glasgow, 1916 S.C. 686; 53 S.L.R. 490; 1916, 1 S.L.T. 80.

(415)

Houses unfit for occupation—Insanitary houses—Occupiers ordered to quit—Occupiers remaining under Increase of Rent (Restrictions) Acts.

Alexander's Trustees v Assessor for Ayrshire, 1922 S.C. 453; 59 S.L.R. 343; 1922 S.L.T. 275, No. 189, *supra*.

4. ALLOCATION OF VALUE.

(416)

Waterworks in various parishes.

Where waterworks, consisting of piping, reservoirs, &c., for the supply of water for a town, are partly situated within and partly outside the area of distribution and assessment, the proper mode of allocating the annual value of the whole undertaking among the various parishes is to give to each parish the proportion of the total annual value which the structural cost of the works in that parish bears to the total structural cost.

Dundee Water Commissioners v Dundee Road Trustees, &c., 1883, 11 R. 390; 21 S.L.R. 261.

(417)

Held that the total value must be allocated among the different parishes in which the undertaking was situated, according to the proportion which the structural cost of the works, including the cost of the solum, in each parish bore to the structural cost of the whole undertaking.

Magistrates of Glasgow, &c., (O.H.) 1884, 12 R. 3; 22 S.L.R. 10.

(418)

Ferry between two counties.

A ferry between two counties entered in the valuation rolls of both counties, the value being allocated between the two.

Lord Blantyre, 1877, 4 R. 1150.

(419)

Harbour in two parishes—Quayage.

In apportioning the cumulo valuation of a harbour between two parishes within which it was situated, the assessor did so according to the lengths of quayage in the two parishes respectively. One of the parishes maintained that it should be first credited with revenue derived from certain fixed machinery locally situated within its bounds, and that only the remaining revenue should be apportioned according to quayage. **Held** that the harbour fell to be regarded as a unum quid, and that the allocation by quayage was right.

Ayr Harbour Trustees v Assessor for Ayr, 1894, 21 R. 807; 31 S.L.R. 726; 2 S.L.T. 47.

(420)

Mineral field situated partly in county, partly in burgh—Entry in burgh valuation roll—Valuation as between county and burgh—Minerals hitherto worked situated wholly within county—Act 1854, secs. 1 and 42.

A coal company leased the minerals in a portion of an estate. The consideration was a fixed rent of £500, or, in the option of the landlord, certain specified royalties. Part of the minerals included in the lease was within the burgh of Musselburgh, and the remainder was within the county of Midlothian. The part in the county was alone being worked. No part of the minerals in the burgh had hitherto been worked. The assessor for the burgh entered the part of the subjects within the burgh in the burgh roll as of a value (£215) proportional to the surface acreage of the mineral field within the burgh. The assessor for the county entered the full rent of £500 in the county roll, on the ground that the whole of the minerals which had been worked were within the county. The company appealed against the entry of £215 in the burgh roll, and craved that the same should be deleted, or that the valuation should be entered as nil. **Held** that the minerals in the burgh having been let were, although unworked, lands and heritages within the meaning of the Lands Valuation Acts, and that they had rightly been entered in the burgh valuation roll at £215.

Edinburgh Collieries Co. v Assessor for Musselburgh, 1906, 8 F. 484; 43 S.L.R. 307; 13 S.L.T. 763.

(421)

Mineral field situated in two valuation districts.

In an appeal against the valuation of a mineral field, situated partly in one valuation district and partly in another, which was let on a lease providing for a fixed rent with the alternative of royalties, **held** that the equitable rule for apportioning the valuation between the two districts was as follows:—(1) Where the minerals were not being worked—On the basis of the fixed rent, apportioned according to the surface area of the minerals in each district. (2) Where the minerals were being worked—On the basis of the royalties actually earned, apportioned according to the amount earned from the minerals won in each district, with the addition of any sum by which the fixed rent might exceed the total royalties, that sum being apportioned according to surface area.

United Collieries v Assessor for Lanarkshire, 1912 S.C. 800; 49 S.L.R. 301; 1912, 1 S.L.T. 177.

(422)

Gas undertaking in three rating areas—Allocation according to structural cost—Way-leaves for gas mains and pipes.

Where the total valuation of a gas undertaking, extending into three different rating areas, had to be allocated for rating, **held** (1) that it must be allocated according to

the capital cost, and not the value, of the works in each area; and (2) that consequently the value of wayleaves for gas pipes was not to be taken into account in the allocation when no price had been paid therefor.

Edinburgh and Leith Gas Commissioners v Assessor for Edinburgh, 1909 S.C. 664; 46 S.L.R. 442; 1909, 1 S.L.T. 307.

(423)

Sewer between burgh and county.

Inveresk Paper Co. v Assessor for Musselburgh, 1907 S.C. 747; 44 S.L.R. 433; 14 S.L.T. 790, No. 96, supra.

Magistrates of Dundee v Assessor for Forfarshire, 1912 S.C. 848; 49 S.L.R. 333; 1912, 1 S.L.T. 175, No. 399, supra.

(424)

Farm partly within a special water district.

Forbes Irvine v Assessor for Aberdeenshire, 1897, 24 R. 741; 34 S.L.R. 622, No. 153, supra.

(425)

Water for mill obtained from adjacent county—Claim for deduction in county where mill situated.

James Alexander Weir, Limited v Assessor for Clackmannanshire, 1901, 4 F. 513; 38 S.L.R. 853, No. 130, supra.

(426)

Cumulo valuation of railway—Allocation between counties—Act 1854, sec. 22.

County Council of Argyllshire v Assessor of Railways and Canals, (O.H.) 1895, 32 S.L.R. 518, No. 434, infra.

VI. VALUATION OF RAILWAYS AND CANALS.

(427)

Whether assessment should be by assessor of railways or burgh assessor—Portion of line of railway within a police burgh where no separate valuation of that portion.

The commissioners of police of a burgh which had adopted the Police and Improvement Act, 1850, imposed an assessment for the years ending Whitsunday, 1866, 1867, and 1868, upon a portion of a line of railway within the burgh, fixing the value at a proportion of the value appearing in the valuation roll for the parish. No separate valuation of property within such police burghs was required by the Valuation Act, 1854. Objection by the railway company that the assessment was illegal, as the value had not been fixed by the railway assessor in terms of the Valuation Act, repelled.

Templeton v Glasgow and South-Western Railway Co., 1870, 9 M. 57; 43 J. 24; 8 S.L.R. 55.

(428)

Houses occupied by railway employees.

Houses, the property of a railway com-

pany, within the limits of a station but with entrances from a public street in a burgh were occupied by railway employees who paid rents to the company. **Held** that these houses fell to be entered in the valuation roll of the burgh and not in that made up by the assessor of railways, in respect that they did not form part of the undertaking of the railway.

Dundee and Arbroath Joint Line Committee, 1883, 11 R. 396; 21 S.L.R. 540.

(429)

—Lands acquired for purposes of a railway but not yet so used.

In an appeal against a determination of the valuation committee sustaining a valuation by the assessor for the county of certain ground which had been acquired by a railway company (whose line was partly constructed) for the purposes of their undertaking, but which was still in grass and in no way used for these purposes, **held** (per Lord Lee) that the ground had rightly been valued by the county assessor and not by the assessor for railways and canals, notwithstanding a provision of the company's Act of Parliament that the lands from time to time acquired by the company should, "for all purposes of tolls, rates, and charges, and for all other purposes whatsoever, be the undertaking, railway works, and property of the company"; **held** (per Lord Fraser) *contra* that the ground in question ought to have been valued by the assessor for railways and canals as part of the undertaking of the company. The judges being divided in opinion, the valuation stood.

Forth Bridge Railway Co. v Assessor for Linlithgowshire, 1888, 15 R. 595; 25 S.L.R. 320.

(430)

A plot of ground lying within a burgh had been acquired by a railway company, whose Act of Parliament provided that the lands from time to time acquired by the company should, "for all purposes of tolls, rates, and charges, and for all purposes whatsoever, be the undertaking, railway works, and property of the company." Part of the ground had been used in the construction of a railway embankment, the remainder being covered with the debris caused by the formation of the embankment. The burgh assessor included the subjects in his valuation on the ground that they were not "wholly occupied by the railway and works," and that the railway was still unfinished. In an appeal against the determination of the valuation committee sustaining the assessment, the Court **held** that, as the ground in question formed part of the undertaking of a railway company within the meaning of secs. 20 and 21 of the Lands Valuation Act, 1854, the burgh assessor had no duty in regard to it, and that the determination was wrong.

Forth Bridge Railway Co. v Assessor for Queensferry, 1889, 16 R. 797; 26 S.L.R. 533.

(431)

Railway bookstall.

Held that the bookstall in a railway station, in the occupation of newsagents who paid the company a fixed sum annually for the privilege of supplying newspapers and books within the station, but who supplied not only passengers travelling on the railway but inhabitants of the town with newspapers and books, had been properly valued by the assessor of railways and canals as part of the undertaking of the company, and did not fall to be separately entered by the burgh assessor in his roll.

Callander and Oban Railway Co. v Assessor for Oban, 1888, 15 R. 634; 25 S.L.R. 464.

(432)

Tobacco stall in railway station.

A railway company let to a lessee the exclusive right of selling tobacco, cigars and cigarettes at a stall erected by the company in a railway station, reserving to the company the right to remove the stall and terminate the lease "should the site be required for railway purposes." **Held** that the stall was rightly included by the assessor of railways as part of the undertaking of the railway company and did not fall to be separately valued by the burgh assessor.

Glasgow Corporation v North British Railway Co., (O.H.) 1899, 7 S.L.T. 9.

(433)

Foreshore acquired for purposes of railway—Ground lying waste and unoccupied.

Held that certain lands originally foreshore which a railway company had acquired for the purposes of their railway, but not used, and which were lying waste and unoccupied and in a partially reclaimed condition, did not fall to be regarded as part of the undertaking of the company within the meaning of sec. 21 of the Lands Valuation Act.

Magistrates of Greenock v Glasgow and South-Western Railway, (O.H.) 1899, 7 S.L.T. 9.

(434)

Cumulo valuation of whole undertaking—Allocation between counties—Act 1854, sec. 22.

Held that when a railway or canal, constituting a single undertaking for the purpose of assessment, but passing through two or more counties, has no annual value or is worked at a loss, the assessor is not bound to apply the provisions as to allocation of the cumulo valuation between the counties contained in sec. 22 of the Valuation of Lands Act, 1854, although the effect may be, as regards one county, to cancel the loss and bring out a substantial value.

County Council of Argyllshire v Assessor of Railways and Canals, (O.H.) 1895, 32 S.L.R. 518.

(435)

Tramway—Valuation of Lands (Scotland) Amendment Act, 1867, sec. 3.

Held in construing sec. 3 of the Valuation of Lands (Scotland) Amendment Act, 1867

(which deals with the valuation of railways by the assessor of railways and canals), that the word "railway" includes "tramway."

Glasgow Corporation v Assessor of Railways and Canals, (O.H.) 1911 S.C. 1364; 48 S.L.R. 4; 1910, 1 S.L.T. 383.

(436)

————— **Tenant's profits — Percentage on value of plant and stock.**

In an appeal by a tramway company from the valuation put upon their property by the assessor of railways and canals under the valuation statutes on the ground that the principle adopted by the assessor was erroneous, **held** to be a settled rule that the amount of tenant's profits should be estimated at a percentage on the value of plant and rolling stock.

Vale of Clyde Tramway Co. v Munro, (O.H.) 1883, 21 S.L.R. 273.

(437)

Plant and tools—Fixed or attached to lands or heritages.

Held that the annual value of plant and tools not physically fixed or attached to lands or heritages should not enter the valuation roll.

North British Railway Co. v Assessor of Railways and Canals, (O.H.) 1887, 25 S.L.R. 4.

(438)

Deductions — Railway company working lines which do not belong to them.

The ordinary method of fixing the valuation of railways is to take the net revenue of the company, and from that to allow, inter alia, a deduction of 25 per cent. on the value of the rolling stock and plant of the company. In fixing the valuation of a railway belonging to a company which, besides its own lines, worked several other lines belonging to separate companies, the assessor included in the net revenue a sum of £21,000, being the sum received from the other companies for working these lines, but deducted only 5 per cent. on the value of the plant and rolling stock used in working them. **Held** that if the assessor found it necessary, from the way in which the accounts of expenses were stated, to take the revenue of these other lines into account to enable him to value the undertaking of the working company, the deductions to be allowed must be made at rates similar to the deductions allowed in the case of their own lines and rolling stock, and that 18 per cent. ought to have been allowed; but **opinion** that the revenue derived from those other lines ought not to enter the valuation, in respect that it did not represent the rent of heritable property belonging to the company whose undertaking was being valued.

North British Railway Co. v Wallace, &c., (O.H.) 1884, 12 R. 6; 22 S.L.R. 114.

(439)

————— **Materials in store for future use—Act 1867, sec. 3.**

Sec. 3 of the Valuation of Lands Act, 1867,

provides that a deduction shall be allowed of one-half the expenses truly expended in maintaining and repairing the permanent way of a railway. **Held** that this section does not warrant any deduction in the value of rails, chairs, and other materials purchased and kept in store for the purpose of future use in maintaining the permanent way.

North British Railway v Assessor of Railways and Canals, (O.H.) 1884, 22 S.L.R. 114.

(440)

————— **Insurance on goods in transit.**

Circumstances in which a deduction allowed (in respect of previous practice to that effect) from the gross revenue in respect of insurance on goods in transit.

Question, whether the claim was well founded in principle.

North British Railway v Assessor of Railways and Canals, (O.H.) 1884, 22 S.L.R. 114.

(441)

————— **Expense of repairs—Act 1867, sec. 3.**

Held that sec. 3 of the Valuation of Lands Amendment Act, 1867, does not authorise a deduction to be made in fixing the cumulo rent or value of a railway in respect of rails, chairs, &c., purchased by the company, and stored by them for future use in repairing their railway.

North British Railway Co. v Wallace, (O.H.) 1884, 12 R. 6; 22 S.L.R. 114.

(442)

Lands belonging to railway company—Docks—Method of Valuation—Act 1854, sec. 4.

Held that the assessor of railways and canals in valuing the lands and heritages belonging to a railway company in the manner prescribed by sec. 22 of the Lands Valuation (Scotland) Act, 1854, as amended by sec. 4 of the Valuation of Lands (Scotland) Amendment Act, 1867, should treat the entrance channel, sea walls, piers, and jetties connected with docks belonging to the railway company as part of the general undertaking of the railway company, and not as part of the "docks" for which a different method of valuation is provided.

Magistrates of Buckhaven v North British Railway Co., (O.H.) 1915 S.C. 1123; 52 S.L.R. 709; 1915, 1 S.L.T. 454.

(443)

Assessment under special Act or general Act.

In a question as to valuation of the Crinan Canal, **held** that the valuation fell to be made in accordance with the Valuation of Lands Act, 1854, and not under the special Act of 1799.

Commissioners of Supply for Argyllshire v Commissioners of Caledonian Canal, 1872, 10 M. 639; 44 J. 355; 9 S.L.R. 398.

(444)

Special provision as to assessment in Railway Act—Duty of assessor for railways and

canals—West Highland Railway Guarantee Act, 1896, sec. 2.

The West Highland Railway Guarantee Act, 1896, sec. 2 enacts—"The railway shall not be assessed to any local rate at a higher value than that at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway." **Held** that the section gave no warrant to the assessor of railways and canals to value the railway on any other principle than those applicable to railways generally.

West Highland Railway Co. v Assessor of Railways and Canals, (O.H.) 1903, 6 F. 1050; 41 S.L.R. 37.

(445)

Whether "company" includes commissioners—Act 1854, secs. 20 and 21.

Held that the words "canal company" in sec. 21 of the Act of 1854 applied to a body of statutory commissioners who were charged with the administration of a canal when the Act was passed.

Commissioners of the Caledonian Canal v County Councils of Inverness-shire and Argyllshire, 1894, 21 R. 1045; 31 S.L.R. 830; 2 S.L.T. 162.

(446)

Separate canals under same commissioners.

Held that the Caledonian Canal and Crinan Canal form parts of one undertaking, and therefore fall to be assessed by the assessor of railways and canals in terms of sec. 21 of the Lands Valuation (Scotland) Act, 1854.

Commissioners of the Caledonian Canal v County Council of Argyllshire, 1894, 22 R. 149; 32 S.L.R. 108; 2 S.L.T. 349.

(447)

Competency of proof as to value—Jurisdiction of Court of Session—West Highland Railway Guarantee Act, 1896, sec. 2.

The county council and other rating authorities having imposed assessments on the basis of the railway assessor's valuation as shown in the immediately preceding rubric, in an action by the railway company against the county council and the other rating authorities, and also against the county assessor and the assessor of railways and canals, **held** (1) that the railway company was entitled to declarator that the valuation at which the railway had been entered in the railway valuation roll was not the valuation on which the company was liable to be assessed to local rates; (2) that the Court had no jurisdiction to order either the railway assessor or the county assessor to enter any other valuation in their respective valuation rolls; and (3) that the Court had no jurisdiction to ascertain, by proof or otherwise, the valuation on which

the railway company was liable to be assessed in terms of sec. 2 of its Act.

West Highland Railway Co. v County Council of Inverness-shire, 1904, 6 F. 1052; 41 S.L.R. 795; 12 S.L.T. 225.

(448)

Revenue principle—Deductions—Statutory disability to make profit from revenue—Maintenance and management charges.

The commissioners of the Caledonian Canal were under their Acts forbidden to make profit out of the revenue from tolls, dues, &c., levied thereon. **Held**, in a question as to the valuation of the canal, that in fixing the annual value, deduction should be allowed from the gross revenue of all necessary outlays for management, maintenance, and repairs properly chargeable against revenue, and quoad ultra that no deduction should be made.

Caledonian Canal Commissioners v Assessor of Railways and Canals, (O.H.) 1886, 24 S.L.R. 80.

(449)

Deductions from revenue—Landlord's or tenant's charges.

Opinion (by Lord Moncreiff) that in the case of undertakings in which the proprietors are, by the terms of their constitution, prohibited from making profit, the distinction between landlord's and tenant's charges is inapplicable, and that accordingly a deduction must, in the case of such undertakings, be allowed from gross revenue of all necessary outlays for management, maintenance and repairs which are properly chargeable against revenue.

County Council of Argyllshire v Assessor of Railways and Canals, (O.H.) 1895, 32 S.L.R. 518.

For Valuation of Waterworks by the Assessor of Railways and Canals, see V. 3 (2) (1), supra.

VII. VALUED RENT.

(450)

Principle of division of cumulo valued rent.

Held that in dividing a cumulo valued rent the division ought to proceed on the relative value of the several subjects at the date of the original valuation, and that in the case of a railway the best mode of approximating to such relative value was to take the real rent of the land valued as an agricultural subject.

Deeside Railway Co. v Pitfodels Land Co., 1869, 7 M. 1068; 41 J. 602; 6 S.L.R. 703.

VIII. OFFENCES.

[See JUSTICIARY V. 31.]

VALUED RENT. See VALUATION.

VERBAL INJURY. See SLANDER.

VERITAS. See SLANDER.

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I. POSTPONED PAYMENT.

1. PAYMENT AT DIES CERTUS.

(1)

**First term after testator's death—
Direction to pay.**

A testator conveyed his estates in trust for certain purposes and, *inter alia*, "for payment of the legacies and bequests at the first term of Martinmas or Whitsunday that shall happen six months after my decease to the persons afternamed," "viz., to A B the sum of £100," &c. **Held** that the legacies vested a *morte testatoris*.

Hood's Executors, 1869, 7 M. 774; 41 J. 402; 6 S.L.R. 503.

(2)

**First term after death of liferenter—
Direction to pay.**

A testator gave his wife the liferent of his estate. The trust settlement contained the following clause:—"I appoint my trustees to make payment of the legacies following, at the first term of Whitsunday or Martinmas after the death of A B, my spouse, in case she shall happen to survive me," "to W R £100." The truster was survived by his widow and by the legatees. **Held** that the legacies vested a *morte testatoris*.

Rattray's Trustees v Rattray, 1868, 6 M. 476; 40 J. 245; 5 S.L.R. 302.

(3)

A testator directed his trustees to pay certain legacies to named persons at the first term after the death of the survivor of himself and a liferenter. One of the legatees survived the testator but predeceased the liferenter. **Held** that the legacy vested in him a *morte testatoris*.

Hendry's Trustees v Patrick, (O.H.) 1905, 13 S.L.T. 503.

(4)

Legacy payable to A on marriage or death of B.

Held that a legacy directed to be paid to A on the marriage or death of B vests a *morte testatoris*.

Mackintosh v Wood, 1872, 10 M. 933; 44 J. 512; 9 S.L.R. 591.

(5)

Death of liferenter—Direction to divide.

A testator left the liferent of the residue of his estate to his widow, and further directed that on the termination of the liferent "I desire that all of which I am possessed be divided among my cousins the Blackwells (leaving out Mrs. Buckle) and among the children of my uncle, James Hay, Esq., of Belton." **Held** that the fee of the residue vested a *morte testatoris*.

Hay Cunningham's Trustees v Blackwell, 1909 S.C. 219; 46 S.L.R. 175; 16 S.L.T. 592.

(6)

Direction to pay.

A testator by his will, after giving the liferent of his estate to his sisters in certain shares, provided as follows:—"After the death of each and all of them (the sisters)" the estate "shall be given over to the provost and town council in trust" for rebuilding an old bridge. **Held** that the bequest to the provost and town council vested a *morte testatoris*.

Magistrates of Ayr v Shaw, (O.H.) 1904, 12 S.L.T. 126.

(7)

Death of liferenter and annuitants.

A testator directed his trustees to pay certain legacies and annuities, and to pay the interest of the residue, "after deducting the foregoing bequests and annuities," to his widow during her life, "and at the

death of the said" widow and other annuitants "I request my trustees to divide the said residue into nine equal shares, and to pay one-ninth share to A B," a nephew, and the remaining shares to other persons. The nephew predeceased the widow. **Held** that the share of residue had vested in the nephew at the testator's death.

Home's Trustees, 1891, 18 R. 1138.

2. PAYMENT AT DIES INCERTUS (MAJORITY OR MARRIAGE).

(1) POSTPONED VESTING.

(8)

No gift apart from direction to convey.

A trust disposition and settlement contained the following provision:—"Upon my son William attaining the age of thirty years, I direct my trustees to convey to him the properties of A and T." William survived his father, but died before attaining the age of thirty. **Held** that as there was no gift except the direction to convey to William on his attaining the age of thirty, his right to the properties of A and T was conditional on his attaining that age.

Graham's Trustees v Graham, 1899, 2 F. 232; 37 S.L.R. 163; 7 S.L.T. 283.

(9)

A testator directed his trustees to convey to his eldest son, "on his arriving at the age of twenty-five years complete, so as effectually to vest the same in his person," certain lands in India, "with their balances and obligations." **Held**, on a construction of the whole terms of the deed, that the Indian properties did not vest in the son a morte testatoris, but only when he attained the age of twenty-five.

Brodie v Brodie's Trustees, 1893, 20 R. 795; 30 S.L.R. 713; 1 S.L.T. 71.

(10)

Legacy payable to A on marriage of B— Legacy payable to A on marriage or death of B.

A testatrix by her will left the liferent of the residue of her estate to her daughter until her marriage. On the marriage of the daughter the testatrix appointed her executors to pay certain sums to her two sons. By a codicil the testatrix left an additional legacy to each of her two sons, but provided that the additional sum should be paid to them only in the event of the daughter's marriage or death. **Held** that the legacies under the will did not vest in the sons until the marriage of the testator's daughter, but that the legacies under the codicil vested a morte testatoris.

Mackintosh v Wood, 1872, 10 M. 933; 44 J. 512; 9 S.L.R. 591.

(11)

Fund divisible on marriage or death of either of two liferenters.

A testator left his whole estate to two of his daughters in liferent, but, in event of either or both being married, he directed that

their liferent should cease, and the funds be divided between them and certain other beneficiaries. Further, the deed provided that, in the event of the death of either of the daughters unmarried, "then the share which would have belonged to the decessor, had she married, shall accresce and be divided equally among the whole beneficiaries." Neither of the daughters married, and, on the death of one, **held** (1) that there was no vesting a morte testatoris; (2) that either the marriage or death of one of the sisters terminated the liferent; and (3) that a like event vested the fee in the beneficiaries.

Ritchie's Trustees, 1873, 11 S.L.R. 108.

(2) VESTING A MORTE TESTATORIS.

(12)

Gift of income for behoof of legatee during minority—Direction to pay fee to legatee on majority.

A testator by the sixth purpose of his trust disposition and settlement provided as follows:—"I direct my trustees to invest the sum of £1500 and pay the annual interest or produce thereof to my grand-niece Jessie White. . . . And I provide and declare that during the years of her pupilarity and minority the said interest be paid to her legal guardian; and on the said Jessie White attaining her majority my said trustees shall pay over to her the said sum of £1500." The settlement contained a residuary clause. Jessie White survived the testator, but died before attaining majority. **Held** that the gift to Jessie White was a gift of the capital of the legacy of £1500, vesting in her a morte testatoris.

White v Gow, 1900, 2 F. 1170; 37 S.L.R. 895; 8 S.L.T. 127.

(13)

Direction to divide among children, born or to be born, at majority.

A testator directed "that the residue of my funds be divided among the children lawfully begotten, or who shall be lawfully begotten of my cousins T A and J, share and share alike, on each of them attaining the age of twenty-one years"; and appointed executors. **Held** that the residue vested a morte testatoris in the children of T A and J in existence at the date of the testator's death, children born thereafter not being entitled to participate.

Hayward's Executors v Young, 1895, 22 R. 757; 32 S.L.R. 559; 3 S.L.T. 54.

(14)

A testator directed that the residue of his estate should be held applied and paid to and among his six named children and any other thereafter born, who might survive him, each being entitled to his share, or so much thereof as the trustees might be in a position to divide, on attaining twenty-five years of age. He directed that payments to children should be made on the footing of the trustees retaining the full

amount of capital they might think prudent to meet provisions in favour of his wife; and that the trustees should have power to make advances to the children at an earlier period than the attainment of twenty-five, such advances to form deductions from the ultimate shares of the children receiving them. The trustees were also directed to apply so much of the income as they thought necessary for the maintenance of the children until payment of their shares. The testator was survived by the said six children. **Held** that a share of residue vested in each child a *morte testatoris*, although such child had not reached twenty-five, and that the executor of a child dying before reaching twenty-five years of age was entitled to receive immediate payment of the child's share.

Mackintosh's Trustees v Mackintosh, 1907, 44 S.L.R. 911; 15 S.L.T. 272.

(15)

Direction to preserve estate for behoof of children—Power to advance from capital.

A testator directed his trustees to manage and preserve his estate for behoof of his children with power to make advances from capital, and on the youngest child attaining majority to convey the residue to children who might be alive at his death, and the issue of any child dying before his share became payable. In a codicil executed when he had only one child, a boy of six, the testator directed his trustees, in case of the death of his only surviving child and any other children he might have and their issue, to convey the residue to a nephew. The testator's son survived him and died at the age of seventeen. **Held** that the residue vested in the son a *morte testatoris*.

Peacock's Trustees v Peacock, 1885, 12 R. 378; 22 S.L.R. 588.

(16)

Liferent to A—Direction to convey fee to heir of A's body at majority.

A testator directed his trustees to pay over yearly to J W, jun., on his attaining the age of twenty years complete, the free rents and produce of an estate, and, after his decease, "they shall be bound to denude themselves and convey and dispone the same to the lawful heirs of his body on his or her attaining majority." J W, jun., enjoyed the liferent for some years and died, leaving a pupil son. **Held**, on a consideration of the whole deed, that the right of fee had vested in the son, and was not contingent on his attaining majority, though he was not entitled until then to a conveyance of the estate.

Hewat v Grant, 1867, 6 M. 47; 40 J. 33; 5 S.L.R. 44.

(17)

Direction to pay to children on death of liferenter and on children respectively attaining majority — Gift of immediate income.

A testator directed his trustees to make payment to his nephew, D M, of a legacy of £60,000, "and that in liferent for his liferent use only, and on his death I direct the

said sum of £60,000 to be paid to and among his children equally among them, share and share alike, on their respectively attaining the age of twenty-one, payable as such children, after their father's death, respectively attain majority, the interest or annual produce being, however, in the meantime, available for their maintenance and education, the issue of any of the said children who may have predeceased taking their parent's share." D M predeceased the testator. **Held** that the fee of the £60,000 vested equally in all D M's children at the testator's death, irrespective of their attainment of majority.

Mackinnon's Trustees v MacNeill, 1897, 24 R. 981; 34 S.L.R. 742; 5 S.L.T. 67.

(18)

Direction to pay to children at majority or marriage and at death of liferenter—Destination over in general terms.

A testator directed his trustees to set aside and hold a specified sum for behoof of two grandsons and a grand-daughter in liferent, and upon the death of any one of his said grandchildren, or at any later period of division which he or she might appoint, to pay over his or her share of the said funds to or among his or her children "when and as they arrive at majority or are married, whom failing, to his or her assignees, whom failing, to my own nearest heirs." **Held** that on the death of a liferenter leaving children, the fee of the share liferented vested in the existing children, although they were in minority and unmarried.

Normand's Trustees v Normand, 1900, 2 F. 726; 37 S.L.R. 517; 7 S.L.T. 430.

(19)

Residuary bequest—Direction to hold heritage in trust to convey to G on majority—Appointment of G as residuary legatee—Vesting a *morte testatoris*.

A testator, on the narrative of being indebted to the family of J G, directed his trustees to hold his heritable estate "in trust to convey and make over the same to R G, the second son of J G, upon his attaining the years of majority, his heirs and assigns for ever." The testator further appointed R G his residuary legatee, and directed the trustees, upon R G attaining the age of twenty-one, to convey to him, his heirs, and assigns the whole residue not otherwise specifically disposed of by the deed. **Held** that both the heritable and the moveable estate vested in R G a *morte testatoris*, and that the trustees were bound to pay the whole proceeds of the estate to the minor, with the consent of his administrator in law.

Alves' Trustees v Grant, 1874, 1 R. 969; 11 S.L.R. 559.

(20)

Revocation of destination over.

A testatrix directed her trustees to hold one-half of the residue of her estate for her nephew, payable on his attaining the age of twenty-five, with power to expend the interest for his behoof; and to make advances

out of capital, and a destination over to A in the event of the nephew failing to attain twenty-five. By a codicil the testator recalled all the provisions in her settlement in favour of A. **Held** that the destination over being thus recalled, the nephew's interest vested a *morte testatoris*.

Johnston's Trustees v Johnston, 1891, 18 R. 823; 28 S.L.R. 634.

(21)

Gift to become absolute property of A on expiry of life interest, whom failing, to B and C.

A testatrix, by a holograph will, disposed her whole estate to her mother in life interest, and after the death of her mother she directed certain legacies to be paid, and then followed this direction—"After these legacies are paid the whole residue of my means and estate aforesaid to become the absolute property of my brother A B, whom failing, to X, Y, and Z." **Held** that the bequest to A B vested a *morte testatoris*.

Davidson's Executors, 1900, 8 S.L.T. 239.

(22)

Gift payable when claim made.

Under a trust disposition and settlement the trustees were directed to set aside a sufficient portion of the trust estate to secure an annuity to the truster's widow and certain other life interest provisions, "and on the eldest of my children reaching twenty-three years of age complete," to have the remaining trust estate valued, and to pay over a pro rata share according to the number of children then in life to the child who had attained twenty-three. The child or children so paid were at the termination of the annuity and life interest provisions "to have an eventual right to receive subsequently his or her share of that part of the estate which shall have been set aside for satisfying annuities or life interests thereon." On each of the remaining children attaining twenty-three, a similar share was to be successively paid over to them respectively "at the several times when they have right thereto and claim the same." The truster died in 1855 survived by his widow and by several children. As these children respectively attained twenty-three a share of the residue not required to secure the annuity, &c., was paid to each. The widow died in 1878. A, one of the children who had attained twenty-three, died unmarried and intestate in 1892 without having made any claim to a further payment from the estate. In 1902, **held** that a right to a share of the estate required to secure the widow's annuity had vested in A on his attaining twenty-three.

Watson's Trustees v Watson, 1902, 4 F. 798; 39 S.L.R. 628; 10 S.L.T. 64.

(23)

Gift of residue—To son "after these payments are made"—Annuity to wife—Legacies payable on wife's death—Destination over "failing" son.

A testator directed that his son should have

three of his farms, with the stocking, on attaining the age of twenty-three, and a fourth farm on the death of the testator's wife. The testator further directed that his wife should receive £500 a year if the income of his estate could afford it. He also left legacies to each of his daughters, payable after their mother's death. He further declared that his son was "to succeed to whatever may remain of my estate after these payments are made, whom failing, to" his daughters. The wife, the son, and the daughters all survived the testator, the son having attained the age of twenty-three prior to his father's death. The son predeceased his mother and sisters. **Held** that the words "after these payments are made" did not refer to a point of time, but meant "subject to these payments," and that the residue vested in the son a *morte testatoris*.

Scott's Trustees v Scott, 1891, 18 R. 1194; 28 S.L.R. 896.

3. CONSTRUCTION OF "TERM OF PAYMENT," &c.

(1) WHERE PAYMENT DUE BUT NOT YET MADE.

(24)

Gift over in event of death "previous to payment"—Payment at majority—Death after attaining majority, but before payment.

One of twelve shares of the residue of an estate was, under a mutual settlement by two spouses, bequeathed, on the death of the survivor, to a grandson "payable on his attaining the age of twenty-one years." It was further provided that in case he "should die previous to payment" the share was to be divided amongst certain other beneficiaries. The grandson attained twenty-one, but died (eighteen days after the survivor of the spouses) before receiving payment. **Held** that the share had vested in him.

Chalmers' Trustees, 1882, 9 R. 743; 19 S.L.R. 493.

(25)

Gift over in event of death "before receiving payment."

A testator directed the trustees under his trust disposition and settlement to pay an alimentary annuity to his wife in the event of her surviving him, and, subject to payment of the annuity, to hold the residue of his estate for behoof of his son and any other children that might be born to him or the survivors equally among them or their issue per stirpes, under declaration that the residue, "subject to such part of my estate being retained as may be necessary to meet the foregoing annuity, shall be payable to my children as they respectively attain majority." He further directed that, in the event of his son and any other children that might be born to him all "dying before receiving payment" of their shares of his estate without leaving issue, the residue should be held by his trustees and paid or

conveyed to a charity which he named. The testator was survived by his widow and by his son, his only child. The son attained majority, but died, unmarried, a year later, leaving a general disposition and settlement in favour of his mother, and without having received payment of any part of the residue, the whole of which the trustees had found it necessary to retain in their hands to meet the widow's annuity. **Held** that the words "dying before receiving payment" meant dying before the term of payment, and that, as the son, by attaining majority, had survived that term, the residue of the estate had vested in him, and was, accordingly, carried to his mother by his settlement.

Howat's Trustees v Howat, 1922 S.C. 506; 59 S.L.R. 411; 1922 S.L.T. 382.

(26)

Division directed twelve months after testator's death or "so soon thereafter" as trustees could realise—Survivorship clause referring to death before receiving payment.

A testator executed a mortis causa settlement conveying his estates to trustees, with directions, at the expiry of "twelve months after my decease, or so soon thereafter as my trustees may be able to realise said estates, and upon my youngest child attaining twenty-one years of age," to divide the residue equally among his children. It was provided that in the event of any of the children predeceasing the testator, or dying before receiving payment leaving lawful children, such children should succeed to their parent's share, and that in the event of any of the children predeceasing the testator, "or dying before receiving payment of their share" without leaving lawful children, the share of such child should accrete to the survivors. All the children attained majority before the testator's death, and survived him for more than twelve months, but one of his sons died two years after his father's death, before any division of the residue had been made by the trustees. **Held** that the share of this son had not vested, the trustees not having unduly delayed to realise and divide the estate.

Howat's Trustees v Howat, 1869, 8 M. 337; 42 J. 116; 7 S.L.R. 157.

(27)

Direction to divide on death of liferentrix, or as soon thereafter as deemed proper—Destination over applying to death before period of payment and division.

Trustees under a settlement were directed to divide the residue of the trustor's estate on the death of a liferentrix, "so soon thereafter as deemed proper," with the further provision that if any of the residuary legatees should predecease "the said term of payment and division among them," the share of such predeceaser should be held as lapsed. A residuary legatee survived the liferentrix, but died before the trustees had made payment and division. **Held** that the share of residue destined to the residuary

legatee had vested on the death of the liferentrix.

M'Call's Trustees v Murray, 1901, 3 F. 380; 38 S.L.R. 292; 8 S.L.T. 299.

(28)

Trustees to pay when convenient—Survivorship clause applying to event of death before receiving share—Effect of payment to one beneficiary.

Where trustees are directed to hold a fund for behoof of children, and to divide and pay the same when it can be conveniently done, and it is declared that in the event of a child dying without issue before receiving his share under the trust the same shall be divided among the survivors, payment to one beneficiary of his share fixes the period of vesting for all.

Sutherland's Trustees v Clarkson, 1874, 2 R. 46; 12 S.L.R. 19.

(29)

Bequest to be paid as soon as convenient after deaths of testator and a liferenter—Destination over in event of death before period of payment.

A testator by trust disposition and settlement directed his trustees to pay to his sister A the interest of a sum of money, and "after the death of my said sister A, or after my own death in the event of the said A predeceasing me, that my said trustees shall, as soon thereafter as my trustees shall find it convenient, pay the capital of the said sum . . . to my nephew." B, "whom failing, to the lawful issue of his body equally; and in the event of the said" B "dying before the period of payment of the said sum without leaving lawful issue," the testator made a different bequest of the sum of money. A predeceased the testator. B survived the testator for nine months, and died before any of the estate had been realised. **Held** that the legacy vested in B at the death of the testator.

Ferrier v Ferrier, 1872, 10 M. 711; 44 J. 390; 9 S.L.R. 459.

(30)

Direction to convey heritage—Property declared to vest a morte, but not to be transmissible to heirs.

A testator, inter alia, directed his trustees, after realising his moveable estate, to convey a heritable property to his eldest son as part of his share. It was declared that the shares "shall vest at the period of my death, so as to be subject to the deeds, but not to the effect of transmitting to the heirs of the beneficiaries then existing by legal or intestate succession until the conveyances are granted in their favour as after specified." The trustees retained the whole estate undivided for eighteen years, when the eldest son died without having received any conveyance of the property destined to him by his father's settlement. **Held** that, as the eldest son had survived the date when division should have taken place, and when he ought to have received a conveyance of

his share, a tripartite division had taken effect, and the eldest son's share had vested in him.

Love's Trustees v Love, 1879, 7 R. 410; 17 S.L.R. 260.

(31)

Direction to divide—Beneficiary disappearing and legally presumed to have died after testator.

A testator directed his trustees to divide the residue of his estate into seven equal parts, and to bestow one share on each of his seven children nominatim, and, failing any of these "by decease and without having received payment of their provisions and without leaving lawful issue," the share of such child should fall and belong to the surviving brothers and sisters equally. A son who disappeared did not receive payment of his share. He was presumed to have survived the testator, but to have died intestate and without issue. **Held** that the maxim, *Quod fieri debet infectum valet*, applied, and that the son's share vested a morte testatoris.

Yuill's Trustees v Yuill, (O.H.) 1900, 8 S.L.T. 324.

(32)

Gift over in event of death previous to payment—Payment at majority—Beneficiary attaining majority, but dying before actual payment—Vesting in beneficiary.

Chalmers' Trustees, 1882, 9 R. 743; 19 S.L.R. 493, No. 24, *supra*.

(2) EXPRESS DECLARATIONS AS TO VESTING.

[See VI., *infra*.]

(3) CLAUSE OF SURVIVORSHIP, &c., EXPRESSLY REFERRING TO TIME OF PAYMENT.

[See II. 1, *infra*.]

II. SURVIVORSHIP CLAUSES.

1. VESTING POSTPONED UNTIL DISTRIBUTION.

(33)

Gift to grandnieces in liferent and issue in fee—Failing issue, gift to survivors of grandnephews and grandnieces in liferent and their issue in fee.

A testator gave the liferent of his estate to his wife, and the fee to six grandnephews and grandnieces nominatim. He further directed his trustees to pay the share bequeathed to grandnieces to them and their husbands in liferent allenarly, and the fee to the issue of the grandnieces, "whom failing, to the survivors of them and my grandnephews, also named in the foregoing settlement or codicils, equally in liferent and their issue also equally in fee, after the death of the longest liver of me and my wife." One of the grandnieces survived the testator, but predeceased his wife without issue. One of the grandnephews survived

the grandniece, but predeceased the testator's widow, having a son who survived the widow. **Held** that the persons entitled to a liferent under the destination over were the survivors of the grandnieces and the survivors of the grandnephews as at the death of the testator's widow, and that the son of the predeceasing grandnephew was not entitled to participate in the fee.

Richardson v Macdougall, 1868, 6 M. (H.L.) 18; 40 J. 466; 5 S.L.R. 454.

(34)

Payment at first term following death of liferentrix—Legatee surviving liferentrix, but dying before term.

A testator left a legacy to A and B equally and failing either of them to the survivors, and directed the legacy to be paid at the first term of Whitsunday or Martinmas after the death of a liferentrix. A survived the liferentrix, but predeceased the first term after the liferentrix's death. **Held** that the legacy did not vest in A.

Hendry's Trustees v Patrick, (O.H.) 1905, 13 S.L.T. 503.

(35)

Payment at death of liferenter.

A direction to trustees on the expiry of a liferent to pay a part of an estate to A and B equally between them, share and share alike, and the survivor of them, **held** to postpone vesting until the death of the liferenter.

Ferguson's Trustees v Readman's Executors, (O.H.) 1903, 10 S.L.T. 697.

(36)

Gift over to issue, whom failing, to survivors.

A testator directed his trustees, on the death or second marriage of his wife, to pay the residue "to such of my children as have arrived at the age of twenty-one years, or as they respectively reach that age." "If any child shall die, either before or after me, leaving lawful issue, and without having acquired a vested interest" in his provision, there was a destination over to issue, and failing issue, to the surviving children and the issue of predeceasers. A, one of the testator's sons, survived the testator and attained twenty-one, but predeceased the widow, who never remarried. **Held** that the survivorship clause prevented vesting until the death of the widow, and that the share destined to A had never vested in him.

Banks' Trustees v Banks' Trustees, 1907 S.C. 125; 44 S.L.R. 121; 14 S.L.T. 471.

(37)

By antenuptial marriage contract A bound himself to "make payment to the child or children that may happen to be procreate of this marriage" of £8000 "to be payable at the first term of Whitsunday or Martinmas after the death of the longest liver of him" and the wife, "which sum, in the event of there being more children than one, shall be divisible in such propor-

tions as "A shall appoint by a writing under his hand at any time of his life, and, failing such appointment, to be divided equally amongst the survivors of them and the issue of such as may have predeceased leaving issue, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life." The testator was survived by his wife and by four children. **Held** that the right to the sum of £8000 did not vest in the children until the death of the surviving spouse.

Blackburn's Trustees v Blackburn, 1896, 23 R. 698; 33 S.L.R. 505; 3 S.L.T. 331.

(38)

———"Predeceasing the period at which they would have been entitled to the benefit of the provision."

A testator directed his trustees to set apart the sum of £5000 and to hold the said sum for behoof of his sister, A, in *liferent* *allenarly* and for behoof of her children in fee, the provision to be payable to the children on the decease of their mother in the event of their having then attained the age of twenty-five years; but if not, then as soon after such decease as they should respectively attain that age. Between the period of A's decease and the arrival of the term of payment, power was conferred on the trustees to apply the income of a child's provisions towards the proper upbringing of such child. In the event of any of the children "predeceasing the period at which, had they survived, they would have been entitled to the benefit of the said provision," there was a destination over to their issue, and, failing issue, to the survivors and the issue of predeceasers. One child predeceased the mother after attaining twenty-five. **Held** that no part of the provision had vested in him.

Bogle's Trustees v Cochrane, 1892, 20 R. 108; 30 S.L.R. 128.

(39)

A testatrix directed her trustees to hold the residue of her estate for behoof of her grandniece, Janet, in *liferent*, "and in case the said Janet shall marry and have children, then the fee of the residue of my estate hereby provided to her shall belong to her lawful children"; she declared "that in the event of the said Janet . . . predeceasing me, or dying without lawful children, the whole residue hereby provided to her shall in any or either of these cases fall and belong to" Janet's sister and four brothers, *nominatim*, "equally" amongst them; and in the event of any of them dying without leaving lawful issue the share of the predeceaser should "go and be equally divided among the survivors," but should the predeceaser leave issue, "then such issue shall be entitled to succeed to their parent's share equally among them, in the same manner and as fully as if such parent had survived." Janet, her sister, and brothers, all survived the testator. Janet died unmarried. **Held** that un-

til the death of the *liferentrix* no share of residue vested in her brothers or sister.

Cumming's Trustees v White, 1893, 20 R. 454; 30 S.L.R. 459.

(40)

A left half the residue of her estate to her niece B in *liferent*, directing that on B's death the fund was to be divided among her children in equal shares, one share to each daughter in *liferent* *allenarly* and her issue in fee, and one share to each son "and to the survivors of the said" children "at my decease, and the children of such as may have then predeceased leaving lawful issue." One of B's daughters survived A, but predeceased her mother without issue. The other children of B survived their mother. **Held** that the predeceaser's share fell to the surviving children of B.

Roper, 1871, 43 J. 546; 8 S.L.R. 639.

(41)

———Trustees exercising power to withhold payment of legacy.

Walker v Buchanan, 1905, 8 F. 201; 43 S.L.R. 176; 13 S.L.T. 568, No. 213, *infra*.

Russell v Bell's Trustees, 1897, 24 R. 666; 34 S.L.R. 497; 4 S.L.T. 338, No. 219, *infra*.

(42)

Division at completion of certain contracts.

A testator, who at the time of his death had certain contracts in course of execution, directed his trustees to carry them on, and on the completion of them to value and then "fix and determine, divide and apportion" his estate "among the whole of my children, or the survivors of them, or their issue—declaring that in case of any of my children having predeceased the period of apportionment leaving lawful issue, the issue of such predecessor or predecessors shall be entitled equally among them *per stirpes*" to their parents' share. Two sons having died without issue while the contracts were still uncompleted, **held** that no right under the settlement had vested in them.

Scott's Executor v Scott's Trustees, 1881, 18 S.L.R. 436.

(43)

Express reference to period of payment.

A testator directed his trustees twelve months after the death of the longest liver of himself and his wife to pay a share of his estate to the children of his son A, which share should not be paid to his grandchildren but should be invested by the trustees, and the annual income paid to A, his wife, and the survivor. On the death of the survivor the testator directed his trustees to divide the share among A's children. In the event of the decease of any grandchildren "before the period of payment of their shares" without issue, the shares were to be divided equally among their brothers and sisters, but if the predeceasers left issue, the issue were to take their parent's share. The testator died in 1863, his wife in March, 1871, his son A in October, 1871,

and A's wife in 1904. A left children, some of whom predeceased their mother. **Held** that A's children did not take a vested interest until their mother's death in 1904.

Macfarlane's Trustees v Macfarlane, 1906, 8 F. 787; 43 S.L.R. 494; 13 S.L.T. 915.

(44)

Express reference to opening of succession.

A testator, after directing his trustees to pay the income of the residue of his estate to his widow, in the fifth place directed them, upon the death or second marriage of his wife, to divide the residue among nine persons named, "share and share alike, and the lawful issue of such of my said residuary legatees as may have predeceased leaving lawful issue" per stirpes—"And it is hereby provided and declared that in the event of any of my said residuary legatees or their issue being abroad or in this country and their addresses not being known to my trustees at the time of the succession opening to them, and not claiming their respective provisions under this deed within the period of one year from and after the death or second marriage of my said wife, whichever of these events shall first happen, or within one year from the date of my death in the event of my surviving my said wife, my trustees shall be entitled and shall pay after the lapse of said period such unclaimed shares of residue to and equally among my other residuary legatees and their lawful issue, such issue always taking per stirpes, and the share to which they may become entitled going equally among them, declaring that any forfeited share or shares (if any) of my residuary legatees shall be paid to his, her, or their issue, in preference to my other residuary legatees on the lapse of the period foresaid, provided such issue claim the same in same way as if their parent or parents were dead." The testator was survived by his wife and by all the residuary legatees named. Two of the residuary legatees named predeceased the widow, one leaving issue and the other without issue. **Held** that the fifth purpose, taken as a whole, was to be read as directing division of the residue among the residuary legatees named who survived the widow, and the issue per stirpes of such as predeceased her, and that vesting did not take place until the death of the widow.

Sword's Trustees v Main, 1902, 4 F. 1005; 39 S.L.R. 846; 10 S.L.T. 209.

(45)

Liferent to daughters—Fee to heirs of their bodies, whom failing, to surviving children of testator.

By a mutual settlement spouses directed their trustees to divide their estates on the death of the survivor among six of their children. They further directed that daughters' shares should be vested in trustees, and the annual produce paid to the daughters with fee to the heirs of their bodies. Failing heirs of the body of any daughter, her share was to belong to the before-named chil-

v 40

dren "then surviving." I, a daughter, predeceased the surviving spouse without issue, and H, a son, predeceased I leaving a son who survived the longest liver of the spouses. **Held** that the son of H was not entitled to participate in the share which would have been liferented by I had she survived the testators.

Graham's Trustee v Graham, 1868, 6 M. 820; 40 J. 452; 5 S.L.R. 402.

(46)

Successive liferents—Vesting on expiry of first liferent.

A testator by his testamentary settlement bequeathed the residue of his estate on the death of a liferentrix to his children as a class, the shares of daughters to be held for their respective liferent alimentary uses and their issue in fee. In the event of the death of a daughter without issue, part of her share was to fall back into residue. A daughter survived the liferentrix, but died unmarried. The scheme of the settlement treated the residue as one fund. **Held** that the whole of the residue, including the daughter's share, vested at one and the same time, viz., at the death of the liferentrix.

Collins' Trustees v Collins, (O.H.) 1910, 2 S.L.T. 193.

2. VESTING AT MAJORITY OF BENEFICIARY.

(47)

Direction to divide on youngest child attaining majority—Power to make advances.

A testator directed his trustees to divide the revenue of his estate among his children in certain proportions, with power to make advances out of the share of each to meet the expense of his or her maintenance or education; and "so soon as the youngest child born or to be born" of his marriage "shall attain the age of twenty-one years complete, to divide the whole estate amongst the whole of the children born or to be born" of the marriage, "in the same proportions as is directed in regard to the revenue of my estate." The trustees were empowered to advance to any child a sum necessary and expedient to forward him in business, and it was declared that the child "of any of my said children deceasing shall have right to the share which would have fallen to the parent equally as if the parent had survived, but if there shall be no such issue, then the share of the party so deceasing shall be divided equally among his or her surviving brothers and sisters." One son attained majority, but died childless before the youngest of the testator's children attained majority. **Held** that no right to a share of the capital had vested in him.

Fyfe's Trustees v Fyfe, 1890, 17 R. 450; 27 S.L.R. 329.

(48)

Payment at first term after beneficiary attained twenty-five.

A father, in his settlement, made provi-

sions for his son and daughter, the provision to the son being payable at the first term of Whitsunday or Martinmas after the son attained twenty-five. The testator declared that if any of his children should predecease him, or die "before their provisions shall become payable," without issue, his whole estate should be conveyed to the survivors. **Held** that a son who survived his father, but died under twenty-five, had no vested right.

Walker's Trustees, 1870, 8 M. 870; 42 J. 509; 7 S.L.R. 541.

(49)

Direction to divide on death of widow, provided youngest child attained twenty-five—Power to make advances to children on their respectively attaining twenty-five, subject to payment of interest until period of division.

A testator directed his trustees to pay to his widow an annuity of £1300, subject to the burden of maintaining and educating the children of the marriage. In the event of the widow entering into a second marriage, her annuity was restricted to £200, and the trustees were directed to provide for the maintenance and education of the children; and on the death of his widow, the testator directed his trustees, provided his youngest child had attained the age of twenty-five, to divide the residue of his estate amongst his children equally, with power to the trustees to pay to any of his children, on their respectively attaining the age of twenty-five, a sum equal to one-third of their prospective shares, interest on the advances being payable by the children until the arrival of the period of division. In the event of his widow dying before the youngest child attained the age of twenty-five the testator empowered his trustees to pay any of his children who had attained that age their full shares of his estate. With regard to the balance of the yearly income of the trust estate, after providing for the widow's annuity of £1300, the trust directed that it should be accumulated and form part of the residue. The widow entered into a second marriage, and gave up all rights except to her restricted annuity of £200, and the trustees set apart a sum sufficient to secure to her payment thereof. In a special case, presented during the widow's life and when the three children of the marriage were under twenty-five years of age, **held** (1) that no share vested in a child of the marriage till the youngest child had reached the age of twenty-five; (2) that in the circumstances the survivance of the widow would not prevent vesting when the youngest child reached the age of twenty-five.

Ross's Trustees v Ross, 1902, 4 F. 840; 39 S.L.R. 678; 10 S.L.T. 163.

(50)

Direction to pay on death of annuitant and majority of beneficiary.

A testator directed his trustees, from the income of his trust estate, and if necessary

from capital, to expend not less than £36 per annum on the maintenance of his widow, and upon her death, and upon the youngest of his children attaining twenty-one years of age, whichever of these events should last happen, to make an equal division of the residue among his children. In the event of the death of any children before the period of division, there was a destination over to issue, and failing issue, to survivors. The trustees were given power to make advances to the children before the period of division. The testator was survived by only one son, who attained majority, but died before his mother, leaving a widow but no issue. **Held** that the provision in favour of children lapsed on the son's death, nothing having vested in him under the trust settlement during his life.

Smith v Wighton's Trustees, 1874, 1 R. 358; 11 S.L.R. 177.

(51)

Survivorship clause applicable to event of death before or after liferenter—Payment on death of liferenter or children attaining twenty-five.

A testator by his trust settlement directed his trustees to pay the interest of £20,000 to his sister during her life, and upon her death to pay over the said interest, to the extent of £300 a year, to his sister's husband in the event of his surviving her. Further, upon the decease of his sister (but subject to the annuity of £300 provided to her husband) he directed his trustees "to hold and apply the said principal sum of £20,000 and the income" thereof for behoof of the children of his brother B, "procreated or to be procreated," in equal shares, "payable, the several children's shares, to the sons on their attaining twenty-five years of age." Power was given to the trustees to expend the children's shares of income and to advance part of their shares of capital during minority. In the event of the death of any of the children before or after the liferentrix there was a destination over to issue, and failing issue, to survivors. The testator's sister died in 1875, survived by her husband. At that time the testator's brother B was alive, and two of his children had attained the age of twenty-five. **Held** that no right vested in any child of B before the death of the liferentrix, or until his share became payable by his attaining the age of twenty-five; and that on that event the trustees were not entitled to withhold payment on the ground that other children might be born to B.

Buchanan's Trustees v Buchanan, 1877, 4 R. 754; 14 S.L.R. 503.

(52)

Direction after death of liferenter to pay on majority of beneficiary.

A testatrix, one of three sisters, conveyed her whole estate to her sisters, and the survivor in liferent. After bequeathing certain legacies, to be paid on the death of the last

liferenter, she provided, with regard to the residue of her estate, thus, viz.:—"I hereby, after the death of the longest liver of me and my said sisters, appoint my said executors or trustees . . . to pay, assign, and dispose the same to and in favour of my nephews, Walter, Charles, and John M'Alpine, equally between them, share and share alike, and that on their respectively attaining the age of twenty-one years; and I hereby declare that if any one or more of my said nephews shall depart this life before he or they shall attain the age of twenty-one years, then the share or shares of him or them so dying shall go and accresce to the survivors or survivor, equally amongst them; providing, nevertheless, that if any of my said nephews so dying shall have left lawful issue, then such issue shall have right to the share or respective shares which their deceased parent or parents would have been entitled to." All the nephews attained twenty-one and survived the testatrix, but only one survived the last of the liferenters. **Held** that the shares of the residue vested in each nephew on his attaining the age of twenty-one.

M'Alpine, 1883, 10 R. 837; 20 S.L.R. 551.

(53)

A testator provided for his wife (who survived him) by giving her an annuity of £50, increased by a codicil to £100, and directed his trustees to give to his son, John, a liferent of one-fourth of the residue of his estate. The residue was to be divided amongst the other children of his present marriage equally amongst them, "their respective shares thereof being payable on their respectively attaining majority, but subject always to the said annuity to my wife, in regard to which I give my trustees full power to make all necessary arrangements in the event of her surviving all or any of the periods of majority of my said children, born or to be born." One of the sons, William, who had attained majority, died intestate, survived by his mother, his wife, and two children, having meantime assigned his interest in the trust estate for value. There was a declaration in the will to the effect that in case of any child dying and having lawful issue, such issue should be entitled to the parent's share. In a question between William's children and the parties to whom he had assigned for value, **held** that the conditional institution of survivors lapsed on William attaining majority, and that his share was consequently carried by the assignation.

Stirling's Trustees v Stirling, 1896, 34 S.L.R. 80; 4 S.L.T. 147.

(54)

Survivorship clauses referring to majority of beneficiary—Marriage contract provision payable to children on death of surviving spouse.

By antenuptial marriage contract the husband conveyed £5000 to trustees as an alimentary fund for behoof of the family estab-

lishment, with power to them to pay the income to either spouse or the survivor; "and upon the death . . . of the said survivor the principal sum . . . shall belong and be made over" to the children of the marriage equally. It was provided that, in the event of the predecease of any of the children before majority, their share should belong to their issue, and failing issue, should accresce to their surviving brothers and sisters. "In the event of the failure of issue" of the marriage, the £5000 was to be at the disposal of the spouses. The provisions in favour of the children were declared to be in full of their legal rights. **Held** that a share of the fund vested in a child who survived the dissolution of the marriage and attained majority, but predeceased the survivor of the spouses.

Boyd's Trustees v Boyd, 1905, 7 F. 576; 42 S.L.R. 435; 12 S.L.T. 798.

(55)

Certain property was conveyed to trustees to be held by them for behoof of two spouses, and the survivor in liferent allenarly, and with a direction that "after the death of the longest liver" the "trustees shall hold the trust estate for behoof of the whole children," in equal shares, payable at majority or marriage, the share of any child predeceasing the respective terms of payment without issue to accresce to the survivors. The deed further provided that in case there should be no children alive at the death of the husband, the trustees should, on the death of the longest liver of the spouses, make over the estate to such persons as might be named by him, or to his heirs and executors whomsoever. The only issue of the marriage was a posthumous son, who predeceased his mother. **Held** that the fee had not vested in him.

Melrose v Melrose's Trustees, 1869, 7 M. 1050; 41 J. 593; 6 S.L.R. 679.

(56)

Destination over if legatee die before majority or survive that event and die before receiving payment without testing.

Cairns v Cairns' Trustees, 1901, 3 F. 545; 38 S.L.R. 364; 8 S.L.T. 474, No. 266, *infra*.

(57)

Payment at majority of share so far as not required to provide for annuity.

Stewart's Trustee v Stewart, 1875, 13 S.L.R. 5, No. 174, *infra*.

3. VESTING A MORTE TESTATORIS.

(58)

Direction to pay to A, B, and C and survivors—Destination over if A, B, and C all predeceased testator.

A testator, by his settlement, directed his trustees to hold the residue of his estate for payment of the revenue thereof to his widow, and on her death or re-marriage, to pay the residue to A, B, and C, the three children of his brother, "and the survivors

and survivor of them, equally between them, share and share alike; and should the said three children all predecease me, then I direct my trustees to pay the said residue to the Reverend the Presbytery of Edinburgh." **Held** that the words of survivorship referred not to the period of division, but to the death of the testator, and that a share of the residue then vested in each of the three children.

Webster's Trustees v Neil, 1900, 2 F. 695;
37 S.L.R. 493.

(59)

Gift on expiry of liferent to surviving children and issue of those "predeceasing me."

A testator directed his trustees to pay to his widow an annuity out of the free income of his estate and to divide any surplus of the income amongst his whole children, and on the widow's death to realise the whole estate and divide it "among my five children and the survivors or survivor of them equally among them and share and share alike, . . . and in the event of my children predeceasing me and leaving issue, the share of such deceased child or children shall go to such issue." **Held** that vesting took place a morte testatoris.

Cathcart's Trustee v Ewart, (O.H.) 1902,
10 S.L.T. 101.

(60)

Survivance of period of division—Death of annuitant who predeceased testator.

By a testamentary settlement trustees were directed, on the death of two annuitants (who predeceased the testator), to hold a share of residue "for behoof of" J H and his family, as follows, viz.:—For payment of the interest of said share to said J H to the extent of one-half thereof, and the interest of the other half thereof to his children, and if the said J H and his children "stand in need thereof" the trustees were directed "to expend the capital of said share for and in behalf of the said J H and his said children in such proportions as they may think proper." The settlement further declared that, in the event of J H "dying before the division of the residue," the share which he would have been entitled to if alive was to go to his issue, but, failing issue, then to the survivors of the beneficiaries equally. There was no further disposal of the share. **Held** that the power to advance capital was a power to advance to the extent of one-half only to J H, and to the extent of the other half to the children, and that there was a gift of the fee of the share to the extent of one-half to J H, and, as regards the other half, to the children, which vested a morte testatoris.

Gillies' Trustees v Hodge, 1900, 3 F. 238;
38 S.L.R. 150; 8 S.L.T. 320.

(61)

No gift till period of distribution—Special direction regarding one beneficiary.

A testator directed his trustees on the expiry of a liferent to divide the fee of the residue of his estate equally among his

whole surviving nephews and nieces, "declaring that in the event of my brother surviving me and having no children he also shall have an equal share with my said surviving nephews and nieces." **Held** that vesting took place a morte testatoris, because, as the brother was made a member of the class benefited, and it was expressly provided that survivance in his case should mean survivance of the testator, the survivance applicable to the class generally was survivance in the same sense.

Duncan's Trustees v Kennedy, (O.H.)
1897, 4 S.L.T. 358.

(62)

Gift on death of liferenter to "my surviving children."

A testator, dealing with the residue of his estate after providing for certain legacies and provisions, provided as follows:—"The portions of all my children in case of marrying to vest in them as annuity for life, and in case of issue at the death of their parents to be the property of such issue to one all, or more than one, share and share alike; but if no issue, the entire portion to revert back to my estate and become the property of my surviving children, share and share alike." **Held** that a share reverting back to the estate fell to the children of the testator surviving at his death, and not to the children of the testator surviving at the death of the liferenter.

Watson's Trustees v Watson, (O.H.) 1902,
10 S.L.T. 388.

(63)

Gift to A and B—Gift over to survivor on predecease of either without issue.

By mutual disposition and settlement two sisters disposed their whole estates to each other and the longest liver, and on the death of the longest liver to their nieces H and M, declaring that the survivor of their nieces should succeed to the share of her sister predeceasing without issue. M died before the last survivor of the granters, leaving a daughter, who survived both granters. **Held** that the survivorship clause did not take effect, M not having predeceased without issue.

Main v Lamb, 1880, 7 R. 688.

(64)

Gift to issue "then" surviving—Postponed payment.

By an assignation in trust made in contemplation of marriage the wife conveyed her estate to trustees in trust (1) for herself in liferent; (2) after her death, if there was no issue of the marriage, for the husband in liferent, so long as he remained unmarried; (3) for behoof of the issue, if any, of the marriage then surviving, and the issue per stirpes of predeceasers, payable at majority or marriage, whichever of these events should first happen, after the decease of the surviving spouse if the wife should survive, but after the death or second marriage of the husband if he should sur-

vive. The wife died survived by the husband and by two children who were both major. **Held** that the fee vested in the children on the wife's death.

Bate's Trustees v Bate, 1906, 8 F. 861; 43 S.L.R. 660; 14 S.L.T. 95.

(65)

Survivorship clause expressly referred to date of vesting—Legacy payable on death of liferenter—Destination over referred to testator's death.

A testatrix directed her trustees to hold certain funds for the liferent alimentary use of her husband, and after his death for behoof of four persons named, including A, "in absolute fee and property." In the event of any of the persons named "dying before the vesting" of the provisions in their favour there was a destination over to their children, and failing children, to the survivors and the issue of predeceasers. In the event of A "not having more than three children at the date of my death," one-half of his provision was to belong to another of the persons "and his issue, in like manner as the provisions hereinbefore provided to him." A survived the testatrix and had more than three children at her death. He predeceased the liferenter. **Held** that the clause of survivorship referred to the death of the testatrix and that one-fourth of the residue vested in A a morte testatoris.

Alston's Trustees v Alston, 1902, 4 F. 654; 39 S.L.R. 438; 9 S.L.T. 512.

(66)

Payment at first term occurring after testator's death, or so soon thereafter from time to time as estate realised—Survivorship clause referable to testator's death.

A testator directed his trustees "at the first term of Whitsunday or Martinmas making twelve months after my death, or as soon thereafter from time to time as the same may be realised" to pay the residue of his estate to his four children and their heirs and assignees. There was a destination over to issue "in the event of any of my said children dying leaving lawful issue," and a destination over to survivors and the issue of predeceasers "should any of my children die without being married or leaving lawful issue." **Held**, on a construction of the whole terms of the will, that the clause of survivorship was referable to the date of the testator's death, and that the children took a vested interest at that date.

Wood v Neill's Trustees, 1897, 24 R. 105; 34 S.L.R. 107; 4 S.L.T. 138.

(67)

Trustees empowered to postpone division of estate.

Maclean's Trustees v Maclean, 1897, 24 R. 988; 34 S.L.R. 746; 5 S.L.T. 81, No. 205, *infra*.

Henderson's Trustees v Henderson, 1876, 3 R. 320; 13 S.L.R. 181, No. 206, *infra*.

4. VESTING IN LAST SURVIVOR.

[See IX. 2, *infra*.]

5. CONSTRUCTION—WHETHER "SURVIVORS" EQUIVALENT TO "OTHERS."

[See SUCCESSION IX. 8 (1) (i).]

III. EFFECT OF DESTINATION OVER.

1. GENERALLY.

(68)

Gift over in event of institute predeceasing liferenter—Institute predeceasing both testator and liferenter.

A testator directed his trustees to pay the income of the residue of his estate to his sister during her life, and at her death to pay £6000 to each of his nephews whom he named. The deed then provided that "if any of my said nephews . . . die before my sister" leaving issue, the issue should take the parent's share, "and if any of my said nephews . . . die without issue, the share of such deceiver or deceasers shall fall to their surviving brothers and sisters, equally among them . . . the issue of any deceased brother or sister taking the share which would have fallen to their parent." H M, one of the nephews, predeceased the testator without issue, but survived by brothers and a sister, and by the liferentrix. In a special case it was maintained that the destination over took effect only in the event of a nephew surviving the testator but predeceasing the liferenter without issue. **Held** that the surviving brothers and the issue of a predeceasing brother of H M were entitled as conditional institutes to equal shares of the £6000 bequeathed to him.

Earl of Dalhousie's Trustees v Young, 1889, 16 R. 681; 26 S.L.R. 525.

(69)

Destination over in case institute die without issue.

A testatrix, by her holograph will, bequeathed a sum of £8000 to a nephew, "his heirs, executors and administrators absolutely, provided always that in case my nephew shall die without issue I appoint the said sum of £8000" to be paid to certain charities. **Held** that the charities were conditional institutes in the event of the nephew predeceasing the testator without issue.

Crumpton's Judicial Factor v Barnardo's Homes, 1917 S.C. 713; 54 S.L.R. 596; 1917, 2 S.L.T. 100.

(70)

Destination over failing liferenter and her issue—Gift of liferent on attaining twenty-one.

A testator directed his trustees to convey

the liferent of the residue of his estate to his daughter J S for her liferent use alienably when she should attain the age of twenty-one, and to the heirs of her body in fee. The deed proceeded—"And failing my said daughter . . . and the issue of her body . . . I direct my trustees to convey the fee of the residue" to trustees for charitable purposes. **Held** that the trustees for the charities were conditional institutes who were entitled to take only in the event of J S dying in minority and without issue.

Simpson's Trustees v Simpson, 1889, 17 R. 243; 27 S.L.R. 175.

(71)

Gift over in the event of beneficiary predeceasing the testator—Direction to hold for behoof of beneficiary in liferent and issue in fee—Beneficiary surviving testator but dying without issue.

A testator, in disposing of the residue of his estate, directed his trustees "to hold and apply, pay and convey the same as follows, viz.:—one-fifth thereof to be paid and conveyed to my son . . . one-fifth thereof to be held and applied for behoof of the children of my daughter, the deceased Mrs. C . . . and the remaining one-fifth to and for behoof of my daughter E—the shares effeiring to the children of my daughter, the deceased Mrs. C . . . and to my said daughter E to be held for their behoof in liferent for their liferent use only and for behoof of their respective children and the survivors and survivor, equally among them in fee—payable and to be conveyed to them on their respectively attaining the age of twenty-five, and on the death of their parent." In the event of his daughter E, or any of the foresaid grandchildren, "predeceasing me without leaving issue," or of such issue not surviving to take under the destination, he directed, with regard to E, that the sum destined to her in liferent and her issue in fee should fall and accresce to the other residuary legatees, and, with regard to any grandchild, that the share destined to him or her should fall and accresce to his or her surviving brothers and sisters. The testator further empowered his trustees, in certain events, to pay and convey to E, or to any of the grandchildren, such portions of the share of residue provided for his or her liferent, not exceeding in all one-half, as the trustees should think fit. The daughter, E, and a grandson, a child of Mrs. C, survived the testator and died without issue. The grandson was survived by two brothers. **Held** (1) that neither the daughter nor the grandson had a vested right of fee in the shares of residue liferented by them respectively; (2) that, as they had not predeceased the testator, the clause of accretion was inoperative with regard to their shares; (3) that the share liferented by the daughter had fallen into intestacy; but (4) that the terms of the gift to the children of Mrs. C imported a joint bequest of liferent, and, accordingly, that the share liferented by the grandson

fell to be held by the trustees for the life-rent use of his surviving brothers.

Smith's Trustees v Clark, 1920 S.C. 161; 57 S.L.R. 196; 1920, 1 S.L.T. 88.

(72)

Destination over to certain parties along with issue of others—Existence of issue not a condition.

A testator directed his trustees to hold the residue of his estate and to divide the annual proceeds among three of his five children—Robert, Margaret, and Agnes, and on the death of the longest liver of the liferenters to convey the residue in equal portions among their children respectively. In the event of the death of any of the liferenters without issue, the testator provided that "my . . . son John . . . and my . . . daughter Susan . . . or in the event of their death leaving lawful issue their said issue shall be entitled to an equal share along with the issue of my other children . . . per stirpes" of the share liferented by the child deceasing without issue. John left a son who predeceased the last survivor of the liferenters; Robert, Agnes, and Susan left issue who survived the last survivor of the liferenters. **Held** that the issue surviving the last survivor of the liferenters were entitled to the share liferented by Margaret, in respect that the destination over in their favour was not contingent on both John and Susan leaving issue to share it with them.

Corbett's Trustees v Pollock, 1901, 3 F. 963; 38 S.L.R. 723; 9 S.L.T. 105.

(73)

Casus improvisus.

A and B, two brothers, pro indiviso proprietors of heritable subjects, executed a disposition, bearing to be granted for "certain good and onerous" causes, by which they conveyed the subjects to trustees, to be held by them for behoof of certain liferenters, and for the six children nominatim of A in fee. There was, further, a declaration that, in the event of any more children being born to A, "and in the event of me, B, becoming married and leaving issue," then the trustees were to convey to the six children of A, and to any children that might subsequently be born to him, one-half of the subjects disposed in fee, and the other half to B's children; "but in the event of there being no such issue of us, A and B, this declaration at our deaths, eo ipso, becomes void and null, and the said trustees shall make over to the said" six children of A, nominatim, "the absolute fee of the whole subjects after disposed." A subsequently entered into a second marriage, and by it had one child, but B died unmarried and without issue. **Held** that the child of A's second marriage was entitled to share with his surviving half-brothers and sister in the half of the estate which had belonged to his father, though according to the literal interpretation of the deed he was only entitled to participate

therein in the event of B marrying and having children.

Dunlop v M'Crae, 1884, 11 R. 1104; 21 S.L.R. 752.

(74)

A testator directed his trustees to divide the income of his heritage between his two sons; and in the event of one of his sons dying leaving issue, to sell the half and hold the proceeds for behoof of his issue equally; and in the event of the survivor dying leaving issue, to sell the remaining half, and hold the proceeds for behoof of his issue; in the event of the first deceiver dying without issue, to apply his share for the use of the survivor or his issue equally; and in the event of both dying without issue to divide the property among charities. He did not expressly provide for the event which happened of the predeceasing son leaving issue and the survivor dying without issue. Held that there was no intestacy, that the charities took only on the failure of both sons without issue, and that the children of the predeceasing son were entitled to the whole estate.

Aberdein's Trustees v Aberdein, 1870, 8 M. 750; 42 J. 387; 7 S.L.R. 433.

(75)

Liferent to widow with power of appointment—Direction to make over fee to certain persons and survivors.

A truster directed his trustees to pay the free yearly interest of the residue of his estate to his widow, and on her death to make over the fee to his two sisters and three nephews, and the heirs of their bodies, in such proportions as his widow should appoint, and failing such appointment, to the beneficiaries equally, the share of any nephew dying without issue, or of either sister who should die without settling the same, or should predecease the testator, to be divided equally among the survivors and their issue. One of the sisters survived the testator but predeceased the widow, leaving a settlement of, *inter alia*, her share of the fee of her brother's estate. Held (1) that the fee did not vest till the death of the testator's widow; and (2) that the terms of the trust deed did not authorise the testator's sister to settle her share of the fee until it had vested.

Smith's Trustees v Graham, 1873, 11 M. 630; 45 J. 399; 10 S.L.R. 426.

(76)

Effect of residue clause—Legacies.

A testator, under the sixth purpose of his testament, bequeathed to his brothers Thomas and Alexander "the sum of £500 sterling each, payable at the first term . . . after the decease of my said spouse." By the residue clause he appointed the residue, including "any legacy that may have lapsed by the legatees predeceasing her, to be equally divided," &c. The legacies of £500 to his brothers Thomas and Alexander, who had survived the testa-

tor, but predeceased his widow, were the only legacies under the testament to which the above reference to lapse could apply. Held that the legacies of £500 to the testator's brothers Thomas and Alexander vested in them a *morte testatoris*, in terms of the sixth purpose of the testament, and that the direction as to lapsed legacies in the residue clause did not suspend vesting, but only provided for the possibility of lapse by reason of there being no one to take.

Yeats v Paton, 1880, 8 R. 171; 18 S.L.R. 116.

2. NO GIFT APART FROM DIRECTION TO PAY AT POSTPONED DATE.

(77)

Direction to pay on death of liferenter—No other words of gift.

A testator directed his trustees to pay to his wife a liferent of his whole estate, so long as she remained a widow, and "within twelve months after the death of the longest liver of my said wife and me, or as soon thereafter as conveniently may be," to convey certain heritable subjects to his wife's nephew, "A, and the heirs of his body, whom failing, to B," A's brother, "whom failing," &c. A predeceased the testator's widow, who had not married again. Held that as the deed conferred no right upon A, apart from the direction to convey to him, no right vested in him prior to the date when the conveyance fell to be made.

Bryson's Trustees v Clark, 1880, 8 R. 142; 18 S.L.R. 103.

(78)

Destination of heritage—Direction to convey on death of liferentrix to B, whom failing, to the heirs of his body, whom failing to testator's heirs-male.

A testator directed his trustees to hold heritage for his widow in liferent, and on her death to convey it to G B, "whom failing, to the heirs of his body, whom failing, to my own heirs-male and the heirs of their body, whom failing, to my own nearest heirs whomsoever, excluding heirs-portioners." When the testator died G B was his heir-male, but he predeceased the widow without issue. In a special case presented after the death of the testator's widow, held that the testator's heir-male was to be ascertained at the death of the testator's widow (1) because, there being no words of gift except the direction to convey on that event to the institute, whom failing, to the heirs, vesting was postponed till that event; and (2) (per Lord President Dunedin and Lord Kinnear) because the trustees were bound to insert in their deed of conveyance the destination in the trust disposition and settlement, and a destination of heritage in such terms meant that the heir called on the failure of the institute was to be ascertained at the opening of the succession.

Baillie's Trustees v Whiting, 1910 S.C. 891; 47 S.L.R. 684; 1910, 2 S.L.T. 23.

(79)

Payment at first term following death of liferentrix—Legatee surviving liferentrix, but marrying and having no issue alive at her death.

A testator by trust disposition and settlement directed his trustees to give to his wife the liferent of his whole estates, and then directed them, as soon as convenient after her death, to convey a specific heritable property to his daughter M, "but in the event of her marrying and having no issue alive at the time of her death, the same shall revert to and belong to my surviving children, share and share alike." The testator was survived by his wife, by his daughter M, and by other children. **Held** that no fee vested in M at the testator's death.

Groat v Stewart's Trustees, 1894, 21 R. 961; 31 S.L.R. 797; 2 S.L.T. 135.

(80)

A testator directed his trustees to invest in their names one-third of the residue of his estate, and to pay the interest to his daughter, A B, during her life for her aliment and support. The deed then proceeded—"Upon the death of the said A B, I appoint the said third part of said residue" to be divided among A B's children, declaring that it should be payable to each as they respectively attained majority. In the event of a child dying before receiving payment of his or her share leaving lawful children, such children were to succeed to the share, and if a child should die before receiving his or her share, but leaving no lawful children, such child's share was to be equally divided among the surviving children and the lawful children of other predeceasing children. **Held** that no right vested in the children until the death of their mother.

Forbes v M'Condach's Trustees, 1890, 18 R. 230; 28 S.L.R. 188.

(81)

Direction to divide at death of annuitant "and not earlier."

A testator, after directing payment of two annuities, and providing a liferent of the remainder of his estate to his wife if she survived him, directed his trustees that the residue of his estate should, upon the death of his wife, or upon the death of the longest liver of the two annuitants "whichever of these events shall last happen, but not earlier, be divided equally, share and share alike, among" certain beneficiaries. The testator's wife predeceased him. **Held** that the residue did not vest till the death of the last survivor of the annuitants.

Sloane v Finlayson, 1876, 3 R. 678; 13 S.L.R. 448.

(82)

A testator by trust disposition and settlement directed his trustees to pay an annuity to his wife, and the whole residue of income to his son, with power to the son to test upon the fee of the estate. If the son pre-

deceased his mother, the whole income of the estate was to be paid to her during her life. On the death of the wife the trustees were to convey the whole estate to the son, if then alive, and if dead to his issue, if he left any. Failing issue of the son, the estate was to be conveyed to such persons as the son might direct by any writing under his hand, and failing such direction to certain persons named in the trust deed. **Held** that vesting did not take place till the death of the widow.

Young's Trustees, 1877, 14 S.L.R. 235.

3. CONDITIONS OF VESTING IN INSTITUTE AND IN CONDITIONAL INSTITUTE RESPECTIVELY.

(83)

Destination, with vesting postponed, to institute, whom failing, to issue—Failure of institute before period of vesting—Date of vesting in issue.

A testator directed his trustees to hold the residue of his estate for behoof of his children equally, to vest in and be payable to them at the age of thirty, and not sooner, the issue of any who might predecease that age being entitled to their parent's share. A son died at the age of twenty-eight, leaving issue. **Held** that the son's share vested in his issue at his death.

Cattanach's Trustees v Cattanach, 1901, 4 F. 205; 39 S.L.R. 154; 9 S.L.T. 284.

(84)

Gift subject to contingency—Issue to take predeceasing parent's share—Whether gift-over subject to contingency—Independent or substitutional bequest.

Under a trust disposition and settlement trustees were directed, on the death of the last of three liferentices, "to divide the whole estates and effects hereby conveyed, and to pay the free proceeds thereof among and to the whole of my sons and daughters that may then be in life, share and share alike, and failing any of them by death, to any child or children they may have respectively left, also in equal portions." All the testator's children predeceased the last liferentrix, three of them leaving issue, some of whom also predeceased the last liferentrix. **Held** that the gift to the testator's grandchildren vested in them on their survival of their parents, and was not contingent on their being alive at the death of the last liferentrix.

Campbell's Trustee v Dick, 1915 S.C. 100; 52 S.L.R. 78; 1914, 2 S.L.T. 326.

(85)

A testator's trust disposition and settlement conveyed his estate to trustees for behoof of his widow in liferent and certain persons named in fee, share and share alike, "the provisions of any of them dying and leaving lawful issue to be divided equally among his or her issue." **Held** that the

share of any heir who predeceased the life-renter vested in his or her issue alive at his or her death whether or not such issue predeceased the life-renter.

Davidson's Trustees v Davidson, (O.H.) 1909, 2 S.L.T. 20.

(86)

A testator by his trust disposition and settlement directed his trustees, on the death or second marriage of his widow, to pay the residue to such of the children as had arrived at the age of twenty-one, or as they respectively reached that age, declaring that the issue of children dying leaving issue should be entitled "to the shares, original and accruing, which their parent would have taken by survivorship," and that the share of any child dying without leaving issue should be divided among the surviving children and the issue of such children as might have died leaving issue, equally per stirpes. A, a son of the testator, survived the testator, but predeceased the widow, leaving a pupil child, B. It was found that no right had vested in A. **Held** that the share destined to A did not vest in B on the death of her father, the issue of children predeceasing the period of payment being substituted to their parent and being subject to the contingencies as regarded survivorship which qualified his right; and that vesting in B was postponed until the death or second marriage of the widow, but not until B attained twenty-one.

Banks' Trustees v Banks' Trustees, 1907 S.C. 125; 44 S.L.R. 121; 14 S.L.T. 471.

(87)

A testator directed his trustees to hold a share of the residue of his estate for his eldest son in life-rent and his issue, if any, in fee, declaring that, in the event of the death of that son without issue, the capital of his share should fall and belong to the testator's two other sons and his three daughters "equally among them, and the survivors and survivor of them, the issue of any of them predeceasing being entitled equally among them, if more than one, to their deceased parents' share." The life-renter died without issue predeceased by two of his sisters, who, however, left issue, some of whom, though surviving their parent, predeceased the life-renter. **Held** that, as the issue were called in place of their deceased parents and not as original legatees, the gift to them was subject to the same conditions as the gift to their parents; and accordingly that no vesting had taken place in the issue who predeceased the life-renter.

Addie's Trustees v Jackson, 1913 S.C. 681; 50 S.L.R. 586; 1913, 1 S.L.T. 394.

(88)

A testatrix directed her trustees to invest a certain fund for a son in life-rent, and on his death to pay and divide the fund among her four other sons and the survivors or

survivor of them equally, share and share alike, "declaring always that the children of a predeceasing parent shall in every such case take equally amongst them the share which would have fallen to his father had he been in life at the time." The life-renter survived his brothers. Three of the brothers left issue. Some of the issue, though surviving their parent, predeceased the life-renter. **Held** that the gift to the children of predeceasing sons was not an original and independent gift, but was a substitutional gift and was subject to the condition as to survivorship which affected the gift to their parents; and, accordingly, that no vesting had taken place in grandchildren of the testatrix who had predeceased the life-renter.

Todd's Trustees v Todd's Executrix, 1922 S.C. 1; 59 S.L.R. 2; 1921, 2 S.L.T. 235.

(89)

Institute predeceasing testator.

A testatrix directed her trustees to hold the residue of her estate for her children, the issue of a predeceasing child being entitled to the interest which such child would have taken had it survived, "and to retain the capital in their own hands under the trust hereby constituted until they can pay it over to trustees under a marriage contract, or otherwise, appointed by my children respectively, under trust which shall prescribe that the said income and produce shall be alimentary for my said children and the capital provided to their issue." The testatrix left three daughters. One of them predeceased her, leaving a son and daughter, who were in pupilarity. **Held** that the share which would have belonged to the predeceasing daughter if she had survived vested in her children at the death of the testatrix.

Murray's Trustees v Bloxson's Trustees, 1887, 15 R. 233; 25 S.L.R. 191.

(90)

Gift on expiry of life-rent to A and on re-marriage or death of A to B—A predeceasing life-renter—Date of vesting in B.

A testatrix by her trust settlement directed her trustees, on the expiry of certain life-rents, to divide one-half of the residue of her estate between her brother's present children, one of whom was a widow, and destined over the widow's share to her daughter in the event of the widow's re-marriage or decease before payment. The widow survived the testatrix but predeceased the last of the life-renters. **Held** that a share of the residue vested in the daughter on the death of the widow.

Fraser's Trustees v Fraser, (O.H.) 1913, 1 S.L.T. 254.

(91)

Right of child taking under condition—Vesting postponed until time when parent could have taken.

Dixon's Trustees v Duneher, 1918 S.C. 60; 55 S.L.R. 131; 1917, 2 S.L.T. 243. SUCCESSION, No. 1062.

4. DESTINATION OVER TO HEIRS.

(92)

Opinions (per Lord Watson and Lord Davey) that there is no reason why a different construction as regards the time of vesting should apply to a direction to trustees to pay to A, whom failing to his heirs, and a direction to pay to A, whom failing to B.

Bowman v Bowman, 1899, 1 F. (H.L.) 69; [1899] A.C. 518; 36 S.L.R. 959; 7 S.L.T. 159.

(93)

Destination, on expiry of liferent, to a person named "or his heirs in heritage."

A testator, who died survived by his wife, directed his trustees to hold his dwelling-house, the furniture therein, and a sum of £3000, for his wife in liferent, and on the death of the survivor of himself and his wife to convey the house and furniture, and to pay the sum of £3000, to his cousin, A B, "or his heirs in heritage." A B survived the testator, but predeceased the widow. He was survived by his eldest son, who also predeceased the widow without leaving issue. A B's second son survived the widow. **Held** (by the whole Court) that the destination to the heirs in heritage of A B was a conditional institution which suspended vesting until the death of the testator's widow.

Wylie's Trustees v Bruce, 1919 S.C. 211; 56 S.L.R. 156; 1919, 1 S.L.T. 41.

(94)

Destination to A and his heirs and/or assignees.

Question, whether a destination over to heirs or assignees is suspensive of vesting.

Thompson's Trustees v Jamieson, 1900, 2 F. 470; 37 S.L.R. 346; 7 S.L.T. 340.

(95)

A testator directed his trustees, on the death or second marriage of his widow, and in certain events to dispose a house to his son "and his heirs and assignees." **Held** that notwithstanding the use of the word "and" and the introduction of assignees the destination was a conditional institution suspending vesting.

Montgomerie-Fleming's Trustees v Carre, 1922 S.C. 688; 59 S.L.R. 492; 1922 S.L.T. 520.

(96)

Held that a destination in favour of a liferenter . . . and to A, B, C, and D "and their heirs and assignees" in fee postponed vesting till the death of the liferenter.

Corstorphine's Trustees v Corstorphine, (O.H.) 1903, 11 S.L.T. 294.

(97)

A testator directed his trustees to hold a sum of money for behoof of W C in liferent only, and for behoof of his issue, whom failing J C and his heirs in fee. J C having survived the testator but predeceased the liferenter, **held** that the destination over to J C's heirs had the effect of postponing vest-

ing until the death of the liferenter, when the legacy vested in the heirs in mobilibus of J C ascertained as at that date.

Anderson v Cunningham's Trustees, (O.H.) 1906, 14 S.L.T. 588.

(98)

Gift to A B or his heirs at law.

A testator directed his trustees, after the death of his wife, on whom he conferred a liferent of his whole estate, to pay and convey his estate to R C "or to his heirs at law." **Held** that vesting was postponed until the death of the liferentrix notwithstanding the terms of a codicil which provided for a different destination of the estate in the event of R C predeceasing the testator.

Cordiner v Duffus, (O.H.) 1909, 2 S.L.T. 164.

(99)

Held that a direction to trustees to pay a share of the trust estate on the expiry of a liferent to each of A and B or their heirs postponed vesting until expiry of the liferent.

Highet's Judicial Factor v Hamilton, (O.H.) 1912, 1 S.L.T. 474.

(100)

Gift to two nieces and their respective heirs.

A testator directed his trustees after the death of the survivor of himself and his sister M, to whom he gave the liferent of his whole estate, to convey to his nieces A and B "equally between them, and their respective heirs" a certain heritable property. A survived the testator but predeceased M. **Held** that the gift over to heirs must be treated as a proper conditional institution, with the result that A took no vested right in the property.

Hendry's Trustees v Patrick, (O.H.) 1905, 13 S.L.T. 503.

(101)

To persons named with conditional institution of their heirs in heritage and executors in moveables.

Two spouses conveyed to trustees the estates which should belong to them "respectively" at their deaths, (3) in order that the trustees should pay the income to the survivor, and "(7) in order that the trustees may and shall, at the death of the longest liver" of the spouses, convey certain property, heritable and moveable, to A, B, and C, "their heirs and assignees," providing that if any of the said A, B, or C should have predeceased, their heirs should be entitled to take their share of the heritage, and their executors their share of the moveables. **Held** (1) that the legacies did not vest till the death of the survivor of the spouses.

Stodart's Trustees, 1870, 8 M. 667; 42 J. 330.

(102)

Destination over to heirs of institute, whom failing to heir of testator.

By his trust disposition and settlement a testator directed his trustees to convey

certain lands at the first term occurring not less than six months after his decease to "his son and the heirs-male of his body, whom failing to my own heirs-female." The son having died before the appointed date of conveyance, **held** that whatever might be the effect of the destination over to the son's heirs, the destination over to the testator's heirs-female was a proper destination over, which had the effect of postponing vesting in the son until the date of conveyance.

Bell's Trustees v Bell, (O.H.) 1916, 2 S.L.T. 250.

(103)

Specialties held to displace general rule.

Terms of a trust settlement where trustees were directed, after the death of the testator's widow, to divide the estate "equally among my whole children and their respective heirs, share and share alike, as they respectively attain the age of twenty-one years complete," under which **held** that vesting took place a *morte testatoris*.

Cairns v Cairns' Trustees, (O.H.) 1902, 10 S.L.T. 364.

(104)

Destination to "A" and his heirs.

Hay's Trustees v Hay, 1890, 17 R. 961; 27 S.L.R. 771.

(105)

Destination to A "and her heirs and successors" — Destination to A "and her heirs and representatives."

A testator by his trust disposition and settlement conveyed his whole estate to trustees, and directed them to pay to his wife during her lifetime the whole income thereof, and, on her death, *inter alia* (1) to convey a certain heritable subject to his daughter "and her heirs and successors whomsoever," and (2) to pay to the daughter "and her heirs and representatives" a sum of £300. The daughter survived the testator but predeceased the *liferentrix*. **Held** that both bequests vested in the daughter a *morte testatoris*.

Marshall's Trustee v Campbell, 1914 S.C. 443; 51 S.L.R. 397; 1914, 1 S.L.T. 266.

(106)

Payment "not sooner" than expiry of a lease.

A trustee directed that his trustees should, on the expiry of a certain lease, "in or about the year 1892 as I think, or whenever that may be, but not sooner, pay and convey" the residue of his estate to certain nephews and nieces and their heirs, equally among them, share and share alike. **Held** that the residue had vested a *morte testatoris*.

Archibald's Trustees v Archibald, 1882, 9 R. 942; 19 S.L.R. 709.

5. DESTINATION OVER TO ISSUE.

(1) VESTING IN INSTITUTE SUBJECT TO DEFEASANCE.

[See VIII. 3, *infra*.]

(2) VESTING POSTPONED.

(107)

Direction to trustees to pay at postponed period.

A testator directed his trustees to pay the free income of the trust estate to his widow, and after her death or second marriage to "pay to or apply for behoof of my children until the youngest attain the age of twenty-one years complete the free income of my said estates." The testator further directed his trustees—"So soon as convenient after my youngest child attains the age of twenty-one years complete, and after the interest of my said spouse has ceased by her decease or having entered into another marriage, my said trustees shall either convey or pay over the whole of the free residue of my estates to my children equally, the issue of any child who may have predeceased leaving issue coming in place of and taking the share which would have been taken by the predeceasing parent if in life." **Held** that vesting of the residue was postponed until the youngest child attained twenty-one years of age.

Adams' Trustees v Carrick, 1896, 23 R. 828; 33 S.L.R. 620; 4 S.L.T. 49.

(108)

By his trust settlement and codicil a testator provided that on the death of his son David his estate should be divided and paid to and among his daughter and two other sons equally, share and share alike, "declaring always that the issue of any of them predeceasing the period of payment to be entitled equally to the share which would have fallen to their parent." **Held** that vesting was suspended by the conditional institution of issue until the date of payment.

Parlane's Trustees v Parlane, 1902, 4 F. 805; 39 S.L.R. 632; 10 S.L.T. 48.

(109)

General rule — Substitution of issue to parents is *prima facie* suspensive of vesting.

A mutual trust disposition and settlement executed by husband and wife provided for payment, on the death of the survivor, of the interest of £1000 to each of three of the wife's sisters, and on the death of each of the sisters, or on the death of the survivor of the spouses, if any of the sisters predeceased the spouses, for payment of the fee of the three several principal sums among the children of the three sisters and of a deceased sister, in such proportions, at such times, and under such conditions as the wife, without the concurrence of her husband, might appoint, and, failing appointment, equally among them, "the issue of such of the said children as shall predecease the foresaid respective terms of payment being entitled to the share which would have fallen to their predeceasing parent." **Held** that vesting in the children of the sisters was suspended—by

the conditional institution of their issue—until the term of payment.

Forrest's Trustees v Mitchell's Trustees, 1904, 6 F. 616; 41 S.L.R. 421; 11 S.L.T. 820.

(110)

Terms of a will on which held that the conditional institution of the children of beneficiaries predeceasing was referable to the time of payment, and had the effect of postponing vesting in the beneficiaries until that date.

Warden's Factor v Warden, (O.H.) 1905, 12 S.L.T. 670.

(111)

Gift to children "and their descendants."

A testator gave to his son A a liferent of his whole estate, and directed his trustees in the event of A dying without issue "to divide the whole estate among the children of" his deceased sister B "and their descendants." Held that vesting in the children of B was postponed until the death of A.

Gauden's Trustee v Jamieson, (O.H.) 1902, 10 S.L.T. 326.

(112)

Legacies to daughters payable on death or marriage of all daughters but one—Destination over to issue referred to period of payment.

A testator directed his trustees to pay the liferent of his estate to his widow, under burden of maintaining his unmarried daughters, and after her death to pay an annual sum equally to his sons and the balance of income equally among his unmarried daughters, while two remained unmarried. By a codicil, the testator directed his trustees to pay "to each of my daughters, married or unmarried, without restriction, and not exclusive of the *ius mariti* of their husbands, the sum of £1500 sterling at the first term of Whitsunday or Martinmas after the death of my wife, and after the death or marriage of all my daughters but one; and it is hereby specially provided and declared that the issue of a daughter predeceasing the period for payment of the aforesaid provision of £1500 shall have right equally among them to their mother's provisions." The sons were appointed residuary legatees. The testator was survived by his widow, one son, and three daughters. After the death of the widow one daughter died leaving issue, and a second daughter, H, died unmarried; the third daughter, who survived, was unmarried. Held that a legacy or provision of £1500 had not vested in H.

Reeve's Executor v Reeve's Judicial Factor, 1892, 19 R. 1013; 29 S.L.R. 897.

(113)

Gift payable after deaths of two liferenters or on youngest child attaining majority.

A testator directed his trustees to pay the whole income arising from his estates,

heritable and moveable, to certain beneficiaries, and after the death of his widow and his only son, and upon the youngest grandchild attaining majority, to close the trust and to divide the whole residue among his grandchildren and their issue, the issue of a deceased child taking the share which their parent would have taken if in life. The youngest grandchild attained majority, but predeceased the testator's son. Held that vesting was suspended until the death of the testator's son.

Morin's Trustees v Scott, 1872, 10 S.L.R. 65.

(114)

Several liferenters—Condition of none leaving issue.

A testator directed his trustees to hold the residue of his estate, and to divide the annual proceeds thereof among three of his five children — Robert, Margaret, and Agnes; and on the death of the longest liver of the liferenters, to convey the residue in equal portions to and among the children respectively of the liferenters—"Declaring, however, that in the event of the death of any of my said children without leaving lawful issue, my said son John . . . and my said daughter Susan, . . . or in the event of their death leaving lawful issue, their said issue, shall be entitled to an equal share alongst with the issue of my other children, and that per stirpes and not in capita of the share of the residue of my said estates of which such child or children so deceasing without issue had or would have had the interest, and my said trustees are in that event directed so to divide, pay, or convey the same accordingly." Held that as it could not be known till the death of the last survivor of the three liferenters whether such survivor would leave issue, no vesting of the share of a deceased liferenter who left no issue could take place before that event.

Corbett's Trustees v Pollock, 1901, 3 F. 963; 38 S.L.R. 723; 9 S.L.T. 105.

(115)

Ultior destination to issue.

A testator directed his trustees to set aside and hold £7000 for behoof of his daughter Janet in liferent allenarly, and of her issue in fee; "and failing issue of the body of the said Janet White, or in case of such issue predeceasing before becoming entitled to or receiving payment of said provision, then the said sum of £7000 sterling, or property in which the same may be invested, shall fall and accrue to and be divided among the brothers and sister of the said Janet White equally and share and share alike, the issue of any brother or sister deceasing always succeeding to the same share as would have fallen to their parent had he or she been in life." Janet died unmarried. She was survived by one sister, Jane, and by one brother, Alexander, and predeceased by one brother, John, who left no issue, and by two brothers, James and Robert, who left issue. Held that the

right to the fee vested at the date of Janet's death.

White's Trustees v Chrystal's Trustees, 1893, 20 R. 460; 30 S.L.R. 463.

(3) VESTING A MORTE TESTATORIS.

(116)

A postponed period of payment coupled with a destination to the issue of the children called primarily **held** not to postpone vesting.

Ogle's Trustees v Ogle, 1904, 6 F. 359; 41 S.L.R. 284; 11 S.L.T. 659.

Taylor's Trustee v Christal's Trustees, 1903, 5 F. 1010; 40 S.L.R. 738; 11 S.L.T. 190.

Matheson's Trustees v Matheson's Trustees, 1900, 2 F. 556; 37 S.L.R. 409; 7 S.L.T. 365.

Mellis v Mellis' Trustee, 1898, 25 R. 720; 35 S.L.R. 552; 5 S.L.T. 373.

Ballantyne's Trustees v Kidd, 1898, 25 R. 621; 35 S.L.R. 488; 5 S.L.T. 322.

Richard's Trustees v Roland, 1894, 22 R. 140; 32 S.L.R. 130; 2 S.L.T. 351.

Water's Trustees v Waters, 1884, 12 R. 253; 22 S.L.R. 176.

Ross's Trustees, 1884, 12 R. 378; 22 S.L.R. 232.

Jackson v McMillan, 1876, 3 R. 637; 13 S.L.R. 388.

Elliot v Bowhill, 1873, 11 M. 735; 45 J. 446; 10 S.L.R. 610.

Hendry's Trustees v Hendry, 1872, 10 M. 432; 44 J. 236; 9 S.L.R. 263.

Lord Advocate v Hotson, (O.H.) 1894, 31 S.L.R. 915; 1 S.L.T. 580.

Airth's Executor v Lord Advocate, (O.H.) 1886, 24 S.L.R. 165.

(117)

As a general rule, and in the absence of evidence of a contrary intention, a testamentary direction to pay to a person in **liferent** and on the death of the **liferenter** to pay the fee to another person named and his issue, does not import a suspension during the subsistence of the **liferent** of vesting in the person named as **lifer** if he survives the testator. The issue are presumed to be called not as persons independently favoured but from favour to the parent.

Ross's Trustees v Ross, 1897, 25 R. 65; 35 S.L.R. 101; 5 S.L.T. 202.

(118)

Direction to pay at majority—Income meanwhile available for maintenance and education.

A testator directed his trustee to make payment to his nephew of a legacy of £60,000 for his **liferent** use, "and on his death I direct the said sum to be paid to and among his children equally among them, share and share alike, on their respectively attaining the age of twenty-one, payable as such children, after their father's death, respectively attain majority, the interest or annual produce being, however, in the meantime available for their maintenance and

education, the issue of any of the said children who may have predeceased taking their parents' share." The nephew predeceased the testator.

Held that the fee of the £60,000 vested equally in all the nephew's children at the testator's death, irrespective of their attainment of majority.

Mackinnon's Trustees v MacNeill, 1897, 24 R. 981; 34 S.L.R. 742; 3 S.L.T. 67.

(119)

Gift of fee to institutes—Subsequent clause containing destination over to issue.

A truster directed his trustees to hold a share of residue for behoof of his brother's children nominatim "equally between and among them in **liferent** and their lawful issues, born and to be born, equally among them in fee." There was a further declaration that, in the event of any of the issue predeceasing the term of payment, leaving lawful issue, such issue should come in place of the parent. **Held** that the first clause imported an absolute gift to the issue of the brother's children, that the subsequent clause did not control the absolute character of the gift, and that the fee vested in the issue a **morte testatoris**.

Byars' Trustees v Hay, 1887, 14 R. 1034; 24 S.L.R. 728.

(120)

Gift to testator's children — Destination over in the event of death of all children—Child surviving testator, but predeceasing date of payment.

A testator, in his trust disposition and settlement, directed his trustees to manage and preserve his estate for behoof of his children, with power to make advances from capital, and on his youngest child reaching the age of twenty-one to convey the free residue to his children who might be alive at the date of his decease. There was a destination over to issue in the event of any child dying before his share became payable. In a codicil executed when he had only one child alive, a boy of six, the testator, on the narrative that he had not provided for the disposal of his whole estate, "in the event of the death of my children or their issue," directed his trustees, in case of the death of his only surviving child, and any other children he might have, and their issue, to convey the whole residue to a nephew. The only son survived the truster, and died at the age of seventeen. **Held** that the residue had vested in the son.

Peacock's Trustees v Peacock, 1885, 12 R. 878; 22 S.L.R. 588.

(121)

Gift to testator's children payable on youngest attaining majority—Immediate gift of income to children—Power to trustees to make advances before the term of payment.

A testator directed his trustees after paying certain annuities to divide the free income of his estate equally among his children until the youngest child should attain majority, when the residue was to be

divided equally among them, the issue of any predeceasing the period of payment to take their parents' share. There was also a power given to make advances out of capital to children before the term of payment, which were to be held as payments to account of residue. **Held** that the share of residue of a son who survived the testator but predeceased the period of division vested at the testator's death.

Wilson's Trustees v Quick, 1875, 5 R. 697; 15 S.L.R. 395.

IV. VESTING OF CLASS GIFTS.

1. CLASS CLOSED AT TESTATOR'S DEATH.

(122)

Bequest to vest a morte testatoris—Payment postponed—Express declaration as to vesting.

A testator directed his trustees on his wife's death to divide the residue of his estate among his grandchildren then surviving. The testator further declared that the interest of the residuary legatees should vest at his death, and that the shares should only be payable as the legatees attained twenty-one, the interest being in the meantime payable for their support and education. **Held** that a grandchild born after the testator's death, but before the death of the widow, was not entitled to share.

Davidson's Trustees v Davidson, 1871, 9 M. 995; 8 S.L.R. 646.

(123)

Legacy to children severally—To be placed by marriage trustees for their benefit while under age.

A testator, after a legacy to his daughter, bequeathed "to each of her children by this her present marriage £1000 each, free of duty, but to be placed at the discretion of the marriage trustees for their special benefit while under age." **Held** that the bequest was limited to children alive at the death of the testator, and did not extend to children born after the testator's death.

Stopford Blair's Executors v Heron Maxwell's Trustees, 1872, 10 M. 760; 44 J. 444; 9 S.L.R. 490 and 497.

(124)

"Children of A lawfully begotten or who shall be lawfully begotten"—Payable to children at majority—Vesting a morte.

A testator directed "that the residue of my funds be divided among the children lawfully begotten, or who shall be lawfully begotten of my cousins T, A, and J, share and share alike, on each of them attaining the age of twenty-one years," and appointed executors. **Held** that the residue vested a morte testatoris in the children of T, A, and J in existence at the date of the testator's death, and that children born thereafter were not entitled to participate.

Hayward's Executors v Young, 1895, 22 R. 757; 32 S.L.R. 559; 3 S.L.T. 54.

(125)

No provision for continuing trust.

A testatrix directed her trustees to hold her estate for her children, if any, in fee; and declared that the shares of her children should vest at majority. There was a gift over failing issue to the children of her brothers and sisters. She died without issue. Her brothers' and sisters' children were still in pupillarity. **Held** on a construction of the settlement that the testatrix did not intend to set up a continuing trust for the children of her brothers and sisters, and that accordingly her trustees must immediately pay over their shares to their respective fathers as their tutors.

Lietke's Trustees v Graham, 1907, 45 S.L.R. 257; 15 S.L.T. 660.

(126)

Bequest to grandchildren born before testator's death—Right of grandchild illegitimate at testator's death but subsequently legitimated.

Burns' Trustees v Burns, 1917 S.C. 117; 54 S.L.R. 111; 1916, 2 S.L.T. 318. SUCCESSION, No. 587.

2. VESTING SUBJECT TO PARTIAL DEFEASANCE IN FAVOUR OF NEW MEMBERS.

(127)

General rule.

Per Lord Davey—"It is an elementary principle in the construction of wills that a gift to a class after a life interest or liferent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the lifetime of the life tenant or liferenter."

Hickling's Trustees v Garland's Trustees, 1898, 1 F. (H.L.) 7; [1899] A.C. 15; 35 S.L.R. 975.

(128)

Inter vivos trust deed—Liferent to A and his wife with fee to children.

Miller v Finlay's Trustees, 1875, 2 R. (H.L.) 1; 12 S.L.R. 630, No. 296, infra.

(129)

Member of class born after testator's death—To daughter in liferent and her issue in fee.

A testator directed his trustees, upon his death, to convey certain heritable subjects to his daughter in liferent and to her issue in fee. **Held** that a child of the daughter, born after the testator's death, was entitled to share in the fee.

Simpson v Marshall, 1900, 2 F. 447; 37 S.L.R. 314; 7 S.L.T. 195.

(130)

To children of A on termination of liferent.

A testator left the liferent of the whole residue of his estate to his widow, and directed that, on the termination of the liferent, "all of which I am possessed be divided among my cousins the Blackwells

(leaving out Mrs. Buckle) and among the children of my uncle James Hay, Esq., of Belton." Held that the fee of the residue vested a *morte testatoris*; and that a member of the Hay family born after the testator's death was entitled to a share.

Hay Cunningham's Trustees v Blackwell, 1909 S.C. 219; 46 S.L.R. 175; 16 S.L.T. 592.

(131)

———**To daughter in liferent and issue of her body in fee.**

A testator directed his trustees to dis-
pone the residue of his estate to his daughter in liferent *allenary*, "and to the lawful issue of her body in fee." The daughter was not married at the date of the will, but she married subsequently, and had one child prior to the testator's death. Five children were born subsequent to that event. Held that the children born subsequent to the testator's death were entitled to a share in the fee of the estate.

Christie v Wisely, 1874, 1 R. 436.

(132)

———**Direction to hold residue for daughter and her children—Power of appointment.**

A testator directed his trustees to hold and apply or pay a share of residue and the income thereof to or for behoof of one of his daughters and her children, or any of them, in such portions and at such times as his trustees might think most for the advantage of them or any of them. The daughter had two children at the date of the testator's death. Thereafter two other children were born to her before any apportionment of the share in question had been made. Held that the children born after the date of the testator's death were included among the objects of the power.

Potter's Trustees v Allan, 1918 S.C. 173; 55 S.L.R. 229; 1918, 1 S.L.T. 72.

(133)

———**Direction to settle on J D in liferent and his children in fee—Gift over failing J D and his children.**

By a codicil a testatrix directed her trustees with reference to a legacy left to J D by her settlement "to invest and settle" the legacy "in such manner as to secure the liferent to J D" and the fee to his children. . . . Failing the said "J D" and his children, the capital of the said legacy is to revert to "the next of kin of the testatrix." Held that the legacy vested in the child of J D alive at the death of the testatrix for behoof of himself and of any other children who might be born.

Scott's Trustees v Dunbar, 1900, 2 F. 516; 37 S.L.R. 375; 7 S.L.T. 346.

(134)

———**Destination in liferent and fee—To A in liferent *allenary* and her children *nascituri* in fee.**

Held that under a destination to a woman in liferent *allenary* and to the children to be procreated of her body in fee the chil-

dren took a vested interest on coming into existence.

Douglas v Thomson, 1870, 8 M. 374; 42 J. 173; 7 S.L.R. 224.

(135)

———**Direction to hold for A in alimentary liferent and issue per stirpes in fee.**

Where a testator directed his trustees to hold the residue of his estate for his children equally, and to hold and retain invested in their own names the shares of his daughters for their liferent alimentary use only, and for their children equally per stirpes in fee, held that a share of residue vested in each child of a daughter at birth.

Steel's Trustees v Steedman, 1902, 5 F. 239; 40 S.L.R. 202; 10 S.L.T. 440.

(136)

———**Liferent to children—Fee to grandchildren per capita—Directions for disposal of income.**

A testator conveyed his estate to trustees for behoof of his only son and his seven daughters nominatim equally among them in liferent *allenary*, and of their children in fee per capita and not per stirpes, but under burden of an annuity to his widow. The trustees were directed on the death of the survivor of his son and seven daughters and of his widow "to denude in favour of the persons who shall then have right to the different subjects hereby conveyed." In the event of any of the testator's son and daughters predeceasing the period of division leaving issue, such issue were to succeed per stirpes to their parent's life interest, and in the event of any of the testator's son and daughters predeceasing the period of division without leaving issue, or of such issue dying before the period of division, then the life interest of the son or daughter so predeceasing was to be divided among the whole grandchildren "surviving at the time" until the period of division should arrive. The testator died in 1830, the last survivor of his son and seven daughters in 1878, and his widow in 1880. At the latter date, of his fifty-two grandchildren, only twenty-three survived. Held that the fee of the trust estate vested a *morte testatoris* in those grandchildren who were then in existence for themselves, and for those who would afterwards be born.

Duncan's Trustees v Thomas, 1882, 9 R. 731; 19 S.L.R. 502.

(137)

———**Vesting in class subject to birth of other members.**

Terms of a will under which held that the residue of a trust estate vested subject to defeasance.

Cassels v Houston's Trustees, 1894, 2 S.L.T. 118.

(138)

———**Gift in liferent to family, and failing issue to survivors and in fee to issue, whom failing to issue of survivors—Last survivor**

of liferenters dying without issue—Vesting in issue of predeceasers.

A testator directed his trustees to pay the free income of his estate, after deducting an annuity to his widow, in equal portions to his brother and four sisters, and failing them without issue, to the survivors and survivor. He further directed his trustees, on the death of any of his brother or sisters leaving issue, to pay to such issue (and the issue of any predeceasers) the capital sum liferented by their parents, so far as that could be done consistently with retaining enough to secure the widow's annuity; and on the death of his widow "to make over and settle my whole heritable and moveable means and estate . . . and that in equal shares, upon my said brother and sisters in liferent for their liferent use alienably, and the issue of their bodies respectively, whom failing to the issue of the survivors or survivor in fee." The testator was survived by his widow and his brother and four sisters. His brother and three sisters predeceased the widow, the brother and two of the sisters leaving issue. The remaining sister survived the widow, and died without issue. It having been held that the words, "survivors or survivor," were equivalent to "others or other," held (1) that the fee of the shares liferented by the brother and sisters who left issue vested in such issue a *morte testatoris*, or as soon thereafter as they came into existence; and (2) that the fee of the share of the last surviving sister, who died without leaving issue, vested only on her death in the issue of her brother and sisters, or their descendants who survived her.

Ramsay's Trustees v Ramsay, &c., 1876, 4 R. 243; 14 S.L.R. 168.

(139)

Conditional institution of parent in liferent and children in fee—Date of vesting in children.

A testator directed his trustees to hold heritage in trust for A in liferent, and A's issue in fee, whom failing for B in liferent and his issue in fee, whom failing to C and D (daughters of the testator) in liferent *seriatim*, and their issue in fee, whom failing to others in fee. The trustees were directed to convey the property accordingly. A and B died without issue. When the liferent opened to C she had a son and daughter; the daughter predeceased her, leaving issue. Held that the fee vested in C's issue at the date of the opening of her liferent.

Bowie's Trustees v Black, 1899, 36 S.L.R. 475.

(140)

Provision to children in liferent and their issue in fee — Children rejecting liferent — Right of issue to payment — Payment on caution.

A testator directed the residue of his estate to be divided at his death into five equal shares, one share to be paid to each of his children in liferent and their issue in

fee. With regard to four of the children it was provided that in the event of the death of any one of them without issue, his or her share should revert to the general residue. With regard to the fifth child J, a daughter, there was no such provision. The children all repudiated their father's settlement and successfully claimed legitim. Held that the children of J, who had attained the age of fifty-three years, were entitled to immediate payment of the one-fifth share of residue directed to be paid to them upon their mother's death, upon finding caution to make forthcoming to any child or children to be hereafter born of their mother the share to which such child or children might be entitled.

Cameron v Young, 1873, 45 J. 272.

(141)

Children to receive income only—Gift of fee to grandchildren — Entail Amendment Act, 1868, sec. 17.

A testator first directed his trustees to hold his estate for behoof of his children. He then directed that they should only receive the income and gave the fee to his grandchildren. Held that the trustees held the estate for an existing grandchild and any further grandchildren who might come into existence, *per stirpes*, but subject to the provisions of sec. 17 of the Entail Amendment Act, 1868.

Downie's Trustees, 1901, 38 S.L.R. 755; 9 S.L.T. 142.

(142)

"Failing the said J D and children."

A testatrix, by a codicil, directed her trustees to invest and settle a legacy provided by her to J D, so as to secure the liferent to J D and the fee to his children. "Failing the said J D and children, the capital of the said legacy is to revert to my own next of kin." She was survived by J D and one child of J D. Other children were afterwards born. Two children predeceased J D. Held that the legacy vested in the child of J D alive at her death for behoof of himself and of any other children who might be born.

Scott's Trustees v Dunbar, 1900, 2 F. 516; 37 S.L.R. 375; 7 S.L.T. 346.

(143)

"Should institute die without issue."

Held (1) that where a testator directed his trustees to hold the whole residue of his estate for his children equally, and "to hold and retain invested in their own names" the shares of his daughters "for their liferent alimentary use only, and for their children equally *per stirpes* in fee," a share of residue vested in each child of a daughter at its birth; and (2) that a destination over to survivors to take effect "should any of my daughters die without issue," was to be construed as limited to the case where the daughter died without ever having had issue.

Steel's Trustees v Steedman, 1902, 5 F. 239; 40 S.L.R. 202; 10 S.L.T. 440.

(144)

Gift to issue of daughter in event of daughter "leaving issue"—Direction to divide amongst issue of each daughter.

A testator directed his trustees to pay the interest of a sum of £36,000 equally amongst his three daughters, and continued—"On the death of my said daughters respectively leaving lawful issue, I hereby direct my trustees to divide amongst the issue of each of my said daughters" one-third of the foresaid sum of £36,000. **Held** that although the gift to the daughter's issue was contingent on her leaving issue, it was not limited to the issue who survived her, and that the contingent right vested at the testator's death in the issue as a class, including all the children then alive.

Hickling's Trustees v Garland's Trustees, 1898, 1 F. (H.L.) 7; [1899] A.C. 15; 35 S.L.R. 975.

(145)

Gift over "failing issue."

A testator directed his trustees to lend out his daughters' shares of his estate and to take the securities to be granted therefor in such a way that the interest or annual-rent of such share should be paid to them during all the days of their lifetime, and the principal sum or share itself after their death be paid or divided equally, share and share alike, among the decedent's lawful issue, and failing issue, equally among the testator's own children surviving at the time. One of the testator's daughters married after his death, and had eleven children, five of whom predeceased her, leaving no issue. **Held** that a share of the provision liferented by the daughter vested in each of her children at birth.

Cunningham v Cunningham, 1889, 17 R. 218; 27 S.L.R. 106.

3. VESTING ON PAYMENT OF SHARE TO ANY MEMBER.

(146)

Member of class born after date of distribution—Bequest to children payable at majority or marriage.

A testator directed his trustees to "convey and make over" a sum of £10,000 to the "younger children" of his nephew John Scott, "equally share and share alike, on said children, if males, attaining the age of twenty-one years complete, and if females, on their attaining said age or being married," till which period it was declared none of the shares should vest. By a codicil the testator further directed his trustees to "hold, invest, pay, convey, and make over" the sum of £8000 to "the lawful issue of the body" of the same nephew equally, with the same provision regarding the period of distribution as in the previous bequest. **Held** in the case of both bequests (1) that the provisions were conceived only in favour of the children of John Scott alive at the date when the eldest of the respective classes attained majority (including a child born after the

death of the testator but prior to that date), and (2) that the beneficiaries were entitled to payment of their respective shares as they respectively attained twenty-one years of age, or, if females, married before attaining that age.

Scott's Trustees v Scott, 1909 S.C. 773; 46 S.L.R. 719; 1909, 1 S.L.T. 504.

(147)

"Children born or to be born"—Vesting on majority.

Terms of a trust disposition and settlement and codicil under which **held** that a bequest to the children of a certain marriage "born and to be born," vesting as they attained majority, excluded children born after the date when the first payment out of the fund fell to be made to one of the then existing children.

Howden's Trustees v Macpherson, (O.H.) 1911, 2 S.L.T. 308.

(148)

Direction to "hold" fund "for behoof of the children of my nearest of kin if there any be."

A testator, after providing for two liferents of the residue of his estate, directed his trustees to "hold the said residue for behoof of the children of my nearest of kin if there any be." At the expiry of the second liferent his nearest of kin was his second son, whose eldest child was then in utero. Other children were subsequently born. **Held** that, in the absence of any provision in the settlement for a continuing trust, the child in utero succeeded at his birth to the whole fund, and was entitled to immediate payment.

Murray's Trustee v Murray, 1919 S.C. 552; 56 S.L.R. 503; 1919, 2 S.L.T. 47.

(149)

Successive distributions—Post natus—Born after interim, but before final distribution.

Where a testator directs a fund to be distributed in portions at various times among the children of a family, a child born after any of the distributions will be presumed, in the absence of any indication by the testator to the contrary, to be entitled to share in subsequent distributions, but in these only.

A testator directed his trustees to pay annuities of £2000 each to a brother and sister, and in order to secure these to set apart a sufficient sum of the residue of his estate. He directed eight one-hundredth parts of the residue to be divided among the children of J D. At the testator's death J D had eleven children. The trustees retained a sum to meet the annuities, and distributed the rest. A second distribution took place on the death of one of the annuitants, and thereafter another child was born to J D. **Held** that the post natus was entitled to share equally with his brothers and sisters in so much of the family's share as had not been distributed, but to no other share of the residue.

Ross v Dunlop, 1878, 5 R. 833; 15 S.L.R. 580.

(150)

Liferent to A—Fee to children of B.

A trustor left a liferent of his estate to his widow, and further provided that after her death it should be sold and the price divided in certain proportions between the children "born or to be born" of his only daughter. **Held** that the shares, being divisible among the children at the death of the liferentrix, vested at that date.

French, 1881, 18 S.L.R. 527.

(151)

Testamentary trustees were directed, after payment of debts, legacies, and certain annuities, to hold the residue of the testator's estate for behoof of his brother George, and failing him his cousin John, in liferent, and thereafter for "payment and delivery" thereof to the children of George, whom failing for payment of a special legacy and the balance to the children of the testator's brother Archibald, whom failing to the children of the testator's brother William. At the death of the survivor of the annuitants, Archibald was alive, but had no children, and William had an only son. **Held** that after payment of the special legacy William's only child was entitled to have the residue immediately made over to him.

Stewart's Trustees v Stewart, 1868, 7 M. 4; 41 J. 5; 6 S.L.R. 3.

(152)

Direction to convey to two daughters in liferent and their children, "any of whom failing," to the survivors in fee—Successive periods of distribution.

A testator by his trust settlement, inter alia, directed his trustees, so soon as they should see fit, to convey certain heritable property to two daughters—his only children—in liferent respectively, and to two grandchildren nominatim and other grandchildren nascituri, equally among them, share and share alike, "any of whom failing, the share or shares of the deceiver or deceasers to the survivors, equally among them, share and share alike, in fee." **Held** that the fee did not vest in the testator's grandchildren or their issue at the testator's death, but that on the death of each daughter the half liferented by her fell to be divided among the testator's grandchildren or their issue then in existence, exclusively.

Marshall v King, 1888, 16 R. 40; 26 S.L.R. 24.

(153)

Direction to pay to children on death of liferenter and attainment of majority — "Whom failing,"

A testator directed his trustees to set aside and hold a specified sum for behoof of two grandsons and a granddaughter in liferent, and upon the death of any one of his grandchildren, or at any later period which he or she might appoint, to pay over his or her share of the fund to and among his or her children "when and as they arrive at majority or are married, whom failing, to his or her assignees, whom failing to my own

nearest heirs." **Held** that on the death of a liferenter leaving children the fee of the share liferented vested in his children.

Normand's Trustees v Normand, 1900, 2 F. 726; 37 S.L.R. 517; 7 S.L.T. 430.

4. VESTING AS EACH MEMBER ATTAINS MAJORITY.

(155)

Gift to issue of liferenter payable at majority and on death of liferenter—Gift over in event of issue not surviving to take.

A testator directed his trustees to hold and convey certain funds for behoof of his daughter in liferent only and her "children per stirpes in fee payable . . . to and among such children equally, and that upon their respectively attaining the age of twenty-one years, and on the death of their respective parents." It was also provided that in the event of the daughter "dying without leaving issue," or in the event of her "dying leaving issue, but of such issue not surviving to take in terms of the destination hereinbefore contained" the fund liferented by the daughter should devolve upon her surviving brothers and sisters. The daughter died leaving three sons. **Held** that vesting did not take place in the three sons as a class on the eldest attaining majority, but in each individual on his attaining majority.

Neill's Trustees v Neill, 1902, 4 F. 636; 39 S.L.R. 426; 9 S.L.T. 495.

(156)

Gift to issue of children—Destination over on failure of children without leaving issue who should attain majority.

A testator directed his trustees to "hold and invest" the residue of his estate "for behoof of the whole of my children equally among them in liferent, for their respective liferent alimentary uses allenarly, . . . and for behoof of the issue of my said children respectively, per stirpes, equally among them in fee, subject to the contingent exception and declaration after mentioned with regard to the issue of my sons, William Wilson and James Wilson; and failing any of my said children by decease without leaving issue who may attain to the age of majority or be married, then to the survivors or survivor of my said children and the issue of their bodies respectively, per stirpes, who may attain to majority or be married, in liferent and fee respectively as aforesaid subject to the said contingent exception and declaration after mentioned with regard to the issue of my said sons, William Wilson and James Wilson . . . declaring always, and providing by way of exception, that in the event of the issue of my son, William Wilson, who may attain to the age of majority, or be married, exceeding in number the issue of my son, James Wilson, who may attain to the age of majority or be married, the shares of said residue falling to the issue of my said two sons . . . shall not be divided per

stirpes, but shall be slumped together, and then divided per capita equally among the issue of my son, William, and the said issue of my son James." William Wilson was survived by three children who attained majority, and was predeceased by two children, who also attained majority. James was survived by an only son, who attained majority. **Held** that the gift to issue being contingent, not only on the parent's leaving issue, but on such issue attaining majority or being married, the right did not vest in the issue as a class, but that the contingency affected each individual, so as to make it a condition of his taking (1) that he should survive the parent; and (2) that he should attain majority or be married.

Wilson's Trustees v Wilson, 1901, 3 F. 967; 38 S.L.R. 706; 9 S.L.T. 102.

(157)

Bequests to children payable after death of liferentrix, on children respectively attaining twenty-five.

A testator directed his trustees on the expiry of a liferent to hold and apply a principal sum of £20,000, and the interest thereof, for behoof of the children of his brother B, "procreated or to be procreated," in equal shares, "payable the several children's shares on their attaining twenty-five years of age," and at the expiry of the liferent the testator's brother was still alive and two of his children had attained the age of twenty-five. On the death of the liferentrix vesting took place in the children who had then attained twenty-five, and the other children took a vested interest as they respectively attained that age. **Question**, whether children born after the death of the liferentrix were entitled to share in the bequest.

Buchanan's Trustees v Buchanan, 1877, 4 R. 754; 14 S.L.R. 503.

5. VESTING ON YOUNGEST MEMBER ATTAINING MAJORITY.

(158)

Youngest beneficiary dying in minority.

A testator directed his trustees, "upon the youngest of my sons that may be born to me reaching the age of twenty-one years, to convey and make over to them" certain heritable estates belonging to the testator. The testator was survived by three sons. The youngest died in minority after the two elder sons had attained majority. **Held** that the share of the elder sons vested in them on the death of the youngest.

Roberts' Trustees v Roberts, 1903, 5 F. 541; 40 S.L.R. 387; 10 S.L.T. 642.

(159)

Gift to children—Vesting declared to take place on youngest child attaining twenty-five—Claim by sole surviving child at age of twenty-three.

Lawrie's Trustees v Lawrie, 1905, 7 F. 910; 42 S.L.R. 693; 13 S.L.T. 246, No. 200, *infra*.

(160)

Direction to divide on death of widow provided youngest child has attained twenty-five.

Ross's Trustees v Ross, 1902, 4 F. 840; 39 S.L.R. 678; 10 S.L.T. 163, No. 49, *supra*.

6. VESTING POSTPONED UNTIL PERIOD OF PAYMENT.

(161)

Gift to children alive at death of liferenters.

A testator directed his trustees to pay the yearly interest or produce of a sum of £6000 Bank of Scotland stock to his wife's niece, and in the event of her predeceasing her husband, which occurred, to pay the yearly produce to him during his life, and on the death of the survivor of them he directed "the capital of said stock to be paid or transferred to their child or children who may be then alive." The testator likewise gave directions for the disposal of the residue of his estate. There were two sons, one of whom predeceased both parents, and the other survived his mother and predeceased his father. **Held** (1) that the capital of the stock had not vested in the sons or either of them so as to be carried by their testamentary deeds; and (2) that it did not become intestate succession, but went to the residuary legatees of the testator.

Dymock's Trustees, 1873, 45 J. 289; 10 S.L.R. 263.

(162)

Direction to pay to various families on youngest attaining majority—Destinations over expressly referred to date of division—Survivorship clause in general terms.

A testator directed his trustees that one-half of the residue of his estate should be divided among his grandchildren, one-third to each family. The testator further directed that, on the youngest member of any family attaining twenty-five, the share falling to the members of such family "shall be divided amongst my grandchildren, the members of such family and the survivors equally," the issue of grandchildren dying before the period of division taking their parent's share. In the event of any part of the shares provided to any family not having been paid over to such family, "and of the members thereof and their issue all failing by death," the same was to be paid over to the members of the other families. **Held** that there was no vesting in grandchildren prior to the respective dates of division.

Begg's Trustees v Reid, 1899, 1 F. 498; 36 S.L.R. 382.

(163)

Destination over on liferenter's death without leaving issue.

A testator directed his trustees to retain the share of residue destined to a married daughter, paying her the income, and on her death to convey the capital to her issue as she might appoint, which failing, equally among them. In the event of her dying

without leaving issue the trustees were directed to convey the capital to his other children. The daughter (who survived the testator) died leaving six children and predeceased by a son. **Held** that vesting of the fee of the share liferented by the daughter was postponed till her death, and accordingly that her predeceasing son had acquired no right in the fund.

Graham's Trustees v Lang's Trustees,
1916 S.C. 723; 53 S.L.R. 585; 1916, 1 S.L.T. 400.

(164)

Destination over "failing lawful issue."

A testator by trust disposition and settlement and codicil destined a share of his estate to his daughter A in liferent, and after her death to her children in joint liferent with fee to the issue of the children. The gift of fee in favour of the issue was to take effect on the failure of A's children "leaving lawful issue." There was a destination over to the other children of the testator "failing lawful issue" of A's children. **Held** that the fee did not vest in A's grandchildren until the death of the last survivor of the children of A.

Binnie's Trustees v Prendergast, 1910 S.C. 735; 47 S.L.R. 271; 1910, 1 S.L.T. 49; reversed on another point, 1911 S.C. (H.L.) 6; 48 S.L.R. 251; 1911, 1 S.L.T. 142.

(165)

Gift to children of daughter payable on daughter's death and as children attain majority—Destination over if daughter die without leaving a living child.

A testator conveyed an estate to his son under burden of payment of a provision of £500 to be equally divided among the children of the testator's daughter, payable six months after her death, with interest from the date of her death, to such of them as might then have attained majority and to the others on their attaining majority. There was a destination over in favour of the testator's son in the event of his daughter dying "without leaving any living child." The daughter had two children who predeceased her. **Held** that the provision did not vest in the daughter's children during her life.

Halliday, 1869, 8 M. 112; 42 J. 65; 7 S.L.R. 60.

(166)

Declaration that in the event of liferentrix dying "leaving lawful issue" "such" issue shall take.

A declaration by a testator in a trust settlement that "in the event of any of them (the liferenters of a fund) dying, whether before or after me, leaving lawful issue, such issue shall inherit their parent's share," **held** to exclude the representatives of a child of a liferentrix who predeceased his mother.

Crichton's Trustees v Bell, (O.H.) 1900, 8 S.L.T. 177.

(167)

Direction "to hold" — Gift to children attaining majority or marrying.

A testator directed his trustees "to hold"

a fund in trust for all the children of A who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry. During A's lifetime, certain of his children who had attained majority claimed payment of their shares. **Held** that as the class of beneficiaries could not be ascertained till after the death of A, no child was entitled to payment of a share before that event.

Hope Johnstone v Sinclair's Trustees,
1904, 7 F. 25; 42 S.L.R. 30; 12 S.L.T. 384.

V. GIFTS SUBJECT TO BURDENS OR CONDITIONS.

1. GIFTS SUBJECT TO ANNUITIES.

(168)

Annuity distinguished from liferent.

Observed (per Lord M'Laren)—". . . that in determining the point of distribution there is an important distinction where a general liferent of the estate is given with a destination of the capital at the time of distribution and the case . . . of an unlimited fee burdened with an annuity."

Scott's Trustees v Scott, 1891, 18 R. 1194; 28 S.L.R. 896.

(169)

Observed (per Lord Moncreiff)—"Lastly, where the sole interposed interest is not a liferent so as to exhaust the annual revenue but only a burden on the annual revenue, the presumption in favour of vesting becomes still stronger."

Henderson's Trustees v Henderson, 1886, 3 R. 320; 13 S.L.R. 181.

(170)

Part of estate retained to meet annuity—One period of vesting.

Muir's Trustees, 1869, 8 M. 53; 42 J. 25; 7 S.L.R. 24, No. 171, *infra*.

Henderson's Trustees v Henderson, 1876, 3 R. 320; 13 S.L.R. 181, No. 206, *infra*.

Ramsay's Trustees v Ramsay, 1876, 4 R. 243; 14 S.L.R. 168, No. 138, *supra*.

Watson's Trustees v Watson, 1902, 4 F. 798; 39 S.L.R. 628; 10 S.L.T. 64, No. 22, *supra*.

Coats' Trustees v Coats, 1903, 5 F. 401; 40 S.L.R. 330; 10 S.L.T. 585, No. 181, *infra*.

Allan's Trustees v Allan, 1918 S.C. 164; 55 S.L.R. 212; 1918, 1 S.L.T. 76, No. 245, *infra*.

(171)

Gift to children alive at testator's death on attaining majority—Sum retained to meet annuity.

A father directed his trustees to retain funds to secure an annuity for his widow, and to divide the whole remaining estate "equally among my whole children that may be alive at the date of my death," the provision to be payable on their attaining majority, and to be in lieu of legitim. He further directed that in case any of his children died before their share was payable, "the provisions of the children so dying

shall be divided equally among the survivors, excepting the children so decessing shall have families of their own," &c. The funds to be retained for the widow's annuity were directed to be paid at her death among "my said children in the manner before specified." After the testator's death the trustees retained the whole estate to provide the widow's annuity, and no payment was made to any of the children until after her death. Before that date the whole children had attained majority, and some of them had died unmarried. **Held** (1) that by the deed the portion of the estate to be retained to secure the widow's annuity was destined to the same persons as the remainder of the estate; and (2) that the shares destined to the several children vested in the whole of them either a morte testatoris (subject to the condition of survivorship) or in regard to those who were then minors at majority.

Muir's Trustees, 1869, 8 M. 53; 42 J. 25; 7 S.L.R. 24.

(172)

Residue payable on death of liferenter and annuitant — Survivorship clause in general terms—Destination over to issue referred to liferenter's death—Annuitant surviving liferenter.

A testator bequeathed an annuity to one sister, and the liferent of the residue of his estate to another sister, and directed his trustees after the death of both sisters to divide his estate among the children of the liferentrix nominatim and the survivor of them, the issue of children predeceasing their mother taking their parent's share. The liferentrix predeceased the annuitant. **Held** that the residue vested on the death of the liferentrix, and that, due provision being made for the payment of the annuity, the balance could then be divided.

Jack, 1874, 12 S.L.R. 42.

(173)

Estate subject to annuity — Destination over—Beneficiary predeceasing annuitant.

A testator directed his trustees to pay his wife an annuity, and provided that his son A, his daughter B, and any children to be born of his marriage should have the rest of his estate equally amongst them, payable on majority, subject to the annuity to his wife, "and I direct that on the death of my said wife . . . my trustees shall divide the capital yielding the said annuity equally amongst my said children." He further declared that in case any of the children died without issue "before his, her, or their shares respectively become payable," such share should accresce to the survivors. A predeceased the annuitant. **Held** that his share vested in him on majority.

Stirling's Trustees v Stirling, 1896, 34 S.L.R. 80; 4 S.L.T. 147.

(174)

Fixed term of payment so far as not required for annuity—Vesting at term of payment.

Trustees were directed to make payment

to the truster's wife, in the event of her surviving him, of a free annuity, and to hold the whole residue of his estate for the use of a son and three daughters, equally amongst them. The share of the son was declared to be payable on majority or marriage, except in so far as regarded the capital necessary for the security of the annuity to the truster's widow, as to which the shares were only to become payable upon her death, "if she shall survive the respective terms of payment." The trustees were also empowered to advance money to the children for maintenance and education "until the said respective terms of payment." Then followed a clause of survivorship, providing that if any of the children should die "before the terms of payment of their respective provisions," his or her share should go to the survivors or to lawful issue, if any. **Held** that the rights of the children in the whole estate vested on the majority of the son and the majority or marriage of the daughters.

Stewart's Trustee v Stewart, 1875, 13 S.L.R. 5.

(175)

Sum partially burdened with annuity — Payment to account.

Buchanan's Trustees v Buchanan, 1877, 4 R. 754; 14 S.L.R. 503, No. 51, supra.

(176)

Terms of trust settlement under which held that the residue had vested in the residuary legatees, and was divisible amongst them in the lifetime of an annuitant.

Cleland's Trustee, 1874, 12 S.L.R. 42.

(177)

Direction to divide at death of annuitants and "not earlier."

A testator, after directing payment of two annuities and providing a liferent of the remainder of his estate to his wife if she survived him, directed his trustees that the residue of his estate should upon the death of his wife, or upon the death of the longest liver of the two annuitants, "whichever of these events shall last happen, but not earlier, be divided equally, share and share alike, among the children of my said two sisters, and if any child or children shall have died either before the date of these presents or before the said period of division, then their issue shall, equally among them, succeed to their parent's share: Declaring that in the case of females, whether children or the issue of children, the provision in their favour shall be exclusive of the jus mariti or right of administration of any husbands whom they may have married or may marry; and as well in that case as in that of any of the other beneficiaries of the fee, even males, their provision shall be either paid to themselves upon their own receipt, or secured for their behoof by my said trustees and their aforesaid in such way as they in their sole discretion may think most fit for the interest of the beneficiaries." The testator's wife predeceased him. **Held** that the residue

did not vest till the death of the last survivor of the annuitants.

Sloane v Finlayson, 1876, 3 R. 678, 13 S.L.R. 448.

2. GIFTS SUBJECT TO OTHER BURDENS.

(178)

Legacy to B—Power of encroachment conferred on A.

By mutual settlement dated in 1867, a husband conveyed to his wife, in the event of her survivance, the whole estate which might belong or be due to him at the time of his death, and the wife made a similar conveyance in favour of her husband. The husband reserved power, in the event of his predecease, to test on three-fifths of the estate remaining at the death of the survivor and it was also provided that the survivor should have full power "to use or encroach on" the estate conveyed on either side. In 1873 the husband, in exercise of the reserved power to test, executed a testamentary writing whereby he left certain legacies to the families of his late brother and of certain sisters and other sums to his other sisters. The husband died in 1876 survived by his wife, who died in 1887. Held that the power which the survivor had "to use or encroach on" the estate was limited to encroachments for her own use exclusively, and that it did not postpone vesting in the husband's legatees, which took place on his death.

Reddie's Trustees v Lindsay, 1890, 17 R. 558; 27 S.L.R. 514.

(179)

Terms of a trust settlement under which held in respect, inter alia, that the settlement conferred the very wide power to appropriate the capital of the residue, that the vesting of the residue of the estate was postponed until the death of the liferentrix.

Robertson's Trustees v White, (O.H.) 1903, 11 S.L.T. 566.

(180)

Mutual settlement.

By mutual settlement a husband and wife directed their trustees to value their whole estate at the death of the first deceiver, and thereafter to hold one-half thereof for behoof of the deceiver's relatives mentioned in the deed subject to the survivor's liferent. Held that the right of the relatives vested at the first deceiver's death.

Kerr v Ure, 1873, 11 M. 780; 45 J. 512.

(181)

Contingent liferent to widow of institute dying without a family.

A testator directed his trustees to pay an annuity of £4000 a year to his widow, and to divide the balance of the income among his children, and further provided—"On the death of my wife my estate to be divided equally among my four children.

In the event of the death of any of my children (being married) without leaving any family, the widow or widower to be liferented in their portion." Held that the fee of the testator's estate vested in the children a *morte testatoris*.

Coats' Trustees v Coats, 1903, 5 F. 401; 40 S.L.R. 330; 10 S.L.T. 585.

(182)

Gift to A—Obligation on executors to divide between B, C, and D in the event of them surviving A.

A testator, by his trust settlement, left his whole estate to trustees to hold for his wife in liferent and his son in fee, under burden of a payment by the son on the first term after the wife's death of a sum of money to each of the three daughters of the testator. By a codicil the testator, in the event of the daughters surviving the son, bound and obliged himself and his executors to pay to them equal portions of his estate. The son survived the testator, but predeceased the widow. Held that the fee vested in the son a *morte testatoris*.

Briggs' Trustees v Briggs, (O.H.) 1894, 2 S.L.T. 309.

3. GIFTS SUBJECT TO CONDITIONS.

[See also I. 2, *supra*.]

(183)

Conditional bequest—Bequest to lunatic to take effect on his recovering his reason.

A testator in his trust disposition directed that his trustees should maintain a lunatic son, but that, if he recovered his sanity, he was to receive payment of the provision thereinafter made; he then directed that his estate should be divided among his children equally, the shares being payable to sons on attaining majority, with power to the trustees to make advances and to apply for their maintenance the income of their respective shares, declaring that the provisions were not to vest until payment. On the death of a child before the term of payment, leaving issue, his provision was to be divided equally among his issue. The testator then declared that the lunatic son's share should not be payable unless in the event of his recovering his reason. On the death of the lunatic son, who survived the testator, but never recovered his reason, held that the bequest to him was a contingent bequest which never took effect, and that the portion of the estate retained to meet this bequest was carried by the original destination to the testator's other children.

Smith's Trustees v Smith's Trustees, 1908, 46 S.L.R. 19; 16 S.L.T. 403.

(184)

A testatrix directed her trustees to apply the free proceeds of her estate for behoof of her daughter, and declared that, although the daughter was restricted to a liferent, the trustees were to convey the fee to her in the event of her regaining sanity. In the event of the daughter dying insane, the testatrix

bequeathed legacies in favour of named legatees. **Held** that the legatees did not take a vested interest until the death of the daughter.

Hood's Trustees v Jack, (O.H.) 1919, 1 S.L.T. 208.

VI. EFFECT OF DECLARATION AS TO VESTING.

(185)

Vesting not to take place until "period of payment"—Payment at the age of twenty-five after expiry of *liferent*.

A testator by his settlement directed his trustees to divide his estate into shares and to hold the shares for his children, and their respective spouses, in *liferent*, and for their respective children in fee. It was declared that the shares of any of his children dying without leaving issue should accresce "to my other children then surviving in *liferent* and to their respective issue in fee"; that the shares should not be paid to any of the fiars until they attained the age of twenty-five; and that the fee should not vest until "the period of payment" arrived. **Held** that no right in a share of the estate, whether original or accrescing, vested in a grandchild until he attained the age of twenty-five and the *liferents* of his parents terminated.

Swan's Trustees v Swan, 1912 S.C. 273; 49 S.L.R. 222; 1912, 1 S.L.T. 11.

(186)

—Payment on death or second marriage of widow and on youngest child attaining majority.

Gray's Trustees v Gray, 1907 S.C. 54; 44 S.L.R. 39; 14 S.L.T. 381, No. 261, *infra*.

(187)

Vesting not to take place until "respective terms of payment"—Payment on death of *liferentrix* and majority or marriage of children.

A testator directed his trustees to pay over to his wife, so long as she remained his widow, the income of his whole estate. He further directed that, in the event of his wife predeceasing him, or in the event of her entering into a second marriage, or on her death in the event of her surviving him, his trustees should as soon as convenient, after whichever of these events should happen first, realise his estate and make over the residue to his whole children who should survive him, in the case of sons, as they respectively attained majority, and, in the case of daughters, as they respectively attained majority or were married, whichever of these events should happen first, but "the said shares of said residue shall not vest until the respective terms of payment." There was a destination over to issue, and, failing issue, to survivors. The testator's wife survived him, and died without having married again. One of the testator's sons had attained majority at his father's death, and survived his father, but predeceased his mother. **Held** that the share of each son

vested in him on his attaining majority, although he could not obtain payment while the *liferent* subsisted.

M'Kay's Trustees v Gray, 1903, 5 F. 1086; 40 S.L.R. 770; 11 S.L.T. 212.

(188)

—Payment postponed to allow of realisation.

A testator provided that the shares in his estate should vest at and only upon the arrival of the terms of payment, and directed that these should not be payable until the expiry of three years after his death, "said postponement being to allow of my estate being more fully realised." **Held** that a beneficiary having died before the expiry of the three years, a legacy bequeathed to him had not vested.

Smellie's Trustees v Glasgow Royal Infirmary, (O.H.) 1905, 13 S.L.T. 450.

(189)

Vesting declared not to take place until term of payment—Direction to "hold" for behoof of nephews "absolutely"—Shares of minors to be retained until they become major.

A testator directed his trustees to divide the residue of his estate into two equal portions, and to hold one of these for behoof of his sister, whom failing, of four nephews "absolutely," and of two nieces and their issue "in *liferent* and fee," and to divide the other half into sixteen equal parts, and "to hold three of the sixteenth parts for each of the four nephews absolutely, and two of the sixteenth parts for each of the two nieces in *liferent*, and of their issue, per stirpes, in fee." The three-sixteenth parts falling to nephews were to be payable at the first term of Whitsunday or Martinmas occurring after the expiry of six months from the testator's death; and the trustees were directed to retain the shares falling to nieces and their issue, and pay the interest half-yearly, the first payment to be made at the first term of Whitsunday or Martinmas occurring six months after the testator's death, the fee of these shares to be paid to the issue of the nieces at the first term after the death of their respective parents. The testator further provided—"And the interest in the said residue, whether in fee or *liferent*, of my said nephews and nieces and their issue, shall not vest in them till the term of payment shall have arrived; further, declaring that in case any of my said nephews or nieces, or their issue, shall be pupils, or minors and unmarried, at the time of my death, or when their interest in my means falls to be paid under the provisions of these presents, then the share of such pupils or unmarried minors shall be retained by my trustees till they shall successively become major or be married, whichever event shall first happen, the annual proceeds being, in the meantime, in the exclusive discretion of my trustees, either added to the principal and accumulated, or such interest, or a part, or even the whole of the fee or prin-

principal effecting to such pupils or unmarried minors shall, in the exclusive discretion of my trustees, be applied as my trustees shall in their judgment deem best for the support and education of such pupils or unmarried minors, and that although the said fee or principal should not then have vested in such pupils or unmarried minors." The trustees were directed to exercise their discretion as to the time of realising the estate. **Held** that by the time of payment the testator meant the time when the residue fell to be divided, viz., the first term of Whitsunday or Martinmas six months after his death, and that vesting took place at that date and was not suspended by the direction that the shares of pupils and of unmarried minors should be retained till their marriage or majority.

Hunter's Trustees v Hunter, 1888, 15 R. 399; 25 S.L.R. 298.

(190)

Vesting declared to take place at term of payment—Payment at first term after death of life tenant.

A testator directed his trustees to pay the life tenant of the residue of his estate to his daughter and her husband, and at the first term of Whitsunday or Martinmas after the death of the survivor, to divide the residue equally among their children, and the survivors and survivor of them, declaring that payment should not be made to any grandchild till the first term of Whitsunday or Martinmas after reaching majority. It was further provided that grandchildren's provisions "shall vest at the said terms of payment so fixed by me." The testator was survived by his daughter and her husband. The latter outlived his wife, and died on 21st March, 1895, predeceased by four children, and survived by two children, of whom one, Mrs. N, died on 17th April, 1895, leaving issue. **Held** that no share of the residue vested in Mrs. N, in respect that she predeceased the term of Whitsunday, 1895, which was the term of payment.

Neville v Shepherd, 1895, 23 R. 351; 33 S.L.R. 248; 3 S.L.T. 226.

(191)

No time of payment specified.

Terms of a trust disposition and settlement in which it was provided that shares of residue should be deemed to vest as at the time of payment, and no time of payment was specified, on which **held** that the time of payment was the date of the testator's death.

Rutherford v Easton's Trustees, (O.H.) 1904, 12 S.L.T. 184.

(192)

Provision not to vest "till actual payment and conveyance."

A testator conveyed his whole estates to trustees, directing that, "upon the death of me and my wife, my trustees . . . shall, upon my youngest child attaining the age of forty years, divide my whole means

and estate among those of my children who shall be then alive, and the children of any who may have died, . . . declaring that the provisions to my children under these presents shall not vest in them until actual payment and conveyance, and if any one or more of my children shall die before receiving payment or conveyance of their share, and without leaving issue, such share shall be divided among my surviving children. . . ." The youngest child who survived the testator did not attain the age of forty, and the next youngest, who attained the age of forty, died less than six months thereafter without having obtained a conveyance of his share. **Held** that no right had vested in him.

Macdougall v MacFarlane's Trustees, 1890, 17 R. 761; 27 S.L.R. 638.

(193)

Direction to apportion "within twelve months after death, or as soon thereafter as circumstances will permit" — Declaration that vesting to take place at period of payment.

A testator directed his trustees to pay over the free yearly income of his estate, both heritable and moveable, to his son; and in the event of his son dying without issue, within twelve months after that event, "or so soon thereafter as circumstances will permit," to convey his heritage, and his plate and pictures, to a nephew. As regarded the residue, he directed his trustees, "in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, . . . to apportion and divide the said residue among" the testator's brother's "children . . . and it is hereby declared that the share of succession effecting to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." The testator's personal estate amounted to £48,000, which was all capable of early realisation, except the stock, crop, and implements of two farms of the value of £5000. The testator's son died without issue. J, one of the nephews, survived him about six months, and died unmarried and intestate. At the date of his death the trustees had not apportioned and divided the residue. **Held** that a share of the residue had vested in J.

Maclean's Trustees v Maclean, 1889, 16 R. 1095; 26 S.L.R. 777.

(194)

Declaration that provisions should not become "vested interests until the respective terms of payment thereof."

A testator, in the second purpose of his trust settlement, directed his trustees to pay an annuity to his widow, and to set apart a capital sum to secure it, which sum he directed "upon the death of my said spouse" to be divided into six equal shares, of which one was to be held in trust for the use and behoof of his son J L, and they

"shall retain the same, or such part thereof as they may think proper, in their own hands for such period after the death of my said spouse as they may deem expedient, and they shall pay the said share to him by such instalments or in such portions and at such times as they may think fit," paying him the interest of any part retained. The other three shares he directed to be held for his three daughters in life and their children in fee. In the fifth purpose he directed that division of the estate was to be made "as soon as my estate shall be realised." The deed then provided—"Declaring that the foresaid provisions to my said sons and the issue of my three daughters shall not become vested interests in them until the respective terms of payment thereof." Held that the terms of payment referred to by the testator in fixing the dates of vesting were in regard to the second purpose, the death of his widow, and in regard to the fifth purpose, the realisation of his estate, that vesting took place at these dates respectively, and that the special discretion given to the trustees to postpone payment of J L's share did not suspend vesting in his case.

M'Elmail v Lundie's Trustees, 1888, 16 R. 47; 26 S.L.R. 28.

(195)

Reform of beneficiary—Destination over.

A trustor directed his trustees to set aside half of the residue of his estate for his son, but only to pay it to him when they considered that he had so acted and reformed as to lead them to believe that the said share might be safely paid to him, but not otherwise, and of which they should be sole judges "... and until my said trustees shall pay to my son, his share shall not be assignable by him nor affected by his debts or deeds, nor shall it vest in him until the share is paid." It was further provided that, in the event of the son dying without issue, his share should be paid to his sister, and in the event of his dying leaving issue, his issue should succeed to his share. The son died without leaving issue. Held that the portion unpaid had not vested in the son.

Arkley v Paterson, (O.H.) 1893, 1 S.L.T. 336.

(196)

Declaration postponing vesting until twenty-five.

A testator directed his trustees to hold the residue of his estate and to apply the same for behoof of his sister and her children, in manner following:— "... The trustees were directed to pay to sons their shares on attaining twenty-five years, and to daughters on attaining that age or being married, "but said provisions of residue in favour of the children of my said sister shall not vest until they respectively attain the said age, or being daughters respectively attain said age or be married; and ... in case any of said children shall predecease me or die before

his or her share of residue becomes vested, leaving lawful issue alive at the period for vesting, such issue shall be entitled, and that equally amongst them if more than one, to the share or respective shares which his or her or their parent would have taken if alive." Held that the words "shall not vest" in the foregoing provision postponed vesting to all effects, in accordance with the ordinary meaning of the word "vest," and consequently that one of the daughters, who had died unmarried and without having attained the age of twenty-five, did not take any vested interest under the settlement.

M'Laren v M'Alpine, 1907 S.C. 1192; 44 S.L.R. 900; 15 S.L.T. 238.

(197)

Survivorship clause referring to death of A—Declaration that beneficiaries should not take a vested interest until majority.

A, by his antenuptial marriage contract, bound himself to pay to the children of the marriage the sum of £3000 "at the first term of Whitsunday or Martinmas after his death to such of them as are then twenty-one years or married, and to such of them as are not then of that age or married at the first of these events of majority or marriage." There was a reserved power to divide the sum among the children, and failing apportionment the division was to be equally among them. The marriage contract provided that the children should not be deemed to have a vested interest until they "shall have attained the age of twenty-one years or been married," and also that if any children should die before the said A leaving lawful issue, the said issue who should be in life at the decease of the said A should have right to the share that would have belonged to their parent in the event that said parent had survived A. All the children of the marriage attained majority, but some of them predeceased A. A was survived by his wife. Held that the children did not take a vested interest until the death of A.

Gore Booth's Trustee v Gore Booth, 1898, 25 R. 803; 35 S.L.R. 606; 5 S.L.T. 381.

(198)

Vesting declared to take place at respective majorities of children—Payment on death of life tenant and majority of youngest child—Destination over referring to death before period of division.

A testator directed his trustees, after the death of the survivor of himself and his wife, to "set apart as a debt the sum which they shall judge necessary" for the maintenance and education of such of his children as should then be in minority until they should reach majority, "and the trustees shall pay over and divide the free proceeds of my moveable or personal estate and arrears or accumulations, if any, of the whole income of the trust estate, to and among, and shall disburse, assign, and convey my whole heritable or real estate to and in favour of" his children, "equally, share and share alike, and the survivors

and survivor equally, and that at the term of Whitsunday or Martinmas immediately following the death of the survivor of my said wife and me, or the majority of my youngest child, whichever of these events shall last happen, on the following conditions:—The share of the premises of each child shall be a vested right at majority, though not payable till the youngest child reach majority; if any of my said children die before the said period of division leaving lawful issue, the latter shall succeed equally to the share of their parent." The testator's eldest son survived his father and attained majority, but predeceased his mother. **Held** that the shares of the testator's children vested in them as they respectively attained majority, although their mother might then be alive.

Carruthers' Trustees v Eeles, 1894, 21 R. 492; 31 S.L.R. 352; 1 S.L.T. 480.

(199)

Payment on youngest child attaining majority.

A trustee provided to his wife, in the event of her surviving him, a life rent of his whole means and estate till his youngest child alive should attain majority, upon which event the whole was to be realised and divided among his children. He expressly declared that the shares of his sons should become vested interests on their attaining majority, and those of his daughters on their being married or attaining majority, and that they should become payable to them at the first term after his youngest child should attain majority. He further provided a right of survivorship to the children, inter se, in the event of one or more of them dying before their share or shares should "have vested or become payable as above mentioned." One of the daughters attained majority and married before her father's death, but died before the youngest child attained majority. **Held** that the share vested in her during her life, and passed jure mariti to her husband.

Bowes' Trustees v Waddell, 1870, 42 J. 382; 7 S.L.R. 427.

(200)

Vesting declared to take place on youngest child attaining twenty-five—Claim by sole surviving child at age of twenty-three.

A testator directed his trustees to hold the residue for behoof of his children equally, payable on the youngest attaining the age of twenty-five, the lawful issue of children dying before that period being entitled to the share which their parent would have taken, and the share of children dying without issue being divisible among the survivors jointly with the issue of predeceasers. He also directed that until the period of division the income of each child's share should be applied for its education and to paying its mother for its maintenance between the ages of fifteen and twenty-five. It was declared that the period of vesting should be as at the date when the youngest

child should attain twenty-five. The testator was predeceased by his wife, but survived by two children, one of whom died without issue before the period of payment. The surviving child when twenty-three years of age demanded payment of the residue from the trustees. **Held** that on a true construction of the settlement the clause of vesting was still applicable although only one child survived, and that consequently the residue had not yet vested in him.

Lawrie's Trustees v Lawrie, 1905, 7 F. 910; 42 S.L.R. 693; 13 S.L.T. 246.

(201)

Declaration that beneficiaries not entitled to sell, &c., before division.

A trustee, who died in 1877, by his trust deed bequeathed, inter alia, certain legacies to his children, and the residue of his estate to his sons and the heirs of their bodies equally, including per stirpes the lawful children of any son who might have predeceased, declaring as regarded the date of setting apart or payment of the legacies that his trustees should, at the first term after the expiry of six months from his death, pay or set aside for investment such a proportion of each of the pecuniary legacies as the personal estate should yield, the balance to be paid or set aside for investment at Martinmas, 1883, should he predecease that term, "declaring that none of my said children or of their issue shall have any right to sell, or dispose of, or assign, or alienate their share of or interest in the said fund before it is divided." One of the sons died in 1881. **Held** that both his legacy and his share of residue had vested a morte testatoris, and that they fell to be computed in ascertaining his widow's *jus relictæ*, the words quoted being applicable to deeds inter vivos, and not such as struck at mortis causa deeds, and therefore not such as to exclude vesting.

Craig v Craig's Trustees, 1886, 23 S.L.R. 647.

(202)

"Vest or be payable."

A testator, by trust disposition and settlement, provided that, "unless I otherwise expressly desire, no legacies left by me shall vest or be payable to the legatees till after the death of my wife, who, during her life, shall derive the benefit of all interest or income therefrom." He directed his trustees to pay various legacies to persons named, and appointed residuary legatees. By a holograph writing of the same date he declared that no legacy should be paid till after his wife's death, and by another holograph writing of the same date he referred to the legacies left by him "to be paid after my dear wife's decease." On the back of the trust settlement the trustee had written, "No legacy whatever left by me shall be payable until after the decease of my dear wife." **Held** that the legacies vested a morte testatoris.

Popham's Trustees v Parker's Executors, 1883, 10 R. 888; 20 S.L.R. 595.

(203)
"Take effect" — Whether equivalent to "vest."

Jamieson v Allardice, 1872, 10 M. 755; 44 J. 437; 9 S.L.R. 482, No. 212, *infra*.

VII. EFFECT OF DISCRETION GIVEN TO TRUSTEES.

1. DISCRETION OR DIRECTION AS TO PERIOD OF DIVISION.

(204)
Power to postpone payment—Payment on dissolution of testator's firm—Power to postpone dissolution of firm—Destination to person named "or his heirs."

A trustee, by his trust disposition and settlement, conveyed his whole estate, including his interest in a firm of coalmasters, of which he was a partner, to trustees, and empowered them to represent him in the firm, and to be parties to any new leases which the firm might enter into. The trustees were directed to allow his widow the liferent use of his house, and such allowance as they should consider necessary for the maintenance of herself and of such daughters and their children as might be living with her, and were empowered to make advances during the currency of the trust to his children out of the shares of his estate "effeiring" to them. They were also directed, on the dissolution of the firm, or on the death of his widow, if she then survived, to divide his estate into four equal shares, and to pay one share to each of his children A, B, C, and D, "or to their respective heirs." Held that the testator's intention in regard to the date of vesting of his children's shares of residue was to be gathered from the whole deed, and that the fact that he had given his trustees a discretionary power to enter into new leases with the effect of postponing the dissolution of the firm, and consequently the date of distribution, was to be held as showing his intention that the shares should vest at his own death, and that the conditional institution of the children's heirs should take effect only in the case of children predeceasing the testator.

Bowman v Bowman, 1899, 1 F. (H.L.) 69; [1899] A.C. 518; 36 S.L.R. 959; 7 S.L.T. 159.

(205)
Power to postpone division or to make interim divisions—Survivorship.

A testator, after directing his trustees to pay certain alimentary annuities, directed that "after the foregoing purposes are served" his trustees should divide the residue of his estate equally, share and share alike, among his remaining children nominatim, and the children of a deceased daughter, "such children coming in the place of their mother and receiving equally among them the share that would have fallen to her if she had survived me and formed one of my residuary legatees, and to the survivors of my said five children and grandchildren; declaring that, in the

event of any of my children before named, or grandchildren before referred to, dying prior to the division of said residue, leaving lawful issue, such issue shall succeed equally, share and share alike, to that portion of my said means and estate which would have devolved on their parent under the destination above written, and as if such parent had survived said period of division." The testator empowered his trustees to sell all or any portion of his estates at such times as they might consider advantageous, and to set aside sufficient investments for payment of the annuities, if they thought proper. He further empowered them to postpone the division of the residue until the whole had been realised, or to make interim divisions as the realisation proceeded. Held that the whole residue vested in the children and grandchildren of the testator at the date of his death.

Maclean's Trustees v Maclean, 1897, 24 R. 988; 34 S.L.R. 746; 5 S.L.T. 81.

(206)
Power to fix date of division—Survivorship clause—Annuity to widow.

A testator directed his trustees to pay to his widow out of the free income of his estate an annuity of £150, and to divide the surplus annual income of his whole estate equally among his three sons nominatim, the lawful issue of any deceased being entitled to their parent's share. He further directed his trustees to divide the residue equally among his three sons "or the survivors of them, at such times and in such manner" as his trustees might think proper. Held that the residue vested in the sons at the testator's death.

Henderson's Trustees v Henderson, 1876, 3 R. 320; 13 S.L.R. 181.

(207)
Direction to divide on realisation of estate—Survivorship clause applying to death before period of division.

A testator directed his trustees to convey a heritable subject to his niece in liferent and her four children in fee. On the death of the niece the subject was to be sold or let in the discretion of the trustees, and when realised was to be divided among the four children in specified shares. There was a destination over to survivors "should any children die before division is made." Held that although the trustees had an absolute discretion with reference to the realisation of the subjects, vesting was suspended until they were realised.

Bleakley's Trustees v Johnston, 1907 S.C. 593; 44 S.L.R. 483; 14 S.L.T. 810.

(208)
Direction to sell heritage and divide estate on death of widow and extinction of debts—Power to trustees to sell under burden of debts—Survivorship clause referring to death before period of division.

A testator whose estate at his death consisted entirely of heritage, burdened with

heritable debt, directed his trustees, on the decease of his widow, and after paying off the heritable debt, to sell and divide it in equal shares among his five children, substituting the issue of children dying before the period of division to their parents, and with a survivorship clause referring to the same period. The testator died in 1854 and his widow in 1867. The trustees sold the property in 1875. The testator's five children survived his widow, but four of them predeceased the resolution of the trustees to sell the property. **Held** that vesting took place at the date of the widow's death, being the earliest period at which the trustees might in the exercise of their discretionary powers have fixed the period of division, and was not postponed till the actual exercise of these powers.

Scott v Scott's Executrix, 1877, 4 R. 384; 14 S.L.R. 272.

(209)

Liferent of residue to widow with fee to children—Power to trustees to hold heritage or sell it or convey it to children—Heritage sold after widow's death—Survivorship clause in general terms.

A testator directed his trustees after his wife's death to divide the residue of his estate among his children equally, and after paying off sums advanced by a company, either to hold his heritable estate and divide the revenue among the children, or to sell the same and divide the price among the children or to convey the property to the children equally. If any child should die without leaving issue, the child's share was to revert to the estate and be divided among the other children; but if any of the children should die leaving issue, such issue should receive the share which the child would have taken, if alive. The testator was survived by his wife and by six children. The sums advanced by the company were paid off prior to the death of the widow, but the heritage was not sold until after. **Held** that vesting took place in the children on the widow's death, and was not postponed until the date of the sale.

Seton's Trustee v Seton, 1886, 13 R. 1047; 23 S.L.R. 770.

(210)

Direction to divide on death of liferenter—Power to trustees to postpone realisation of estate—Survivorship clause.

A testator provided that his trustees should as soon as convenient after the death of himself and a liferentrix, who survived him, divide the residue of the estate among certain residuary legatees or the survivor of them, the issue of these dying "before the residue becomes payable or before my trustees denude of the trust" to take their parent's share. The testator gave his trustees power to postpone the realisation of the estate for such length of time as they in their sole discretion should think proper. One of the residuary legatees survived the testator and the liferentrix, but died before the trustees had denuded of the trust. **Held** that the

share of residue had vested in the residuary legatee on the death of the liferentrix.

Hendry's Trustees v Patrick, (O.H.) 1905, 13 S.L.T. 503.

(211)

Direction to purchase heritage and convey it to A in liferent and the heirs of his body, whom failing, other persons.

In a trust settlement the trustees were directed to lay out the residue of the trust estate (which amounted to £60,000) in the purchase of lands, and when the whole residue, or within £300 thereof, was so invested, to deliver a disposition of the lands to the brother of the testatrix (who predeceased her) in liferent, and his son and the heirs whatsoever of his body in fee, whom failing, certain other persons, the trustees being declared to be "the sole and exclusive judges of the lands which and the period when these should be purchased, free from the control of any of the heirs who may be interested therein." The trustees invested the residue as directed except £20,000. **Held** that the nephew's right as a beneficiary vested in him a morte testatoris.

Spens v Monypenny's Trustees, 1875, 3 R. 50; 13 S.L.R. 25, 45.

(212)

Power to accelerate payment—Payment to be made to son when thirty "or earlier if expedient."

The residue of a trust estate was bequeathed to the son of the testator, who directed that the bequest should not take effect till the son attained thirty years of age, "unless my trustees shall be of opinion that it should take effect sooner." The testator further stated his wish that the trustees should make over his landed property to his son on his attaining thirty years of age or "earlier if expedient," and he gave them power to sell the whole or part of his lands. **Opinion** that the bequest vested in the son a morte testatoris.

Jamieson v Allardice, 1872, 10 M. 755; 44 J. 437; 9 S.L.R. 482.

2. POWER TO WITHHOLD PAYMENT FROM PARTICULAR BENEFICIARY.

(213)

Power to withhold payment—Destination over to issue, or failing issue, to survivor of legatees in general terms.

A testator conveyed his estate to trustees, inter alia, "for payment at the first term" after his death, of £1000 to his nephews A and B equally, but with power to the trustees to withhold payment of this legacy in whole or part for such time as they might think proper, and to apply the income or such part of the capital as they might think proper for the benefit of the legatees; and providing that "in the event of either of the said A or B dying leaving lawful issue," the trustees should be entitled to apply such decesser's share of the legacy for behoof of such issue in any way they might think proper, and failing such issue, to hold the

share of such deceiver for behoof of the survivor of A and B. He also directed his trustees to divide the residue among the legatees in proportion to the legacies bequeathed to them. The trustees retained the legacy and proportion of residue falling to A, and made regular payments to account of the income and capital to him during his lifetime. A died intestate, leaving a widow and children. On A's death there was still a balance in the trustee's hands. In a competition between A's widow claiming *ius relicte* and his children, **held** (1) that the word "dying" had reference to the death of A or B before complete payment of the legacy and share of residue; (2) that in respect of the ulterior destination to issue and the survivorship clause the balance unpaid had never vested in A.

Walker v Buchanan, 1905, 8 F. 201; 43 S.L.R. 176; 13 S.L.T. 568.

(214)

—Power to restrict to liferent —
Destination over.

In a trust settlement payment of the capital of a bequest was postponed until the death of a liferentrix, and the trustees were given an option to restrict the right of any child to a liferent, the unpaid capital of the share of any child who died without issue to go to the surviving brothers and sisters. **Held** that vesting did not take place *a morte testatoris*.

Maxton's Trustees v Henry, (O.H.) 1897, 5 S.L.T. 85.

(215)

Power to retain shares until trustees think proper to buy annuities.

A testator conveyed his estate to trustees and directed them to divide it into eight shares, one for each of his children. He directed two of the shares to be paid to A and F, two of his children, as soon after his death as his trustees should think proper, but the trustees were to retain the other shares until they judged it proper to invest them in annuities. In the event of any child dying before his or her share was paid or invested in an annuity as the case might be, there was a gift over to the issue of the deceasing child, and failing issue to the surviving children, accreting shares to be held subject to the same provisions as the original shares. The trustees had a power of sale of heritage, in order to carry out these provisions. After the testator's death the greater part of the heritage was sold, but no payment was made to the children entitled to receive payment of their shares, and no annuities were purchased. A predeceased the testator. On the death of the last surviving child, who had been entitled to have an annuity purchased for him, **held** that the whole estate vested in the last surviving child, excepting the share destined to F, including the proportions of accreting shares which fell to him, and that F's share fell to be paid to his heirs in moveables.

Sorley v Martin, 1890, 27 S.L.R. 880.

(216)

Power to make advances—Vesting in portion advanced.

A testator provided that his trustees should hold his estate for behoof of his wife, and should have power to expend and apply the estate or the revenue thereof, or so much only as they should think expedient for the maintenance of his wife, and, if they thought it would be for her benefit, to deliver the whole of it to her. During the lifetime of the widow the trustees paid over part of the principal. **Held** that the vested right in fee of the widow was confined to the sums paid to her during her lifetime.

Dun v Angus, (O.H.) 1893, 1 S.L.T. 158.

(217)

Gift dependent on exercise of powers by trustees.

A testator, who by his settlement committed large discretionary powers to trustees with reference to the maintenance and education of his illegitimate son, authorised them, *inter alia*, on the son's attaining majority, in accordance with their opinion of his character and behaviour, either to convey to him the whole, or such part as they might consider proper, of the residue of the trust estate in such terms as to destine the same to him and to his lawful issue, whom failing, &c., or to withhold the conveyance of the estate from him, either for a time or absolutely, and to pay him an annuity merely, disposing of the residue for the benefit of his issue, if any. The son died at the age of thirty-three, leaving a pupil child. He conducted himself to the satisfaction of the trustees, but he did not demand, nor did they execute, a conveyance in his favour of the residue of the estate, although they advanced to him large sums from capital as well as revenue. At his death he left a settlement in favour of his widow, who claimed the residue of the trust estate as having vested in her deceased husband. **Held** that no right to the residue had vested in him, and consequently that his pupil child was entitled to be preferred under the destination in the trust deed.

Paterson's Trustee v Paterson, 1870, 8 M. 449; 42 J. 198; 7 S.L.R. 247.

(218)

A testator provided in a holograph trust disposition and settlement — "I also appoint that one thousand pounds be invested or laid in stock of that value, and given in such sumes and way and times as the trustees may think best for J, my nephew; he is abroad, he having no controle or right to interfere with the trustees anent the same under forfeiture of all claim to the same." J survived the testator, but died without receiving anything from the trustees. **Held** that no right vested in him.

Smith's Trustees v Smith, 1883, 10 R. 1144; 20 S.L.R. 764.

(219)

Gift of fee in will—Codicil restricting beneficiary to liferent—Power to trustees to pay

capital—Survivorship clause referred to date of payment.

A testatrix by her settlement directed her trustees, twelve months after her death, to pay the residue of her estate to her four children nominatim. Should any child die "before the said residue becomes payable," there was a destination over to issue and survivors. By a codicil dated some years later the testatrix provided that the portion falling to her son W should not be handed over to his own care, but that he should "only draw from my trustees the interest thereon weekly. If, however, at any time my trustees consider it would be for his true benefit to hand over to himself what might then be his share, I hereby empower them to do so." The trustees paid certain capital sums to W, but refused to pay the remainder. **Held**, on a construction of the settlement and codicil, that, in the case of the son the survivorship clause applied to the event of his predeceasing the date when the trustees saw fit to make payment to him, and that the unpaid portion of the son's share did not vest in him so long as it was retained by the trustees.

Russell v Bell's Trustees, 1897, 24 R. 666; 34 S.L.R. 497; 4 S.L.T. 338.

(220)

Declaration that provisions should not vest until the respective terms of payment.

M'Elmail v Lundie's Trustees, 1888, 16 R. 47; 26 S.L.R. 28, No. 194, *supra*.

3. WHERE PAYMENT DUE BUT NOT MADE.

[See I. 3 (1), *supra*.]

VIII. VESTING SUBJECT TO DEFEASANCE.

1. GIFT TO LEGATEE FAILING ISSUE OF LIFERENTER.

(221)

Conditional institutes ascertained — No ulterior destination.

Per Lord President Inglis—"Where in a testamentary deed a fund is settled on the children of the testator for their liferent use allenerly and their children, if any, in fee, whom failing, to another person or class of persons in absolute property, if the person or persons so called are known or the individuals composing the class are ascertained at the death of the testator, the fee will vest in them a *morte testatoris*, subject to defeasance in whole or in part in the event of the liferenters or any of them leaving issue; if they are not so known or ascertained, the fee will not vest until the occurrence of the event which will determine who are the persons called, or until the individuals composing the class are ascertained."

Steel's Trustees v Steel, 1888, 16 R. 204; 26 S.L.R. 146.

(222)

A testator directed his trustees to hold the whole residue of his estate for the liferent use allenerly of his son, and in the event of the son's leaving issue, to divide the residue among such issue on the death of the testator's widow and the son. He further directed his trustees on the death of the survivor of his widow and son (the latter without leaving issue) to convey a heritable property to A. B. **Held** that the heritable property vested in A. B. a *morte testatoris* subject to defeasance in the event of the son leaving issue.

Thomson's Trustees v Pringle, (O.H.) 1901, 9 S.L.T. 11.

(223)

Class conditionally instituted.

A testator who died in 1876 directed his trustees to hold certain property for the maintenance of his brother, Robert, in alimentary liferent, declaring that if Robert should be survived by lawful issue the trustees should hold the property for the maintenance and education of such issue, and should convey it to said issue equally on their attaining majority, but if the said Robert should not have lawful issue, or having lawful issue, if all of them should die before majority, the trustees should thereupon "sell and divide the property as follows, viz.:—One-fourth part thereof to the children of" the testator's brother James . . . Robert, the liferenter, died unmarried in 1904, having survived his brother James, who died in 1892. James had four children who survived the testator, but two of them predeceased Robert, the liferenter. No children were born to James after the testator's death. **Held** that the one-fourth share of the proceeds of the heritable property destined to the children of James vested a *morte testatoris* in the children of James alive at the death of the testator, subject to defeasance in the event of the liferenter, Robert, leaving issue who attained majority.

Corbet's Trustees v Elliott's Trustees, 1906, 8 F. 610; 43 S.L.R. 379; 13 S.L.T. 815.

(224)

A testator directed his trustees to hold the residue of his estate for behoof of his daughter in liferent, for her liferent use only, and for her whole children equally among them in fee, with a separate direction, in the event of the daughter predeceasing or dying without leaving issue, to divide the residue in equal proportions amongst the families of B and C. The testator's daughter survived the testator, but died without leaving issue. **Held** that the residue vested in the families of B and C a *morte testatoris*, subject to defeasance in the event of the liferentrix leaving issue, the fact that the destination over was made the subject of a separate clause not being sufficient to take the case out of the application of the ordinary rule.

Searcy's Trustees v Allbuury, 1907 S.C. 823; 44 S.L.R. 536; 14 S.L.T. 898.

(225)

A testator directed his trustees to hold the residue of his estate for his daughter in life-tenant and her issue in fee, and, in the event of his daughter not leaving issue, to divide the residue into three equal parts, and to pay one-third to the children of a deceased brother, one-third to the children of a deceased sister, and the remaining third, after providing for two life-tenants, equally to the same persons. The daughter survived the testator and the last-mentioned life-tenants, but died without issue. **Held** that vesting subject to defeasance in the event of the daughter leaving issue took place a morte testatoris in the representatives of all the nephews who survived the testator.

Smith's Trustees v Smith, (O.H.) 1893, 1 S.L.T. 355.

(226)

Ultior destination if no conditional institutes attain majority — Vesting at majority.

A testator directed his trustees "to hold and apply" the residue of his estate for behoof of his nieces and their children in the following proportions, viz.:—One-third for behoof of A in life-tenant and her children in fee, one-third for behoof of B in life-tenant and her children in fee, and the remaining third for behoof of C, D, E, and F in life-tenant equally, and their children in fee equally among them per stirpes. He further provided that in case of A and B dying without issue, or of such issue dying before attaining majority or being married, then the two one-third shares destined to them and their issue should fall and accrue to C, D, E, and F, and their children respectively, in life-tenant and fee, and equally among them per stirpes, as provided with respect to their own share of the residue. There was also a destination over in the event of C, D, E, or F dying without leaving children, or of their children not attaining majority. A and B died without issue. C left one son, who attained majority subsequent to the death of the testator, but predeceased A and B. **Held** that the children of C, D, E, and F had, from the dates of their respectively attaining majority or of their marriage, a vested interest in the fee of the shares life-tenanted by A and B, subject to divestiture in the event of A or B leaving issue who should attain majority or be married, and therefore that C's son had a vested interest from the date of his majority.

Taylor v Gilbert's Trustees, 1878, 5 R. (H.L.) 217; 3 App.Cas. 1287; 15 S.L.R. 776.

(227)

Two life-tenants—Defeasance quoad one-half if either left issue.

A testatrix directed her trustees to invest the sum of £1300, and divide the annual interest therefrom equally between her nieces Jane and Isabella during their joint lives, and on the death of either without lawful issue, to pay the whole annual interest to the survivor; but in case either

should die leaving lawful issue, then such issue should be entitled to their parent's share of said interest; and upon the death of the survivor one-half of the said sum should be paid to the lawful issue of each of Jane and Isabella; "but declaring always, that if either or both of the said Jane and Isabella shall die without leaving lawful issue, then the half or the whole of said £1300, as the case may be, shall, on the death of the survivor, be paid by the said trustees to my brother, the said Robert Cumming." The testatrix was survived by the two nieces, who were not married, and by Robert Cumming. **Held** that the fee of the sum of £1300 vested at the death of the testatrix in Robert Cumming, subject to defeasance to the extent of one-half in the event of Isabella leaving issue, and to the extent of the other half in the event of Jane leaving issue.

Cumming's Trustees v Anderson, 1895, 23 R. 94; 33 S.L.R. 77; 3 S.L.T. 158.

(228)

Ultior destination to heirs or assignees.

A testator directed his trustees to invest in their names the sum of £3500, and to make payment of the annual interest thereof to Hannah, his daughter, and, in the event of her marrying and leaving issue, to divide the capital among her issue as soon after her death as possible, "and in the event of the said Hannah dying without leaving lawful issue I appoint my trustees to pay, make over, and denude of said sum of £3500 in favour of my said son Robert, and his heirs or assignees." Robert and Hannah both survived the testator. Robert predeceased Hannah, unmarried, and leaving a will. She married, but died without issue. **Held** (by a majority of the whole Court) that Robert's testamentary trustees fell to be preferred to the £3500.

Thompson's Trustees v Jamieson, 1900, 2 F. 470; 37 S.L.R. 346; 7 S.L.T. 340.

(229)

Ultior destination to survivors of conditional institutes—Vesting in last survivor.

Gardner v Hamblin, 1900, 2 F. 679; 37 S.L.R. 486; 7 S.L.T. 412, No. 253, *infra*.

(230)

Vesting in residuary legatees subject to defeasance.

A testator left a sum of £6000 to his son A in life-tenant only, and to A's issue in fee, the fee to fall into residue if A left no issue. The residue was divided into shares among the children who survived the testator. A survived the testator, but died without issue. **Held** that a fourth part of the sum of £6000 had vested in A as part of the residue.

Wright's Trustees v Wright, (O.H.) 1896, 4 S.L.T. 74.

(231)

Effect of conditional institution of heir of body of institute.

By general disposition and settlement A disposed a share of her heritable and move-

able estate to B in liferent allennary, and to the heirs of B's body in fee, whom failing, to C, D, E, and F and the respective heirs of their bodies in fee. C survived the testator, and was survived by B, the liferentrix, who died unmarried. C left an heir of his body who survived the liferentrix. **Held** that no fee had vested in C, as the heir of his body was a conditional institute. **Observations** on the doctrine of vesting subject to defeasance.

Turner v Gaw, 1894, 21 R. 563; 31 S.L.R. 447; 1 S.L.T. 526.

(232)

Ultior destination to issue, and failing issue, to strangers.

Testamentary trustees were directed to hold a legacy in trust for H in liferent, and for her children or their issue in fee. Failing issue of the liferentrix the fee was destined to her brother R, whom failing to his issue, whom all failing to three members of the family of C nominatim and the survivors and survivor of them, the issue of predeceasers being entitled to the share which their parent would have taken on survivorship. A residuary clause in the testator's settlement was declared to include any legacy that lapsed. All the legatees named to whom the fee was destined survived the testator, but all predeceased the liferentrix without issue. On the death of the liferentrix without issue, the legacy was claimed by the representatives of R as having vested in him a morte testatoris subject to defeasance on contingencies which had not occurred; and it was also claimed by the representatives of the last survivor of the family of C as having vested in that party on the predecease of R and the other two members of that family. **Held** that the legacy had lapsed and had fallen into residue. **Observations** (per Lord President Strathclyde) on the doctrine of vesting subjects to defeasance.

Bannatyne's Trustees v Watson's Trustees, 1914 S.C. 693; 51 S.L.R. 605; 1914, 1 S.L.T. 469.

(233)

Ultior destination to issue and survivors.

A testator directed that the residue of his estate should be held for behoof of his children in specified proportions, the daughters' provisions to be held for their liferent alimentary use allennary, and for the heirs of the body of each of them in fee, and failing any daughter without leaving heirs, her share to form part of the residue. He further provided "that in case of the decease of any of my sons before receiving payment of their provisions, leaving heirs of their bodies, the provisions of such deceasers, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively, in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions, without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of

my estate divisible as aforesaid." The widow died, her death being followed, nine years after, by that of one of the sons unmarried. On the subsequent decease of one of the daughters without issue, **held** that the fee of the share liferented by her did not vest until the term of payment, and that no part of it therefore belonged to the representatives of the deceased son.

Steel's Trustees v Steel, 1888, 16 R. 204; 26 S.L.R. 146.

(234)

By his settlement, a testator directed his executors to pay the income of three-sixths of the residue of his estate to his three daughters, and declared that in the event of them dying without leaving lawful children, the share of such daughters should be divided amongst his surviving sons and daughters, that part of it which might thus fall to any of his surviving daughters to be lent out on security as aforesaid, and the interest thereof paid to them. **Held** that the shares which the executors were directed to pay over to the daughters vested in them subject to defeasance in the event of their leaving children.

Walker's Executor v Donald, (O.H.) 1895, 3 S.L.T. 95.

(235)

Ultior destination to children of W, whom failing to W, or his next of kin—W predeceasing liferentrix without issue.

A testator directed his trustees to hold a fund for behoof of his daughter F, and of any husband she might marry who should survive her in liferent, and on the death of the survivor, for behoof of their children. Failing children of F, then the trustees were directed at the death of F, or of her husband, if he survived her, to pay the fund to the children of the testator's son W, and failing such children, to pay one-half of the fund to W himself or his next of kin. W survived the testator, and died unmarried. At the date of his death F was his sole next of kin. In a question between F (who was unmarried, and seventy-five years of age) and the trustees, F contended that one-half of the fund had vested in her, subject to defeasance in the event of her having children. **Held** that vesting was postponed until the death of F.

Wright's Trustees v Wright, 1894, 21 R. 568; 31 S.L.R. 450; 1 S.L.T. 558.

(236)

Destination over to person named, whom failing, her children, whom failing, next of kin of testator.

A testator, by his testamentary writings, destined a certain sum to his grand-daughter in liferent and to her issue, if any, in fee. Failing issue of the liferentrix, he directed that the sum in question should be divided between his two daughters, whom he named, and failing either of them, he directed that her share should be paid to her issue, "whom also failing, to my nearest in kin." The liferentrix and the daughters survived

him, but the daughters and their issue predeceased the *liferentrix*. The daughters were the testator's nearest in kin at the date of his death. On the subsequent death of the *liferentrix*, without issue, a competition arose as to the parties entitled to the sum *liferented* by her. **Held** that the vesting of the gift was suspended till the death of the *liferentrix*, the principle of vesting subject to defeasance being inapplicable owing to the fact that the gift was subject to further contingencies besides the contingency of the *liferentrix* leaving issue; and that the parties entitled to succeed were those who were the nearest in kin of the testator at the death of the *liferentrix*.

Johnston's Trustees v Dewar, 1911 S.C. 722; 48 S.L.R. 582; 1911, 1 S.L.T. 316.

(237)

**Vesting declared to take place a morte—
Vesting subject to defeasance in children
then surviving.**

A testator directed his trustees to divide the residue of his estate into six equal parts, and to hold three-sixths thereof for behoof of his three daughters equally among them in *liferent* *allennarly*. On the death of a daughter the trustees were to pay the interest of each daughter's share to her children equally until they respectively attained majority, when the fee was to be payable to them equally. The period of vesting was declared to be the first term of Whitsunday or Martinmas after the youngest child of the testator had attained majority. In the event of the death of a child before the testator, or before the date of vesting, the share of such predeceaser was to go to increase the shares of the "surviving" children, and in the event of daughters dying after the said date without issue, the share of the daughter so deceasing was to go to increase the shares of the "surviving" children. In a codicil made after all the children had attained majority, and one of them, a daughter, A, had died leaving issue, the testator declared that the date of vesting should be the date of his death, and provided that if any of the testator's other children should predecease the period of vesting without having issue, the share of the predeceaser should go to increase the share of his "other" children, and in the case of either of his two surviving daughters dying after him without leaving children, the share *liferented* by such daughter should go to increase "not only the share of my remaining children, but the shares falling to the children of any of them who have died leaving children." He also declared that the shares of daughters' children should not vest till they attained majority. **Held** (1) that the words "surviving" and "remaining" referred to the periods of vesting specified in the trust disposition and codicil respectively; and (2) that the date of vesting under the codicil being the death of the testator, a right to a proportional part of the fee of a share *liferented* by a daughter B, who survived the testator and died without having issue,

had vested at the testator's death in those of his children who survived the testator, but predeceased their sister B, subject to defeasance in the event of B having issue who attained majority.

M'Dougal's Trustees v M'Dougal's Trustees, 1902, 39 S.L.R. 375.

2. GIFT OF FEE RESTRICTABLE TO LIFERENT ON BIRTH OF ISSUE.

[See FEE AND LIFERENT I. 5 (1) (b).]

3. GIFT OVER TO ISSUE OF INSTITUTE.

(238)

Gift on death of *liferenter*.

A testator directed his trustees upon the death of his widow to invest in their own names three-fifths of the residue of his estate for behoof of his daughter and her husband in *liferent* for their *liferent* use *allennarly*, and for behoof of their children in fee; declaring that in the event of any grandchild dying without having received payment of his share and leaving issue, such share should fall to the issue. The testator was survived by his widow, and also by his daughter and her husband, and by several of the daughter's children, three of whom predeceased their mother and the testator's widow without leaving issue. **Held** that a right to a share of residue vested in each of the grandchildren at the date of the testator's death, subject only to the condition that in the event of any grandchild dying before the term of payment and leaving issue the share of such child should belong to such issue.

Snell's Trustees v Morrison, (O.H.) 1877, 4 R. 709.

(239)

A testator directed his trustees to pay the income of the residue of his estate to his sister during her life, and at her death to pay £6000 to each of his nephews named, including E B R. The deed then provided that "if any of my said nephews . . . die before my sister" leaving children, the children should take the parent's share, " . . . and with regard to the £6000 " directed to be apportioned to E B R, "I desire that, in the event of his predeceasing me without issue, the same shall go" to persons named. E B R survived the testator, but died leaving no issue. The *liferentrix* survived him. **Held** that the £6000 bequeathed to E B R vested in him at the testator's death, subject to defeasance in the event of his predeceasing the *liferentrix* leaving issue, and that, as he left no issue, it fell to the executor under his will.

Earl of Dalhousie's Trustees v Young, 1889, 16 R. 681; 26 S.L.R. 525.

(240)

A marriage contract provided that the trustees should pay to the wife or to the husband if he survived her the annual pro-

ceeds of the trust funds, and with regard to the capital that it should "belong to the child or children of the said intended marriage, share and share alike, and be payable at" (in the event which happened) the death of the wife, "declaring that if any child of the said intended marriage shall have predeceased the said term of payment leaving lawful issue, such issue shall succeed to the share of such child so predeceasing." The liferentrix survived her husband and died survived by several children and predeceased by a son A, who was survived by a daughter B. B survived the liferentrix. **Held** that a share of the capital vested in A, subject to defeasance in the event, which happened, of his predeceasing the term of payment leaving lawful issue, and therefore that B took in her own right as conditional institute.

Wylie's Trustees v Wylie, (O.H.) 1902, 8 F. 617; 43 S.L.R. 383; 13 S.L.T. 818.

(241)

A testator by his trust disposition and settlement gave his widow a liferent of his whole estate, and directed his trustees on her death to convey his whole estate to his four children nominatim equally among them, share and share alike, "the issue of any predeceasing child taking equally among them their parent's share." **Held** that the share destined to each child vested in him a morte testatoris, but liable to defeasance in the event of his predeceasing the liferent leaving issue.

Cairns' Trustees v Cairns, 1907 S.C. 117; 44 S.L.R. 96; 14 S.L.T. 509.

(242)

A testator directed his trustees to allow his wife the liferent of the residue of his estate, and on her death to pay the capital to his brother, whom failing to his issue. The brother survived the testator but predeceased the widow, dying unmarried. **Held** that on the death of the testator the fee of the estate vested in the brother, subject to defeasance in the event of his dying and leaving issue, and that on the death of the brother without issue, the fee passed to his heirs in mobilibus.

Nisbet's Judicial Factor v Nisbet, (O.H.) 1911, 2 S.L.T. 171.

(243)

Power to make advances before division.

A testator by his general settlement appointed his wife his sole trustee with power to advance for the purpose of setting up any of his children in business—all payments to children "being reckoned as part of their ultimate share"—and left his wife the liferent of his whole estate, "the same to be realised and divided equally on her death among" his "children, share and share alike, the issue of predeceasing children taking among them the share which would have fallen to their parents if in life." **Held** that the estate vested in the

children of the testator a morte testatoris subject to defeasance in the event of their predeceasing the liferentrix leaving issue. **Opinion** reserved as to whether defeasance took place on a child's issue surviving their parent irrespective of whether or not they survived the liferentrix.

Penny's Trustees v Adam, 1908 S.C. 662; 45 S.L.R. 481; 15 S.L.T. 908.

(244)

Gift over to heirs of the body—Defeasance in favour of grandchildren.

A testator directed his trustees to hold his estate for his wife and sister successively in liferent, and after the death of the longest liver to pay a legacy to A "and the heirs to be procreated of her body." **Held** that the legacy vested in the legatee a morte, subject to defeasance in favour of children who survived the liferentrices, and of grandchildren per stirpes in the event of the death of children before the survivor of the liferentrices.

M'Kune's Trustees v M'Kerrow, (O.H.) 1908, 16 S.L.T. 18.

(245)

Direction to divide among children on youngest attaining majority.

A testator directed his trustees, after paying annuities to his two sisters, to pay one-third of the remaining income of his estate to his widow, and to pay or apply the other two-thirds of the income for behoof of his children until the youngest surviving child should attain the age of twenty-one. He further provided—"Upon the youngest surviving child attaining twenty-one years complete my trustees shall, after setting apart sufficient portions of my means and estate to meet the foregoing provisions in favour of my sisters and wife, divide the residue equally amongst my children, the lawful issue of any of them predeceasing being entitled equally among them to the share which would have fallen to their parent if alive." The testator was survived by his wife and by four children, one of whom died without issue before the youngest had attained twenty-one. **Held** that a one-fourth share of the estate had vested in the predeceasing child a morte testatoris, subject to defeasance only in the event of that child predeceasing the period of division leaving issue. Authorities on the doctrine of vesting subject to defeasance examined.

Allan's Trustees v Allan, 1918 S.C. 164; 55 S.L.R. 212; 1918, 1 S.L.T. 76.

4. VESTING SUBJECT TO MORE THAN ONE CONTINGENCY.

(246)

Opinion (per Lord Mackenzie) that "there is no reason in principle why a fee should not vest subject to divestiture upon one or more than one contingency."

Bannatyne's Trustees v Watson's Trustees, 1914 S.C. 693; 51 S.L.R. 605; 1914, 1 S.L.T. 469.

(247)

Divestiture on occurrence of alternative events.

A testator gave his widow a life interest of his whole estate, and provided that on her death, after payment of certain legacies to his sons, the residue of his estate should be divided among his children. Further, he declared that in the event of the death of a son before the time of payment of the legacies and shares of residue, either leaving issue, or without issue but survived by a widow, such son's share of the estate should be divided, in the first alternative among the son's issue, and in the second alternative, after providing an alimentary life interest for the son's widow, among the surviving children of the testator and the issue of decessors. **Held** that the legacies and shares of residue bequeathed to the testator's sons vested in them a *morte testatoris*, subject to defeasance in the case of such of them as should predecease the time of payment either leaving issue, or without issue, but survived by a widow.

Coulson's Trustees v Coulson's Trustees,
1911 S.C. 881; 48 S.L.R. 814; 1911, 2
S.L.T. 39.

(248)

Gift to A if in life, whom failing, gift to lifeinterests and to B, whom failing, to C in fee—Vesting in C subject to defeasance if A should be in life or B survive lifeinterests.

In 1816 a testator disposed her estate to A, his son, if in life, and the heirs of his body, whom failing, to the testator's daughters in life interest, and after the decease of the survivor of them to B, his grandson, and heirs of his body, whom failing by predecease without issue, to C, the testator's nephew and his heirs in fee. The testator died in 1823. It appeared from a proof that in 1802 the testator received information that his son, a sailor, had been drowned abroad, and that nothing had occurred to throw doubt on the correctness of this information. The testator was survived by his daughters, his grandson, and his nephew. The grandson predeceased the last survivor of the lifeinterests (who died in 1872) without leaving issue. In an action brought subsequent to 1872, **held** (1) that the son (who would have been ninety years old if alive) was dead without issue; (2) that on the testator's death the fee vested in his nephew, subject to defeasance in the event of its appearing that the son survived the testator or left issue, and also in the event of the grandson surviving all the lifeinterests; and (3) that as the grandson predeceased the last survivor of the lifeinterests the fee never vested in him.

M'LAY v Borland, 1876, 3 R. 1124.

(249)

Gift to A in life interest and her issue in fee, whom failing, to B, whom failing, to his children.

A testator, by his trust settlement, directed his trustees to hold the residue of his estate for his daughter in life interest and her issue in fee, whom failing, to transfer half of it to

his brother, whom failing, to the brother's surviving children. The brother survived the testator, but predeceased the life interest without leaving issue. **Held** that the half of the residue had not vested in the brother. Opinion that there is no reason in principle why a vested right of fee should not be conferred, subject to divestiture in any one of a number of events.

M'Donald's Trustees v Gordon, (O.H.)
1909, 2 S.L.T. 321.

(250)

Two lifeinterests of which one might become fee.

A testator directed his trustees to hold the residue of his estate for his wife in life interest, and on her death to hold one-half of it "for behoof of my said daughter, A B, absolutely and in fee if she be then married, but if then unmarried, then and in that case for her life interest use only, and on her decease for the behoof of the son or sons in equal proportions of my said nephew, C D, in fee." The widow survived the testator, but predeceased A B, who died unmarried. C D had two sons, E and F. E predeceased A B, but F survived her. **Held** that nothing vested in E, because there was no ground for the application of the doctrine of vesting subject to defeasance, since not only were two lifeinterests interposed, but one of them might in a certain event become a fee.

Craigie's Trustee v Thornhill's Executor,
(O.H.) 1896, 4 S.L.T. 95.

5. VESTING IN CLASS SUBJECT TO DEFEASANCE IN FAVOUR OF NEW MEMBERS.

[See IV. 2, *supra*.]

6. MISCELLANEOUS.

(251)

Gift to B in the event of A not recovering sanity.

A testator bequeathed an annuity to his widow, and directed that the remainder of the income of his estate should be applied in maintaining his son in an asylum. In the event of the son recovering the use of his mental faculties, the whole estate was to be made over to him. If he should not recover, then, on the death of his wife and son, the testator bequeathed certain legacies to named individuals and societies, and left the residue of his estate to an infirmary and other charitable institutions. **Held** that the legacies vested in the legatees a *morte testatoris*, subject to defeasance in the event of the testator's son recovering his mental faculties.

Yule's Trustees v Deans, 1919 S.C. 570; 56
S.L.R. 541; 1919, 2 S.L.T. 129.

(252)

Gift to children of marriage—Destination over to husband's next of kin.

In a postnuptial contract of marriage the spouses conveyed "each of them to the other, in case of his or her survivancy, in

liferent," and to the children of the marriage in fee, their whole estate and effects, heritable and moveable. The deed further declared, "that in the event of the dissolution of the said marriage by the predecease of any of the said spouses without leaving children, or of the decease of all such children during the lifetime of the survivor," then "it shall be in the power of the said married parties severally to dispose by testament of the proper share of the said funds and effects belonging to the said parties severally . . . and failing any such disposition . . . the whole funds and estate" belonging to the husband "shall fall to and become the property of his own nearest of kin," and the wife's property to her nearest of kin. The husband died without leaving any further deed, and was survived by his widow and by one child. The latter died, leaving one child. Both predeceased the widow. **Held** that on the husband's death the fee of his moveable estate vested in the only child of the marriage, and that as he was his father's "nearest of kin," in the sense of the deed, his right was not subject to divestiture in the event (which happened) of his predeceasing his mother, the liferentrix.

Opinion (per Lord Watson) that if the child had not been his father's next of kin, the vesting of the child's right would have been subject to defeasance in the event of the child predeceasing the liferentrix.

Gregory's Trustees v Alison, 1889, 16 R. (H.L.) 10; 14 App.Cas. 124; 26 S.L.R. 787.

(253)

Destination of fee on death of liferenters without issue to three brothers or the survivor—Vesting in last survivor.

By a declaration addressed by two sisters to their three brothers, the sisters declared that certain bank stock (to the purchase price of which each of the five had contributed an equal part), although vested in the sisters' names, was held by them in trust (1) for their parents and the survivor of them in liferent; (2) after the death of their parents, for the liferent of the sisters jointly and the survivor of them, "subject to which liferents the fee of said stock shall fall and belong" one-half to the children of each sister, and "failing our having children, the fee of said stock shall fall and belong to you our brothers equally or the survivor of you." On the death of the parents the sisters and the survivor of them enjoyed the liferent. Neither of the sisters married, and the three brothers all predeceased both the sisters. In a special case presented after the death of the survivor of the sisters, **held** (1) that the deed fell to be construed as if it were a joint settlement of the fund, and (2) that the fee had vested on the death of the second brother in the last surviving brother, subject to defeasance in the event of the sisters having children, and that his representatives were entitled to the whole fund.

Gardner v Hamblin, 1900, 2 F. 679; 37 S.L.R. 486; 7 S.L.T. 412.

(254)

Gift to A and B in liferent and their children in fee—Failing children who should attain majority gift to C in liferent and her children in fee—Destination over in event of C leaving no children or of her children not attaining majority—C's son attaining majority subsequent to testator's death—Vesting at majority subject to defeasance.

Taylor v Gilbert's Trustees, 1878, 5 R. (H.L.) 217; 3 App.Cas. 1287; 15 S.L.R. 776, No. 226, supra.

(255)

Destination to R failing issue of liferenter—Failing R, destination to R's issue, whom failing, to persons named or survivor.

Testamentary trustees were directed to hold a legacy in trust for H in liferent, and for her children or their issue in fee. Failing issue of the liferentrix the fee was destined to her brother R, whom failing, to his issue, whom all failing, to three members of the family of C nominatim and the survivors and survivor of them, the issue of predeceasing taking their parents' shares. A residuary clause in the settlement was declared to include any legacy that lapsed. All the legatees named to whom the fee was destined survived the testator, but all predeceased the liferentrix without issue. On the death of the liferentrix without issue, the legacy was claimed by the representatives of the last survivor of the family of C as having vested in that party on the predecease of R and the other two members of that family. **Held** that the legacy had lapsed and had fallen into residue.

Bannatyne's Trustees v Watson's Trustees, 1914 S.C. 693; 51 S.L.R. 605; 1914, 1 S.L.T. 469.

(256)

Direct conveyance of residue to liferenters and to A, whom failing, to B, whom failing to C in fee—Direction that residue be divided among A, B, and C on death of last liferenter.

By mortis causa disposition and settlement the granter disposed and conveyed the residue of his whole means and estate, heritable and moveable, to his two sisters nominatim, jointly and to the longest liver of them in liferent, and to his nephew James, whom failing, to his nephew Thomas, whom failing, to his niece Isabella, in fee, "but divisible in the events and in the manner after mentioned," whom all failing, to his own nearest heirs in fee. Then followed the declaration that on the death of the longest liver of the liferenters the residue of the estate should "be divided into as many equal parts or shares as there shall then be existing in number of the said James, Thomas, and Isabella, and each of them then alive shall be entitled to an equal share," and if only one should be then alive he or she should be entitled to the whole. James predeceased the testator; Thomas and Isabella both survived him, but predeceased the longest liver of the liferenters. Thomas survived Isabella.

Held that the whole residue vested a *morte testatoris* in Thomas, subject to the condition that if Thomas and Isabella survived the liferenters the residue should be divided between them, and that if Isabella alone survived she should take the whole; and that neither of these events having happened the vesting of the fee a *morte testatoris* in Thomas had become absolute.

Bruce's Trustees v Bruce's Trustees, 1898, 25 R. 796; 35 S.L.R. 598.

(257)

Gift to family of children — Exclusion of child succeeding to entailed estate.

By antenuptial marriage contract the wife conveyed her estate to herself in fee, and, in the event of her predeceasing her husband, to him in liferent allanarly and the children of the marriage in fee, excluding the eldest child in the event of his succeeding to estate through the husband exclusively of the other children. The wife predeceased the husband, survived by four children, of whom the eldest son predeceased his father, and the second son succeeded to an entailed estate on his father's death. **Held** (1) that the wife's estate vested in the children at her death, (2) that one-fourth vested in the eldest son although as heir-apparent to his father he had the prospect of succeeding to the entailed estate, and (3) that the share of the wife's estate which vested in the second suffered defeasance on the second son succeeding to the entailed estate.

Robertson, 1869, 7 M. 1114; 41 J. 621; 6 S.L.R. 709.

IX. ACCELERATION OF VESTING.

1. SURRENDER OR FORFEITURE OF LIFERENT.

(258)

Vesting suspended until widow's death.

A testator directed his trustees to pay to his widow an annuity and to accumulate the balance of the income till her death, and thereafter to distribute his estate among his children in a certain manner, declaring that if any of them should predecease the term of payment their provisions should lapse and become part of the residue, unless in the event of the predeceaser leaving lawful issue, in which case the children of the predeceaser were to take their parent's share. The widow repudiated the annuity provided to her and took her legal rights. **Held** that the vesting of the children's interests was suspended until the widow's death, and that her repudiation of the annuity had no effect on the vesting.

Muirhead v Muirhead, 1890, 17 R. (H.L.) 45; 15 App.Cas. 289; 27 S.L.R. 917.

(259)

Vesting suspended until widow's death or second marriage.

A testator by his settlement left his widow an annuity of £50, to continue so long as she remained unmarried, and

directed his trustees on her death or second marriage to pay the residue of his estate over to certain relatives in certain proportions, with a conditional institution of issue and a clause of survivorship, it being expressly declared that "their interests should vest only upon the arrival of the period for realisation and division." The widow repudiated the settlement and took her legal rights. **Held** that the widow's repudiation of the settlement did not accelerate the period of vesting of the residue.

Ross's Trustees v Ross, 1894, 21 R. 927; 31 S.L.R. 775; 2 S.L.T. 119.

(260)

A testator gave his wife the liferent of his estate and directed his trustees on her death or re-marriage to hold his estate for behoof of his children. One-half of the children's shares was to be payable to them on their becoming twenty-five, and the other half on their becoming twenty-eight. There was an express declaration that the children's shares should not become vested interests until the periods of payment. The widow repudiated her testamentary provisions and claimed her legal rights. All the children had attained the age of twenty-eight. **Held** that the vesting of the children's provisions was not accelerated by the widow's action, and that the trust estate could not be distributed until her death.

Dallas' Trustees v Dallas, (O.H.) 1905, 13 S.L.T. 332.

(261)

Vesting suspended until death or second marriage of widow and youngest child attaining majority.

A testator by his trust disposition and settlement directed his trustees, after the death or second marriage of his widow, to convey the residue to his children who should be alive when the youngest of them, or of the survivors of them, should attain the age of twenty-one, equally among them, declaring that the issue of children predeceasing the period of payment should be entitled to the share to which their parent would have been entitled if alive, and providing that these provisions should not vest until the period of payment. **Held** that upon the construction of the settlement vesting of the residue was postponed until the death or second marriage of the widow, and not merely until the date when the youngest of the children attained twenty-one, and that the period of vesting was not accelerated by the widow's having elected to claim her legal rights.

Gray's Trustees v Gray, 1907 S.C. 54; 44 S.L.R. 39; 14 S.L.T. 381.

(262)

Legacies conditional and unconditional payable on death of widow.

A testator in his settlement directed his trustees to pay to his widow the income of the residue of his estate in full of her rights, but with power to her "to con-

sent to payment of all or one or more of the legacies" thereafter bequeathed, "... so as to admit of payment thereof during her life." He then directed the payment of a number of legacies "upon the death of my said wife, or should she surrender her life" over any part thereof so as to admit of payment, then for payment of such part on such surrender." Some of the legacies were unconditional, others were bequeathed subject to a clause of survivorship and conditions in favour of the issue of the legatees. He also directed that any surplus of residue after payment of legacies should be at the disposal of the trustees to apply in augmenting all or any of the legacies, or in helping institutions akin to those to which legacies had been given. After the husband's death, the widow elected not to accept the provisions of the settlement in her favour, and claimed her legal rights, and thereafter executed a formal deed in which she confirmed this election and surrendered her whole rights under the settlement, and consented, so far as she competently could in exercise of the power conferred upon her in the settlement, to the immediate payment of the whole of the legacies. **Held** (1) that the widow, having surrendered the whole of the provisions of the settlement in her favour, was debarred from exercising the power of consent; (2) that the unconditional legacies, having vested indefeasibly at the death of the testator, were, owing to the surrender of the life"ent, payable immediately, provided the trustees had sufficient funds to pay all the other legacies; (3) that the contingent legacies, in which vesting was postponed until the death of the widow, were not payable until that event, the period of vesting being in no way accelerated by the surrender of the life"ent.

Jacks's Trustees v Jacks, 1913 S.C. 815; 50 S.L.R. 536; 1913, 1 S.L.T. 341.

(263)

Postponement of payment solely for purpose of protecting provisions repudiated.

A testator directed his trustees to give his widow the life"ent of his furniture and an annuity of £70, and further directed that upon the death of his spouse, and the youngest of his children having attained majority, or the whole of them being married, his trustees were to "divide" the residue of the heritable and moveable estate into as many shares as the number of his children then surviving and of children who had died leaving issue surviving, and to pay one share to each surviving son and one share to the surviving children of each predeceasing child. The shares of daughters were to be held by the trustees for behoof of them in life"ent and of their children in fee. The testator was survived by a widow and by six daughters, all of whom were married. The widow renounced her provisions, and claimed terce and *jus relictæ*. The terce amounted to £160 per annum. **Held** that as it appeared from the deed that the truster had postponed the period of

division to the date of the widow's death for no other purpose than to give effect to the provisions in her favour, which had now lapsed, the period had arrived for dividing the residue, and that the subsistence of the legal burden of terce was no impediment to the division.

Alexander's Trustees, 1870, 8 M. 414; 42 J. 193; 7 S.L.R. 240.

(264)

A testator directed his trustees, in the event of his leaving no issue, to pay to his widow a free yearly annuity of £200, and gave her the life"ent use of a house, "and whatever further interest and annual income my said estates shall yield . . . shall be accumulated during the lifetime of my said wife by my said trustees, and form part of my estates." The estate yielded a clear return of more than £300 a year, after paying the widow's annuity, which, in the event, which happened, of the testator leaving no issue, was the only provision to be paid or provided for during her life. On her death the trustees were to pay to the children of J M "surviving at said period the sum of £100 each," and an annuity of £100 a year to the brother of the truster's widow, "provided he return to this country and reside here, and provided my said trustees consider that he requires the same." The residue was to form a fund to be vested in certain persons ex officio for the establishment of a charitable foundation, to be styled after the truster, "The Lucas Trust." **Held**, on the widow's repudiation of the settlement, that the trustees and patrons of "The Lucas Trust" were entitled to an immediate conveyance of the residue, subject to existing and contingent interests.

Lucas's Trustees v "The Lucas Trust," 1881, 8 R. 502; 18 S.L.R. 363.

(265)

Son rejecting life"ent and claiming legitim—Gift to son's daughter in life"ent on son's death—No acceleration.

A testatrix directed her trustees to hold one-half of the residue of her estate for her son in life"ent, and, after his death, for his daughter in life"ent and her issue in fee, whom failing for certain other beneficiaries. The testamentary provisions were declared to be in full of legal rights. The son elected to claim legitim, and thereby lost all right to the conventional provisions in his favour. **Held** that, although the son had lost all right to his life"ent of one-half of the residue, the succession to that life"ent did not open immediately to his daughter, her right to it being dependent on his death and her survivance.

Rose's Trustees v Rose, 1916 S.C. 327; 53 S.L.R. 630; 1916, 1 S.L.T. 382.

(266)

Power of trustees to make advances.

A testator left his wife the life"ent of his estate and further directed his trustees "on the death of my said wife" to apply the residue for behoof of C, his adopted

daughter, and to expend the income or part of the capital on C's education and maintenance until she should attain majority or be married, and that on either of these events happening the trustees should either pay over the estate to C or settle it on her. The testator was survived by his wife, who rejected her testamentary provisions and claimed her legal rights, and by C, who was a minor. On C attaining majority **held** (per Lord Young and Lord Trayner) that, whether the fee had vested in C or not, the trustees were entitled (1) to pay her part of the capital of the residue to enable her to repay advances made to her for maintenance and education, and (2) to make to her for the future an allowance out of income during the widow's survivance.

Cairns v Cairns' Trustees, 1901, 3 F. 545; 38 S.L.R. 364; 8 S.L.T. 474.

(267)

Liferent of whole capital — Liferent reducible to one-third on second marriage of liferenter—Effect of second marriage on vesting of remaining two-thirds — Survivorship clause referred to period of payment.

A testatrix directed her trustees to pay to her husband during his lifetime the net income of her whole means and estate, restrictable to one-third in the event of his entering into a second marriage. "Upon the death of my said husband, if he shall survive me, or at my own death if he shall predecease me," the trustees were to hold and apply, pay and convey, "the fee or capital of the residue of my said means and estate," to her children equally on majority, or, in the case of daughters, marriage or majority. "In the event of any of them predeceasing the period of payment and conveyance," there was a destination over to issue, and failing issue to survivors equally among them per stirpes of the share which their parent would have taken on survivance, and; further, in the event of any of them predeceasing the said period without leaving lawful issue, then the share of such predeceaser was to accrete to the other children surviving. The settlement did not contain any provision as to the disposal of the income which would be set free if the husband married. The testatrix was survived by her husband and by three children. In a special case, presented after the children had all attained majority, **held** that vesting as regarded the whole capital was postponed until the death of the liferenter.

Hunt's Trustees v Hunt, 1906, 8 F. 764; 43 S.L.R. 432; 13 S.L.T. 920.

2. VESTING IN LAST SURVIVOR OF CLASS.

(268)

Class reduced to one before period of survivorship.

A testator directed his trustees to pay the residue of his estate to two of his sons, A and B, on the younger, B, attaining the age

of twenty-five. In the event of the death of either son "before the succession opens to him" without leaving issue, his share was to accrete to the survivor. B died in minority. At that date A, the elder son, had not attained twenty-five. **Held** that the whole of the residue vested in A on the death of B.

Mackie v Gladstone, 1876, 13 S.L.R. 368.

(269)

A testator directed his trustees to pay the whole annual produce of his heritable estate to his widow, and after her death "to denude, convey, and make over to my two sons, George and John, the whole heritable properties . . . declaring that if either of my said sons shall predecease my said spouse without lawful issue, then my said trustees shall denude and convey the said several subjects . . . to my surviving son; but should such predeceasing son leave lawful issue, then such issue shall come in their father's room and stead, and my said trustee shall denude and convey the father's share to such issue." **Held** that on the death of one of the sons without issue during the subsistence of the liferent, the fee of the heritage vested in the survivor, although the survivor also predeceased the liferentrix.

Lindsay's Trustees, 1885, 12 R. 964; 22 S.L.R. 638.

(270)

Express provision as to vesting.

Lawrie's Trustees v Lawrie, 1905, 7 F. 910; 42 S.L.R. 693; 13 S.L.T. 246, No. 200, *supra*.

(271)

Predecease of whole class — Vesting subject to defeasance.

Gardner v Hamblin, 1900, 2 F. 679; 37 S.L.R. 486; 7 S.L.T. 412, No. 253, *supra*.

(272)

Last survivor predeceasing liferenter—Legacy falling into residue.

Bannatynes's Trustees v Watson's Trustees, 1914 S.C. 693; 51 S.L.R. 605; 1914, 1 S.L.T. 469, No. 255, *supra*.

3. CONDITION ATTACHED TO GIFT BECOMING IMPOSSIBLE.

(273)

Suspensive condition.

A testatrix bequeathed to each of certain nieces, including one named Christina Purves, the sum of £600, and made similar bequests to her nephews, and bequeathed the residue of her estate to Christina Purves, "but there shall be no division of my estate till my niece Christina Purves attain the age of twenty-one . . . and should any one of my said nieces die unmarried before my niece Christina Purves attain the age of twenty-one their said share shall be divided equally between the surviving sisters." It was declared that all these provisions were to be alimentary. "When my niece Christina Purves reaches

the age of twenty-one each one's share will become his or her absolute property, and can be disposed of by will or otherwise as the legatees desire." All the nieces survived the testatrix. Christina died unmarried before attaining twenty-one years of age. **Held** (1) that the survivorship clause above quoted applied to Christina as well as to the other nieces, and that it suspended vesting; (2) that therefore no right to the legacy of £600 or to the residue had vested in Christina, and that these provisions fell by her death to her surviving sisters; and (3) that the provisions in favour of nephews and nieces vested at the death of Christina, the condition which suspended vesting having become impossible.

Purves's Executor v Purves, 1898, 25 R. 1084; 35 S.L.R. 852; 6 S.L.T. 3.

(274)

Gift to sons payable on majority of youngest—Youngest son dying in minority.

A testator directed his trustees to convey certain heritable estates to his sons on the youngest attaining majority. The testator was survived by three sons, the youngest of whom died in minority at a date when the other had attained majority. **Held** that vesting took place in the two elder sons on the death of the youngest.

Roberts' Trustees v Roberts, 1903, 5 F. 541; 40 S.L.R. 387; 10 S.L.T. 642.

(275)

Gift to children payable on youngest attaining twenty-five—Express declaration that vesting should take place on youngest child attaining twenty-five—Claim by sole surviving child at age of twenty-three.

Lawrie's Trustees v Lawrie, 1905, 7 F. 910; 42 S.L.R. 693; 13 S.L.T. 246, No. 200, *supra*.

4. EXERCISE OF POWER OF APPOINTMENT.

(276)

Gift failing apportionment to children surviving a certain date—Exercise of power prior to date in question.

By his marriage contract, C, an heir of entail in possession, in exercise of a power under the entail, bound the succeeding heirs of entail to pay to the marriage contract trustees a sum equal to three years' rent of the entailed estate for behoof of the children of the marriage not succeeding to the entailed estate in such shares as C should appoint, and failing appointment for the younger children who should be alive at C's death equally or their issue. As a further provision for his younger children C assigned to his trustees certain policies of insurance on his life under similar conditions as to apportionment. In contemplation of the marriage of R, his third son, C executed a deed appointing to R or his lawful issue or assigns £1500 as his share of the total trust funds. This deed was declared to be delivered on execution and to be irrevocable, and R was taken bound

to assign his rights under it to his marriage contract trustees. R predeceased his father. **Held** that R's right to the £1500 vested at the date of the appointment in his favour.

Chancellor's Trustees v Sharples' Trustees, 1896, 23 R. 435; 33 S.L.R. 313; 3 S.L.T. 250.

(277)

By antenuptial marriage contract the wife's estate was conveyed to trustees on trust to pay the income to the spouses and the survivor; "and after the death of the longest liver" the trustees were to be bound "to pay over or convey the said trust estate" to the children of the marriage "in such shares or proportions, if more than one such child, as may be appointed" by the spouses or the survivor, and failing appointment "the said trustees shall be bound to pay or convey the same to the said children equally, and to the issue of such child or children as may have predeceased." There was a destination over to the wife or her heirs and assignees in the event of there being no children or of their predeceasing their parents. The wife survived her husband and executed a deed of appointment of the whole fund in favour of two children of the marriage. **Held** that the persons entitled to the fee of the trust fund, failing appointment, were the children in life at the death of the surviving spouse and the issue of predeceasers; that these persons were the sole objects of the power; that under the marriage contract vesting was suspended until the death of the surviving spouse, and that it was not accelerated by the execution of the deed of appointment.

Cuming's Trustee v Cuming, 1896, 24 R. 153; 34 S.L.R. 77; 4 S.L.T. 146.

(278)

Direction to pay on death of liferentrix to children or survivors—Marriage contract.

By antenuptial marriage contract the husband assigned certain policies of insurance on his life to trustees, directing them to pay the income of the proceeds to his wife, if she survived him, until her second marriage or her death, and, upon her death or second marriage, to pay one-half of the fee to the children of his former marriage "and to the survivor or survivors of them," and the other half to the children of his intended marriage, reserving to himself and to his intended wife jointly, and to the survivor of them, power "to apportion the fee of the said provisions" amongst the children "of my former and present marriage according to the exact proportions hereby settled upon them respectively." After marriage and the birth of children the spouses executed a deed of apportionment whereby they apportioned the one-half of the proceeds of the policies falling to the children of the former marriage. One of the children predeceased the widow. **Held** that under the marriage contract the fee of the fund destined to the children of the former marriage vested at the death of the

second wife, and consequently that the representatives of the predeceasing child took nothing.

Stirling's Trustees v Stirling, 1893, 1 F. 215; 36 S.L.R. 194; 6 S.L.T. 223.

(279)

Appointment in favour of predeceasing child.

A testator by his trust disposition and settlement left the residue of his estate to his sister and her husband in life-erent and to those of their children who should be in life at the death of the survivor of their parents in fee. He also directed that certain farm leases should be made over to his sister and her husband successively in life-erent and to such of her sons as his sister should appoint by any writing under her hand in fee; and, failing appointment, to her eldest son, and, if he would not accept, then to the next eldest son who should be alive at the death of the testator's sister and her husband, and so on to her sons in succession. After the testator's death a family arrangement was made under which the testator's sister and her husband renounced their rights of life-erent in the leases in favour of one of their sons, who took them over and entered into possession of the farms, renouncing all right to any share in the residue. This son died in his mother's lifetime, thus predeceasing the date at which the residue of the estate vested in her children. **Held** that the testator's sister had validly exercised the power of appointment in favour of the son who predeceased her.

M'Dougal's Trustee v Heinemann, 1918 S.C. (H.L.) 6; 55 S.L.R. 80; 1917, 2 S.L.T. 221.

5. DIVORCE.

(280)

Gift of fee to married woman on husband's predecease—Husband divorced.

By trust disposition and settlement a testator directed his trustees to hold the share of his estate falling to his married daughter for her alimentary life-erent use alienably and for her children in fee, but declared that in the event "of her husband predeceasing" her, the provisions of life-erent and fee should cease, and directed the trustees to "make payment to her of her whole share and interest in the estate absolutely." After the testator's death the daughter obtained decree of divorce against her husband, and thereafter required her father's trustees to pay over to her the capital of her share in her father's estate. **Held** that the decree of divorce was not equivalent to the "predecease" of the husband, and that the daughter was entitled to a life-erent only of the estate so long as he lived.

Taylor's Trustees v Barnett, 1893, 20 R. 1032; 31 S.L.R. 11; 1 S.L.T. 155.

(281)

The father of a woman who had been deserted by her husband executed three years after the desertion a trust disposi-

tion and settlement, whereby he directed his trustees to hold certain heritable subjects for her "during the subsistence of the marriage between her" and her husband "or otherwise during their joint lives" and to pay the rents to his daughter "until the dissolution of her marriage" by the death of one or other of them." If the daughter survived her husband the trustees were directed to convey the subjects to her "in absolute right," but in the event of the daughter predeceasing her husband the fee was to go to the children. Four years after the father's death the daughter divorced her husband, and called on the trustees to convey the subjects to her. **Held** that the daughter was not entitled to the fee of the subjects until the natural death of her husband.

Mason v Beattie's Trustees, 1878, 6 R. 37; 16 S.L.R. 6.

(282)

Marriage contract provisions to children—"Dissolution of marriage by death"—Provisions payable out of wife's estate—Wife obtaining divorce.

Under an antenuptial contract of marriage the spouses each contributed a sum to the marriage contract funds. The contract provided that "on the dissolution of the said marriage by the death of either of said contracting parties," if there were children of the marriage alive, the trustees should pay the annual proceeds of the whole fund to the surviving spouse, and "after the death of such survivor," the principal to the children. It was further provided that on the dissolution of the marriage by the decease of the said wife without issue, or leaving issue who should predecease their father, the trustees should pay to the husband the principal of his contribution, and the annual proceeds of his wife's contribution to the fund, and at his death the principal of the latter sum to the wife's heirs and assignees whomsoever. There was a similar provision with regard to the funds applicable to the case of the predecease of the husband in like circumstances. The wife obtained decree of divorce against the husband on the ground of adultery, and thereafter died before him, leaving a daughter of the marriage. **Held** that the capital of the wife's contribution to the fund would not vest in her daughter until the death of the divorced husband, and that the annual proceeds thereof fell into the wife's executors.

Harvey's Judicial Factor v Spittal's Curator ad litem, 1893, 20 R. 1016; 31 S.L.R. 13; 1 S.L.T. 155.

(283)

Payable on death of spouses—Wife obtaining divorce—Daughter not entitled to payment till death of surviving parent—Opinions on vesting reserved.

Dawson v Smart, 1903, 5 F. (H.L.) 24; [1903] A.C. 457; 40 S.L.R. 879; 11 S.L.T. 321. HUSBAND AND WIFE, No. 345.

X. VESTING OF DIRECT GIFTS OF HERITAGE.

(284)

Vesting subject to defeasance.

Observed (per Lord Watson)—“The vesting and divestiture of a proper feudal fee, as distinguished from a heritable *jus crediti*, is . . . alien to the principles of the law of Scotland.”

Studd v Cook, 1883, 10 R. (H.L.) 53; 8 App.Cas. 577; 20 S.L.R. 566.

(285)

Observations on the doctrine of vesting subject to defeasance and its application to direct destinations of heritage.

Turner v Gaw, 1894, 21 R. 563; 31 S.L.R. 447; 1 S.L.T. 526.

(286)

Fee in pendente—Defeasance.

A testator, by a holograph will, left a heritable estate by direct destination to his two sisters equally between them and to the survivor; and he provided that, should neither of them have children, the destination of the estate should be to them in life-*rent* only, and to a charitable institution in fee; but that, should either of them have a child, the life-*rent* destination should lapse, and the estate should vest in his said sisters or sister in fee. **Held** that, as the proviso involved a feudal impossibility, viz., a suspended fee of heritage, it was of no effect, and could not qualify the original gift of fee to the sisters; and, accordingly, that the estate vested in them in fee a *morte testatoris*. **Observations** (per Lord Johnston) on the application of the doctrine of vesting subject to defeasance to destinations of heritage.

Young's Executrix v Gray's Hospital, 1917 S.C. 707; 54 S.L.R. 554; 1917, 2 S.L.T. 91.

(287)

—**Gift to A if in life—Failing A, destination to life-*renters* and to B, whom failing, to C in fee—Vesting in C, subject to contingencies of A being in life and of B surviving life-*renters*.**

M'Lay v Borland, 1876, 3 R. 1124, No. 248, *supra*.

(288)

Destination to heirs of body of life-*rentrix*—Whom failing, to persons named and the respective heirs of their bodies in fee.

By general disposition and settlement A disposed a share of her heritable and moveable estate to B in life-*rent* allenerly and to heirs of B's body in fee, whom failing, to C, D, E, and F, equally between them and the respective heirs of their bodies in fee. C survived the testator, and was survived by B, the life-*rentrix*, who died unmarried. C left an heir of his body, who survived the life-*rentrix*. **Held** that no fee had vested in C, as the heir of his body was a conditional institute.

Turner v Gaw, 1894, 21 R. 563; 31 S.L.R. 447; 1 S.L.T. 526.

(289)

Destination to A and B, and on the death of either without issue, to survivor—Mixed estate.

A testator assigned and disposed to A and B equally between them, and in the case of the death of either without heirs of his or her body to the survivor of them, his whole real and personal effects whatsoever. A and B both survived the testator, and A predeceased B without leaving issue. **Held** that A and B each took a vested interest in one-half of the testator's estate a *morte testatoris*.

Paul v Home, 1872, 10 M. 937; 44 J. 519; 9 S.L.R. 594.

(290)

No gift till death of life-*renter*.

A testator left to his wife, who survived him, “for her sole use and enjoyment during the term of her natural life” certain lands, “and after the death of my said wife, I hereby dispose, convey, and make over my said lands . . . to C, and the heirs whatsoever of his body; whom failing,” to the brothers and sisters of C in their order; whom failing, to a certain series of heirs. C survived him. **Held** that a right had vested in C a *morte testatoris*.

Fraser v Croft, 1898, 25 R. 496; 35 S.L.R. 420.

(291)

Direct disposition to A in life-*rent* only and “after his death” to trustees.

Edmond v Lord Provost of Aberdeen, 1898, 1 F. 154; 35 S.L.R. 193; 5 S.L.T. 230. *SUCCESSION*, No. 184.

(292)

Destination to C, D, and E, or survivors or survivor—Heritage—Mutual settlement.

Five ladies, who were vested equally in heritable subjects, granted a *mortis causa* disposition, whereby they disposed the subjects to “C, D, and E, or the survivors or survivor of them.” D predeceased the longest liver of the granters. **Held** that, on the death of the last survivor of the granters, the subjects vested in C and E as the survivors of the dispositive at that date.

Chancellor v Mosman, 1872, 10 M. 995; 44 J. 557; 9 S.L.R. 646.

(293)

Life-*rent* of residue to widow—Gift of fee to nephew—Destination in event of nephew dying without heirs-male of his body—Clause of reversion.

A testator left the life-*rent* of his whole estate to his widow. With regard to the fee, he provided, *inter alia*, “I leave to my nephew, J F W, my estate of B, but . . . in the event of my said nephew dying without leaving any lawful heir-male of his body, then and in that event my said lands, A B, are to revert back to my nephew, J F B.” J F W survived the testator, but predeceased the widow unmarried. **Held** that the

estate, A B, vested in him a morte testatoris.

Hamilton v Ritchie, 1894, 21 R. (H.L.) 35; [1894] A.C. 310; 31 S.L.R. 934; 2 S.L.T. 91.

(294)

Destination in lease.

Certain subjects were leased for 950 years to P "and his heirs as after-mentioned," and, failing him, "then the whole subjects to and in liferent only to the present wife of the said A P . . . and after the death of the said spouses . . . then to the children of their marriage equally between them, share and share alike, in fee." A P was survived by his wife. Three children of the marriage were alive at the date of the lease, two of whom survived their father. **Held** that the right to the lease, subject to the widow's liferent, vested on the death of the father in the two children then alive to the extent of one-half each.

Marquis v Prentice, 1896, 23 R. 595; 33 S.L.R. 415; 3 S.L.T. 314.

(295)

To A in liferent and B, C, and D and issue and survivors in fee.

A testator made a direct disposition of his whole estate to A in liferent, and "after her decease" to B, C, and D, her children, in fee. If any of the children, B, C, and D, predeceased the testator leaving issue, the share accruing to such child was to belong to the issue, and, failing issue, was to go to the surviving children and the issue of any predeceasing child. B, C, and D all predeceased A without leaving issue, B being the last survivor. **Held** that vesting took place a morte testatoris, subject to the survivorship clause, and that the representatives of B were entitled to the fund.

Christie's Trustees v Lawson's Executor, (O.H.) 1919, 1 S.L.T. 106.

XI. VESTING OF INTER VIVOS GIFTS.

(296)

Trust deed—Liferent to A and his wife, with fee to children.

A took the title to heritable subjects which he had purchased in the names of certain persons, who granted a declaration of trust bearing that they held the subjects in trust, inter alia, for the payment of the free yearly proceeds to A during his life, and after his death to his wife, if she survived him, for their liferent uses allanarly; and after the determination of the foresaid liferents, in trust for A's children, in such shares and proportions as might be fixed by A, and failing apportionment, share and share alike; declaring that the fee of the shares should be payable after the determination of the said liferents, and after the whole children who should have survived A and his wife, and who should be alive, had attained majority, or at such other times after the determination of the said liferents as should be fixed by A. A died, survived by his wife and without fixing the shares of the children.

Held that the children's shares of the estates vested at the execution and registration of the deed of declaration of trust in the children then born, and in the others as they came into existence.

Miller v Finlay's Trustees, 1875, 2 R. (H.L.) 1; 12 S.L.R. 630.

(297)

Disposition of heritage.

A and B, two brothers, executed a disposition bearing to be granted for certain good and onerous causes, whereby they disposed certain heritable subjects of which they were pro indiviso proprietors in trust for certain liferenters and for the six children of A nominatim in fee. The deed was not delivered at its date, but several years afterwards, when three of A's six children were dead, infetment in the subjects was taken in name of the trustees. **Held** that no vesting took place in the beneficiaries under the deed until the date of infetment.

Dunlop v M'Crae, 1884, 11 R. 1104; 21 S.L.R. 752.

(298)

Bank stock conveyed by owner to herself in liferent allanarly and her children in fee.

A lady, by her antenuptial contract of marriage, conveyed certain bank shares to herself in liferent, and, failing her, to her husband in liferent and to the children of the marriage equally in fee, but with power to her husband, and, failing him, to herself, to apportion the provisions thereby made for children, and, failing such apportionment, equally, the issue of a child dying before receiving its provisions having right to the parent's share. After the death of the husband, without exercising the power of apportionment, the wife, by a deed of transference, conveyed the shares to herself in liferent allanarly, and to the four children of the marriage nominatim equally in fee. The transfer bore that acceptance thereof was not to affect the rights and interests of the children under the marriage contract inter se. The children accepted the transfer. The wife died survived by all the children. **Held** that a right to the shares vested in the children upon their acceptance of the transfer.

Whyte v Robertson, 1890, 17 R. 708; 27 S.L.R. 555.

(299)

Gift after liferent to A, B and C—Survivorship clause taking effect "if one of them dies"—Inter vivos trust.

A letter addressed by an uncle to his niece bore that he had resolved to put into her hands, on trust for her three daughters, a sum of £1500, to be divided as specified, and continued, "My desire is that the half of the yearly interest of these sums shall be yours and your husband's, the other half of it to be paid to my wife during her life, then to fall to you. My wish is, that if one of your daughters dies, then her portion to be divided between the other two, and if a second dies, the survivor inherit the whole. If all your daughters are taken from you

by death, then this money to be divided equally between" other persons. The money was at the same time paid to the niece or her husband. **Held** that by the letter of trust a joint liferent of the whole sum was conferred upon the niece and her husband and the survivor, and that no portion of the capital vested in any of the daughters till the death of both liferenters.

Spence v Paterson's Trustees, 1873, 1 R. 46.

(300)

Disputed succession—Compromise subject to special Act of Parliament being obtained—Date of vesting—Bankruptcy.

A person whose estates had been sequestrated obtained his discharge in 1863. In 1862 his wife and other heirs-portioners of a deceased relative obtained decree of reduction in absence, setting aside on the ground of uncertainty the settlement of the deceased, which excluded them. A suspension of the decree was brought by alleged beneficiaries, but no judgment was pronounced, the parties having agreed to a settlement subject to the condition that a special Act of Parliament should be obtained giving effect thereto. A special Act was obtained in 1866, whereby the bankrupt's wife became entitled to a share of the succession. **Held** that no right had vested in the bankrupt or his wife prior to the date when the special Act was passed, and therefore that the trustee was not entitled to have the wife's share transferred to him.

Turner's Trustee v Turner, 1868, 7 M. 6; 41 J. 6; 6 S.L.R. 5.

(301)

Addition to trust funds—Beneficiary predeceasing date of addition.

A man by inter vivos deed assigned two life policies to trustees for behoof of his wife in liferent and his children in fee, but excepted from the assignation all bonuses on the policies. Some years after he executed a further assignation renouncing the exception contained in the earlier deed and conveying the bonuses to the trustees for the purposes set forth in the first assignation. Two of the children predeceased the date of the second deed and two survived it. **Held** on the death of the liferentrix, who survived all her children, that although a share of the bonuses could not vest in the children who predeceased the second deed, the bonuses fell to be distributed in the same way as the remainder of the trust estate as provided by the first deed.

Arklay's Trustees v Arklay's Trustees, (O.H.) 1909, 2 S.L.T. 120.

XII. VESTING UNDER MARRIAGE CONTRACTS IN CHILDREN OF MARRIAGE.

(302)

Obligation to provide and secure—Provision payable after death of surviving spouse—Vesting at birth.

By an antenuptial contract of marriage the

husband bound himself to provide to the children of the marriage a sum varying with the number of children, payable at the first term after the decease of the longest liver of the spouses, and further bound himself in security thereof to take out an insurance policy on his life in favour of the marriage contract trustees. A power of apportionment was given to the father, whom failing, to the mother. There were two children born of the marriage. The wife predeceased the husband. One of the children predeceased the wife, and the other survived the wife and predeceased the husband. **Held** that each child had a vested interest in the provision from its birth.

Walkinshaw's Trustees v Walkinshaw, 1872, 10 M. 763; 44 J. 439; 9 S.L.R. 484.

(303)

Provision by father to self in liferent and children in fee—Predecease of only child—Right of child's issue.

By an antenuptial marriage contract, dated in 1815, a husband provided to himself in liferent, and the children of the marriage in fee, one-half of his whole estate, including not only what then belonged to him, but all that he might acquire during the subsistence of the marriage. One son was born of the marriage. The wife died in 1848. The son died in 1856, leaving issue, and bequeathing his whole estate to trustees. The husband, who contracted a second marriage, died in 1860, and was survived by his second wife, whom he appointed his executrix and universal legatee. He never made any settlement in fulfilment of the obligation in the marriage contract of 1815. **Held** that the provision in favour of the son of the first marriage, who predeceased his father, did not vest in him, but vested in his issue who survived the granter.

Arthur and Seymour v Lamb, 1870, 8 M. 928; 42 J. 542; 7 S.L.R. 592.

(304)

Obligation by father to make provision payable after death to children when major or married—Vesting contingent on survival of father.

Gore Booth's Trustee v Gore Booth, 1898, 25 R. 803; 35 S.L.R. 606; 5 S.L.T. 381, No. 197, supra.

(305)

Direction on death of mother to pay to children "then alive"—Predecease of father—Vesting at dissolution of marriage.

An antenuptial marriage contract, inter alia, directed that after the death of the wife, in case she should survive her husband, and if there should be a child or children of the marriage then alive, the trustees should pay the funds to the children. The marriage was dissolved by the death of the husband. **Held** that the funds vested in the children of the marriage at his death.

Angus' Trustees v Angus, 1880, 17 S.L.R. 536.

(306)

Provision by wife to husband in liferent and children in fee — Wife predeceasing — Vesting on dissolution of marriage.

By antenuptial marriage contract property belonging to the wife was settled, in the event of her predeceasing her husband, upon him in liferent, for his liferent use alienably, and on the children of the marriage in fee, with power to the wife to apportion among the children, and, failing such apportionment, the division to be equally among them, excepting and excluding the eldest child of the marriage, in the event of his succeeding to estate through the father of equal or greater value than such child's equal share of the fund. The wife predeceased the husband, leaving four children, and a deed directing an equal division among the children who should survive the longest liver of the spouses, excluding the eldest or other son who should succeed to his father's estates, declaring that the issue of predeceasing children should take their parent's share. The eldest son survived his mother but predeceased his father, leaving two daughters. **Held** (1) that at the death of the mother the fee vested in the children; (2) that one-fourth vested in the eldest son, although, as heir-apparent to his father, he had the prospect of succeeding to entailed estates of greater value than his share of his mother's estate; and (3) that the share which had vested in the second son suffered defeasance on his succeeding to his father's estates.

Robertson, 1869, 7 M. 1114; 41 J. 621; 6 S.L.R. 709.

[See also *Boyd's Trustees v Boyd*, 1905, 7 F. 576; 42 S.L.R. 435; 12 S.L.T. 798, No. 54, supra.]

(307)

Provision by wife to spouse in liferent and on the death of the survivor to the children of the marriage, whom failing, to the wife's heirs — Wife predeceasing — Child surviving mother and predeceasing father held to have no vested right.

An antenuptial marriage contract appointed trustees to hold funds, contributed by the wife, for her liferent use, and, in the event of her predecease, for the use of her husband, and after the decease of the longest liver to pay over the principal sum "to the child or children of this intended marriage in terms of a joint deed to be executed at any time" by the spouses or the survivor, and, failing such division, then share and share alike; and in case there shall be no children of the said marriage, or, if there shall be children, in case the whole of the said children shall die before the term of payment of their shares of the trust moneys, then and in either of these events to the wife's testamentary disponees or heirs whatsoever. The wife predeceased her husband, survived by issue of the marriage. No joint deed of division was executed by the spouses. Subsequently the father executed such a deed in favour of a surviving son and daughter. This deed was delivered to the son, who, after assigning his right, predeceased his

father, leaving one child. In a competition between the son's assignees and his only child, **held** that the son had no vested interest in his mother's funds under the marriage contract; that he could not assign the share allotted to him under the deed of division; and that it therefore went to his issue.

Scott's Trustees v Brown & Co., 1882, 9 R. 798; 19 S.L.R. 606.

(308)

Provision by father to children payable on death of survivor of spouses, and, failing children then surviving, to husband's heirs and assignees—Husband predeceasing—Vesting at dissolution of marriage.

In an antenuptial marriage contract the husband bound himself to pay an annuity of £150 to his wife, if she survived him, and to pay £4000 to the children of the marriage at the first term after the death of the survivor of the spouses. In security of these provisions he bound himself to convey to trustees an insurance policy for £4000, declaring that if he should predecease his wife the trustees should have power to purchase an annuity of £150 for her, and that the children's provisions should in that event be restricted to the balance of the £4000, and be payable to them at majority or marriage. It was further provided that, in the event of there being no children, or of all predeceasing the survivor of the spouses, without lawful issue, the sum should be held for the husband's own heirs and assignees. There were children of the marriage, which was dissolved by the death of the husband. **Held** that the right of the children vested at the husband's death.

Murray's Trustees v Bloxson's Trustees, 1887, 15 R. 233; 25 S.L.R. 191.

(309)

By a bond and obligation granted in contemplation of marriage (which was afterwards solemnised) the granter undertook to lay out on heritable security the sum of £8000 in the names of certain trustees for payment of the interest to his wife should she survive him, and on her death payment of the capital to the children of the marriage, and provided that—"In case of my said intended wife surviving me, and thereafter dying without leaving any child or children or grandchildren of the said marriage alive at the time (i.e., at the date of the death), then that the said trustees shall immediately convey and make over to me, my heirs and successors, the whole of the foresaid trust funds of £8000, after providing for the expense of this trust." The trustees were given power, in the event of the wife predeceasing, to make advances for the education and maintenance of the children out of their respective shares, with the consent of their father. The wife survived the husband. **Held** that vesting was postponed until her death.

Warrand's Judicial Factor v Warrand, (O.H.) 1896, 3 S.L.T. 251.

(310)

Destination to spouses in liferent and to children of marriage in fee—Gift over to husband's next of kin—Vesting on dissolution of marriage by husband's death.

Gregory's Trustees v Alison, 1889, 16 R. (H.L.) 10; 14 App.Cas. 124; 26 S.L.R. 787, No. 252, supra.

(311)

Provision by wife to spouses in conjunct fee and liferent for liferent allanarly of husband and children in fee—Husband predeceasing—Vesting at dissolution of marriage.

In an antenuptial marriage contract the wife conveyed to trustees the whole of her means and estate for behoof of her husband and herself "in conjunct fee and liferent for the liferent use allanarly" of the husband, exclusive of his *jus mariti*, "and for the use and behoof of the children" of the marriage in fee, in such proportions as the husband should appoint, or, failing such appointment, equally. A discretionary power was given to the trustees to pay to the wife such part of the capital as they should think fit. The husband died, survived by his widow, and by four out of eight children. In a question raised after the death of the widow, **held** that the provisions to children vested in them at the date of the dissolution of the marriage by the death of the father, and not in each child at birth or at the date of the mother's death.

Wardlaw's Trustees v Wardlaw, &c., 1880, 7 R. 1070; 17 S.L.R. 725.

(312)

Provision in favour of wife in liferent and children of that or any future marriage in fee.

In a marriage contract the date of payment of a provision in favour of the wife in liferent and her issue by that or any future marriage, with a destination over in favour of her heirs and assignees, was postponed until her death, when her liferent of the provision expired. **Held** that vesting was postponed until her death.

Murray's Judicial Factor, (O.H.) 1900, 8 S.L.R. 281.

(313)

Provision in favour of spouses in liferent and heirs of the marriage in fee.

In a marriage contract the wife's father entailed an estate on the spouses and the longest liver in liferent (subject to restrictions which limited the right of the spouses to a liferent allanarly) and the heir-male of the marriage, whom failing, the heir-female of the marriage in fee. There were no sons of the marriage, which was dissolved by the death of the husband. **Held** that, on the dissolution of the marriage, the estate vested in the eldest daughter of the spouses, subject to the fetters of the entail and to her mother's liferent.

Maule, 1876, 3 R. 831; 13 S.L.R. 532.

(314)

Marriage contract disposing of estate as at dissolution of marriage—Subsequent settlement granting liferent to wife—Renunciation of liferent.

By antenuptial marriage contract the intending spouses mutually conveyed "to and in favour of each other, and the longest liver of them two in liferent for their respective liferent use allanarly, and to their child or children to be procreated of the said intended marriage . . . whom failing to the heirs or assignees whomsoever of the said two spouses equally, at the decease of the longest liver of them in fee, the whole estate, heritable and moveable, belonging" or "which shall belong to them respectively at the time of the dissolution of the marriage by the decease of either" of them. The husband died leaving a settlement, by which he conferred on his wife a liferent of his whole estate, and directed that on her death his estate should be realised and divided equally amongst his children who should then be alive. Some years after his death, there being then only one child alive, the widow desired to renounce her liferent, so that the child should receive the capital of the estate. **Held** that the marriage contract was the ruling deed, and the effect of it was that the fee of the husband's estate vested in the children, at latest, at the dissolution of the marriage, and that the widow could renounce her liferent, and the child, in whom the estate had vested, receive payment of the capital from the trustees.

Knox v Knox's Trustees, 1887, 24 S.L.R. 282.

(315)

Provision for children—Powers to impose conditions and apportion—Settlement postponing payment with destination over.

A husband in his marriage contract directed his trustees to hold the estate conveyed to them for the benefit of his children, subject to such conditions and in such shares as either he or his wife might appoint by any deed or instrument. The husband, who survived his wife, executed a trust disposition in which he directed his trustees to pay the only child of the marriage the income of the marriage contract estate till he reached the age of thirty, and then pay him the capital, and if he failed to reach the age of thirty, and died without issue, then to pay the capital to certain legatees. The son died before attaining the age of thirty. **Held** that the trust disposition was ineffectual to postpone vesting under the marriage contract, that the estate vested in the child at his father's death, and that his claim thereto was not barred by acceptance of the income provided by his father's trust settlement for several years.

Rogerson's Trustees v Rogerson, 1881, 18 S.L.R. 621.

(316)

Exercise of power of apportionment under marriage contract.

Chancellor's Trustees v Sharples' Trustees, 1896, 23 R. 435; 33 S.L.R. 313; 3 S.L.T. 250, No. 276, supra.

Blackburn's Trustees v Blackburn, 1896, 23 R. 698; 33 S.L.R. 505; 3 S.L.T. 331, No. 37, supra.
Cuming's Trustee v Cuming, 1896, 24 R. 153; 34 S.L.R. 77; 4 S.L.T. 146; No. 277, supra.
M'Dougal's Trustee v Heinemann, 1918 S.C. (H.L.) 6; 55 S.L.R. 80; 1917, 2 S.L.T. 221, No. 279, supra.

(317)
Effect of divorce between parents on vesting in children.
Harveys' Judicial Factor v Spittal's Curator ad litem, 1893, 20 R. 1016; 31 S.L.R. 13; 1 S.L.T. 155, No. 282, supra.
Dawson v Smart, 1903, 5 F. (H.L.) 24; [1903] A.C. 457; 40 S.L.R. 879; 11 S.L.T. 321. HUSBAND AND WIFE, No. 345.

VIOLATING SEPULCHRES. See JUSTICIARY.

VIOLENT PROFITS. See LANDLORD AND TENANT.

VITIOUS INTROMISSION. See SUCCESSION.

VITUPERATION. See SLANDER.

VOLENTI NON FIT INJURIA. See NEGLIGENCE.

VOLUNTARY ASSOCIATION. See ASSOCIATION (VOLUNTARY).

VOLUNTEER FORCE. See MILITARY FORCES.

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WAR.

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I. ALIEN ENEMY.

(1)

Firm—Action at instance of neutral firm—Sole partners individually interested in business carried on in enemy's country—Com-

petency of proceeding with action—Sist of process.
In an action at the instance of a Dutch firm, carrying on business in Holland, it was admitted that the sole partners of the firm were individually interested in, though

not the sole partners of, a business carried on in Germany. **Held** that the pursuers were alien enemies in the sense of the Trading with the Enemy Acts, 1914, and relative proclamations; and action sisted until after the termination of the war.

Van Uden v Burrell, 1916 S.C. 391; 53 S.L.R. 400; 1916, 1 S.L.T. 117.

(2)

Executor—Appointment—Aliens Restriction Act, 1914—Aliens Restriction (Consolidation) Order, 20th August, 1914.

Held that an alien enemy, resident in Scotland and duly registered under the Aliens Restriction Act, 1914, and relative Order in Council, might be appointed an executor-dative.

Schulze, 1917 S.C. 400; 54 S.L.R. 306; 1917, 1 S.L.T. 176.

(3)

Title to sue—Aliens Restriction Act, 1914.

An alien enemy who had resided and carried on business in Scotland for many years, and who had complied with the provisions of the Aliens Restriction Act, 1914, **held** entitled to sue in the Scottish Courts.

Schulze, Gow & Co. v Bank of Scotland, (O.H.) 1914, 2 S.L.T. 455.

II. MILITARY SERVICE.

STATUTES.

Act 1916—Military Service Act, 1916—5 & 6 Geo. V. c. 104.

Act 1916 (Session 2)—Military Service Act, 1916 (Session 2)—6 & 7 Geo. V. c. 15.

(4)

Liability to service—Jurisdiction—Determination of question of liability—"Civil Court"—Court of Session or Court of Summary Jurisdiction—Act 1916, sec. 1 (2)—Army Act, 1881, sec. 190 (31)—Reserve Forces Act, 1882, sec. 15.

The Court of Session has no jurisdiction to determine the question of liability to military service under the Military Service Acts, which falls to be decided by the sheriff in proceedings brought under the Summary Jurisdiction Acts for the enforcement of a calling-up notice, with the ordinary rights of appeal to the High Court of Justiciary. So **held** in the case of (1) a Russian subject who founded upon the alleged lapse of the convention of July, 1917, under which resident Russians became liable to serve in the British army; and (2) a British subject who averred that he was in possession of a valid certificate of exemption; and notes of suspension and interdict against their calling-up notices dismissed as incompetent.

Green v Lord Advocate, 1918 S.C. 667; 55 S.L.R. 647; 1918, 2 S.L.T. 15.

(5)

—**Exceptions—"Regular ministers of**

any religious denomination"—Act 1916, sec. 1 (1), and first schedule (4).

The first schedule to the Military Service Act, 1916, includes among the persons exempt from service "men in holy orders or regular ministers of any religious denomination." **Held** that a third year student of divinity, acting as locum tenens to a minister of the United Free church, was not a "regular minister" in the sense of the schedule, and accordingly was not exempted from military service.

Marshall v Haig, 1918 J.C. 47; 55 S.L.R. 271; 1918, 1 S.L.T. 179.

(6)

The first schedule to the Military Service Act, 1916, includes among the persons exempt from service "men in holy orders or regular ministers of any religious denomination." A religious denomination, which believed it to be unscriptural to have a fixed ministry, that is, regular clergymen attached to separate congregations, elected "elders" from among the members of each congregation, who exercised all the functions usually performed by regular clergymen. In addition, two "evangelists" were appointed to visit the various congregations and to exercise all the functions usually exercised by the elders, except the dispensing of the Lord's Supper. The evangelists were not ordained; they were appointed ad vitam aut culpam; they devoted their whole time to the work; and they were supported by voluntary contributions. **Held** that such an evangelist was not a "regular minister" in the sense of the schedule, and accordingly was not exempted from military service.

Montgomerie v Mackenna, 1918 J.C. 55; 55 S.L.R. 317; 1918, 1 S.L.T. 226.

(7)

—**Act 1916 (Session 2), sec. 1 (1).**

Held that an "elder," elected by the members of a Bible association (which had no "ministers," and could elect an unlimited number of "elders") to perform, without remuneration, the usual duties of a clergyman within the association, whose appointment subsisted for six months but was renewable, and who at the same time carried on his ordinary secular occupation, was not a "regular minister" in the sense of the first schedule to the Military Service Act, 1916, and accordingly was not exempted from liability to military service.

Guy v Mackenna, 1917 J.C. 59; 54 S.L.R. 540; 1917, 2 S.L.T. 81.

(8)

"Ordinarily resident" in Great Britain—Exceptions—Residence for "special purpose"—Residence for purpose of health—Act 1916, sec. 1 (1), and first schedule.

An unmarried Australian of independent means, who had come to Europe in 1913 for the benefit of his health, was in France at the outbreak of war in August, 1914, and, being unable to remain there owing to the conditions resulting from the war, he came

to Edinburgh with friends in September, 1914. He made his headquarters at a hotel there, but visited various health resorts from time to time. In May, 1916, his health was so far restored that he took steps to obtain a passport to return to Australia, but, before the necessary documents had arrived from Australia, he was charged, in September, 1916, with being an absentee from military service. **Held** that he was liable to military service, in respect (1) that he was ordinarily resident in Great Britain within the meaning of sec. 1 (1) of the Military Service Act, 1916; and (2) that he was not resident there for a special purpose within the meaning of the exceptions in the first schedule of the Military Service Act.

Pannifax v Brown, 1917 J.C. 26; 54 S.L.R. 130; 1916, 2 S.L.T. 294.

(9)

Exemption—Powers of tribunal.

A person brought an action of declarator and reduction to have it declared that certain decisions of a local tribunal and appeal tribunal under the Military Service Acts were ultra vires, and to have these decisions reduced, on the grounds that (1) the military representative led no evidence before the local tribunal in support of his application for withdrawal of the pursuer's conditional exemption; and (2) that the local tribunal refused to hear testimony as to the "national interest" involved in the pursuer remaining in his civil occupation, which the pursuer proposed to lead. **Held** (1) that the local tribunal was entitled to withdraw a certificate of exemption, although the military representative called no witnesses; and (2) that the tribunal was not bound to hear witnesses which the applicant for exemption was prepared to adduce.

Osborne v Lord Advocate, (O.H.) 1918, 1 S.L.T. 25.

(10)

Application for exemption—Temporary exemption expiring—Status—Act 1916, secs. 1 (1), 3 (3), and first schedule (6).

A man of forty at 2nd March, 1916, which was the appointed date at which enlistment was deemed to have taken place under the Military Service Act, 1916, sec. 1 (1), had at that date applied for absolute exemption, but did not hold a certificate of exemption. On 1st June, 1916, he obtained a certificate of temporary exemption until 31st July, 1916, and on 22nd July, 1916, applied for a renewal of exemption, which application was dismissed on 2nd November, 1916. On 10th September, 1916, he reached the age of forty-one. On 25th July, 1917, he was called up for service by personal notice, which he failed to obey. **Held**, in a summary complaint, that the man's status was fixed as at 2nd March, 1916, when he was deemed to have been enlisted in terms of the Act 1916, sec. 1 (1); that the effect of his exemption was merely to postpone the date at which he might be called up; that he

had been guilty of an offence in failing to obey the notice.

Mackenna v Rankine, 1918, 55 S.L.R. 268; 1918, 1 S.L.T. 168.

(11)

"Conditional exemption"—Condition that work of national importance be obtained outwith a certain area—Act 1916, sec. 2, and Act 1916 (Session 2), sec. 5.

On an appeal for exemption from military service, made on conscientious grounds, the central tribunal granted exemption from combatant service only, but added this proviso—"That if within twenty-one days he undertakes, under the direction of the committee on work of national importance, work which is of national importance and under conditions approved by the tribunal, he shall be exempt from non-combatant service also. . . ." The committee on work of national importance declined work suggested by the man, intimating in a letter to him that it was a condition laid down by the central tribunal that work should be obtained in a district at least 50 miles from the man's usual abode. The man having suggested no work meeting this condition, he was called to the colours, and having failed to obey the notice, was apprehended and convicted of being a deserter and absentee. **Held** that the tribunal was entitled to impose the condition as to distance, and the conviction sustained.

Dollan v M'Intyre, 1917, 55 S.L.R. 5; 1917, 2 S.L.T. 118.

(12)

Failure to obey notice to join colours—Dependency of application for exemption—Act 1916, sec. 3 (5).

A certificate of exemption granted upon the application of a shepherd's employer was withdrawn by the local tribunal on 12th January, 1917. The shepherd thereafter obtained employment with another farmer, who applied for renewal of his certificate of exemption. The local tribunal refused that application on 27th February, 1917, and the appeal tribunal refused an appeal on 4th April, 1917. On 23rd May, 1917, the man was served with a notice to join the colours on 7th June, 1917, which notice was not obeyed. On 25th May, 1917, the man having obtained employment with another farmer, the latter presented an application for his exemption, which was refused by the local tribunal on 3rd July, 1917, and an appeal against that decision was refused by the appeal tribunal. On 18th June, 1917, the man was served with a notice to report for service on 5th July, 1917, which notice he failed to obey. **Held**, in a summary complaint against the man for failure to obey the notice to report for service, that the application for exemption presented on 25th May, 1917, was incompetent in respect that it was presented after the man's case had been disposed of, and that the man was guilty of an offence in fail-

ing to obey the notice to report for service on 5th July, 1917.

Macniven v M'Leod, 1917, 55 S.L.R. 8; 1917, 2 S.L.T. 125.

III. DEFENCE OF THE REALM.

(13)

Statutory Rules and Orders—Ultra vires—Detention of wagons—Defence of the Realm Consolidation Act, 1914, sec. 1 (1)—Defence of the Realm Regulation 7 B (1) (b)—Railway Wagons Disposal (Scotland), No. 2 Order, 1918 (No. 1575/S. 67 of 1918).

The Defence of the Realm Consolidation Act, 1914, empowered His Majesty in Council, during the continuance of the war, to issue regulations for securing the public safety and the defence of the realm. Regulation 7 B (1) (b) of the Defence of the Realm Regulations authorised the Board of Trade to make Orders prescribing the time after the expiration of which charges might be made by railway companies for the detention of wagons. By the Railway Wagons Disposal (Scotland), No. 2 Order, 1918, issued on 28th November, 1918, the Board of Trade curtailed the free time for detention of wagons previously fixed by arbitration, and authorised railway companies to make charges from the expiration of the abbreviated free time. In defence to an action at the instance of a railway company against a trader for charges incurred under that Order (the rates charged being admitted to be reasonable), the trader maintained that the Regulation and Order were ultra vires in respect (1) that they did not allow a reasonable time for the loading and unloading of wagons, and that they allowed a railway company to make any charge for detention they pleased, and at the same time deprived the trader of his statutory right to submit the reasonableness of the free time and of the rate of charge to arbitration; (2) that the Order was issued after the armistice solely for the benefit of the railway companies, and not for securing the public safety and the defence of the realm. Held that the defences stated were irrelevant; and decree granted for the sum sued for.

North British Railway Co. v Steel Co. of Scotland, 1921 S.C. 252; 58 S.L.R. 182; 1921, 1 S.L.T. 142.

(14)

Royal prerogative—Royal proclamation—Defence of the Realm (Consolidation) Regulations, 1914, 8 D—Water trustees undertaking unauthorised work at request of military authorities.

On being asked by the local military authorities, but without any formal requisition being served on them, the Edinburgh and District Water Trustees, in addition to supplying military camps with water, carried out the ordinary plumbing work connected with the distribution of the water throughout the camps, although under their statutes

they were not empowered to do work of that description. In an action of interdict brought against them by certain Edinburgh plumbers, the defenders founded on (1) a provision in the Defence of the Realm Regulations under which any water authority, if so required by the Army Council, was bound to supply water and carry out such works and render such services as might be necessary for procuring the supply; (2) a royal proclamation enjoining on the king's subjects the duty of obeying all instructions and regulations issued by, inter alios, any officer of the army. Held that the action of the defenders was ultra vires, in spite of the fact that they had undertaken the work at the request of the military authorities and with the sole motive of furthering the public interest; and interdict granted. Question, as to the Trustees' position had they been acting in a national emergency upon a formal requisition made by the proper military authority.

Grieve v Edinburgh and District Water Trustees, 1918 S.C. 700; 55 S.L.R. 691; 1918, 2 S.L.T. 72.

(14a)

Compensation for loss—Defence Act, 1842, sec. 19—Defence of the Realm (Consolidation) Regulations, Regs. 2 and 9—Application for order to have compensation fixed under Defence Act, 1842—Order for specific performance of a statutory duty—Court of Session Act, 1868, sec. 91.

In an action relating to an Edinburgh hotel, which had been occupied by the War Department under the powers conferred by the Defence of the Realm Regulations, 1914, the Court pronounced an interlocutor finding and declaring the proprietors of the hotel "entitled to such compensation as may be found due to them in respect of the occupation and use (of the hotel) under and in terms of the Defence of the Realm Acts and relative Acts of Parliament." Thereafter the proprietors presented a summary petition for an order under sec. 91 of the Court of Session Act, 1868, for the specific performance of a statutory duty, in which, founding on the above interlocutor, they averred that they were entitled to have the compensation fixed by a jury summoned under and in virtue of the provisions of sec. 19 of the Defence Act, 1842, and craved the Court to ordain the Lord Advocate and the Secretary of State for War "forthwith to take such steps to have the compensation . . . ascertained and fixed as may be necessary for the fulfilment of the statutory duty imposed upon the said principal Secretary of State by the Defence of the Realm Acts and relative Acts of Parliament, by causing a jury to be summoned." The Court dismissed the petition as irrelevant, per Lord Dundas and Lord Ormisdale, on the ground that the petitioners had failed to aver a sufficiently definite statutory duty on the part of the respondents, which they had failed to perform, to justify the granting of the order sought; per Lord Justice-Clerk

Scott Dickson and Lord Salvesen on the ground that the respondents were under no statutory duty to cause a jury to be summoned.

Carlton Hotel Co. v Lord Advocate, 1921 S.C. 237; 58 S.L.R. 172; 1921, 1 S.L.T. 126.

(15)

Defence of the Realm (Consolidation) Regulations, 1914—Order by military authority closing licensed premises—Proof of Order in prosecution.

In a prosecution under the Summary Jurisdiction (Scotland) Act, 1908, for a contravention of a closing Order issued under the Defence of the Realm (Consolidation) Regulations, 1914, sec. 10, by a military officer describing himself as a competent military authority within the meaning of the regulations, held that the Order was sufficiently proved by the production in the proceedings of an uncertified copy.

Brander v Mackenzie, 1915 S.C. (J.) 47; 7 Adam, 609; 52 S.L.R. 660; 1915, 1 S.L.T. 440.

(16)

—Compensation for losses—Direct loss by reason of interference with property—Stranded mine exploded by competent naval authority causing damage to buildings—Exercise of power under regulation for defence of realm—Exercise of royal prerogative—Defence of the Realm Regulations, Reg. 2—Indemnity Act, 1920, sec. 2, and schedule, part II.

In a claim against the Admiralty before the War Compensation Court the claimant stated that a mine, which had been washed ashore on his property, was exploded by officials of the Admiralty, and damaged an adjacent farmhouse belonging to him. Held that the claimant had stated a relevant claim of direct loss by reason of interference with his property through the exercise by the respondents of a power under Regulation 2 of the Defence of the Realm Regulations, and that the War Compensation Court could accordingly, under the Indemnity Act, 1920, sec. 2, and schedule, part II, competently entertain the claim. **Opinions** reserved as to whether the act of exploding the mine was also an exercise of the royal prerogative.

Monypenny v The Admiralty, 1922 S.C. 706; 59 S.L.R. 468; 1922 S.L.T. 463.

(17)

—Liability of government department for taking possession of land.

Held that a government department taking possession of lands and buildings under powers conferred upon it by the Defence of the Realm Regulations was not liable to the owner in compensation.

John Best & Sons v Lord Advocate, (O.H.) 1918, 2 S.L.T. 220.

(18)

An officer of the army took possession of certain lands under powers conferred by the Defence of the Realm Regulations, and

proceeded to execute certain works. The proprietors brought a note of suspension and interdict. They did not aver that the officer was acting without orders or without statutory power, but they stated that such works as were necessary for the defence of the realm could be carried out effectively without endangering their interests. Held that these averments were irrelevant.

A B v C D, 1916, 54 S.L.R. 114.

(19)

—Liability of War Office for property commandeered.

The owners of a hydropathic brought an action against the War Department to recover compensation for buildings, furniture, and stock commandeered by the War Department under the Defence of the Realm Regulations. Held that the Department were not liable to pay compensation, in respect that they were acting under powers conferred upon them by the Defence of the Realm Regulations.

Moffat Hydropathic Co. v Lord Advocate, (O.H.) 1919, 1 S.L.T. 82.

(20)

—Reg. 2 (b)—Property requisitioned—Poor, school, and lunacy rates—Liability for owner's assessments—Exemption of Crown property from assessment.

A factory having, under the Defence of the Realm Regulations, 1914, Reg. 2, B, been taken possession of by the military authorities, and retained in their possession, without any rent or compensation having been paid to the owner, held that the owner was nevertheless liable for the owner's assessments for poor, school, and lunacy rates.

Edinburgh Parish Council v Schulze, 1917 S.C. 679; 54 S.L.R. 577; 1917, 2 S.L.T. 77.

IV. TRADING WITH THE ENEMY.

STATUTES.

Act 1914—Trading with the Enemy Act, 1914—4 & 5 Geo. V. c. 87.

Amendment Act, 1914—Trading with the Enemy Amendment Act, 1914—5 Geo. V. c. 12.

Act 1915—Trading with the Enemy Amendment Act, 1915—5 & 6 Geo. V. c. 79.

Act 1916—Trading with the Enemy Amendment Act, 1916—5 & 6 Geo. V. c. 105.

Act 1918—Trading with the Enemy Amendment Act, 1918—8 & 9 Geo. V. c. 31.

(21)

Alien enemy—Action at instance of neutral firm—Sole partners individually interested in business carried on in enemy's country—Competency of proceeding with action—Sist of process.

Van Uden v Burrell, 1916 S.C. 391; 53 S.L.R. 400; 1916, 1 S.L.T. 117, No. 1, supra.

(22)

Attempt to trade—Proposal to supply goods to the enemy through a neutral intermediary—Preparation or perpetration—Trading with the Enemy Proclamation, No. 2, 9th September, 1914—Act 1914—Amendment Act, 1914.

Held (by Lord Justice-General Strathclyde) that an indictment, charging a merchant with writing and posting a letter to a subject of a neutral state residing in the neutral country requesting him to write and ask certain enemies if goods could be delivered to them through the neutral, was a relevant charge of proposing to supply goods to the enemy contrary to the Proclamation and Acts of 1914 directed against trading with the enemy, although the neutral was not the agent or representative of the enemies. **Held**, further, that the posting of the letter was an overt act which might be sufficient to take the offence out of the stage of preparation into that of perpetration.

H.M. Advocate v Innes, 1915 S.C. (J.) 40; 7 Adam, 596; 52 S.L.R. 275; 1915, 1 S.L.T. 105.

(23)

—Act 1914, sec. 1—Amendment Act, 1914, sec. 10 (1)—Criminal Procedure (Scotland) Act, 1887, secs. 1 and 61—Interpretation Act, 1889, sec. 28—Whether attempt to trade a crime prior to passing of the Amending Act.

The Trading with the Enemy Act, 1914, which came into force on 18th September, enacts, sec. 1, that any person trading with the enemy shall be guilty of a misdemeanour and be liable to certain penalties. The Trading with the Enemy Amendment Act, 1914, which came into force on 27th November, enacts, sec. 10 (1), that sec. 1 of the principal Act shall apply to a person who, *inter alia*, "attempts" so to trade. **Held** that, apart altogether from sec. 10 (1) of the amending Act, an attempt to trade was an indictable offence under sec. 1 of the principal Act, when read, as it must be, along with secs. 1 and 61 of the Criminal Procedure (Scotland) Act, 1887, and sec. 28 of the Interpretation Act, 1889; and that a charge of attempting to trade by means of a letter written on 23rd October was accordingly relevant.

H.M. Advocate v Mitchell, 1915 S.C. (J.) 35; 7 Adam, 589; 52 S.L.R. 273; 1915, 1 S.L.T. 92.

(24)

"Proposing" or "agreeing" to trade—Proposal and agreement in letter to proposer's own agent—"Supplying" goods to enemy—Specification of locus—Indictment—Relevancy—Jurisdiction—Act 1914, sec. 1—Amendment Act, 1914, sec. 10.

An indictment set forth that two members of a Glasgow firm wrote to their agents at Rotterdam suggesting that these agents should deliver to a German firm a cargo of iron ore which was stored on the quay at Rotterdam awaiting the Glasgow firm's

instructions, and that they thereafter wrote to their agents agreeing to certain proposed terms for delivering the ore to the German firm. **Held** (by Lord Justice-General Strathclyde) that counts in the indictment charging the accused with "proposing" and "agreeing" to supply goods to the enemy in contravention of the Proclamation and Acts of 1914 relating to trading with the enemy were relevant, and were not open to the objection that the proposal and agreement were made to and with the firm's own agents, and not to or with the enemy or his agents. **Held**, further, that subsequent counts in the indictment charging the accused with "supplying" the ore to the enemy were relevant although they did not specify the locus where the offence had been committed, it being plain from the indictment as a whole that the locus was Rotterdam. **Observed** that, if persons resident and carrying on business in Scotland supply goods to an enemy, they are subject to the jurisdiction of the Court in Scotland, no matter in what country such persons or goods may chance to be when the goods are supplied.

H.M. Advocate v Hetherington, 1915 S.C. (J.) 79; 7 Adam, 663; 52 S.L.R. 742; 1915, 2 S.L.T. 90.

(25)

"Supplying" goods to enemy—Requisites of the offence—Property in goods—Contractual obligations—Conditions with regard to supply—Position of intermediary—Act 1914, sec. 1—Royal Proclamation, 5th August, 1914.

Held (by Lord Justice-General Strathclyde) that the offence of "supplying" goods to the enemy, in contravention of the Proclamation and Acts of 1914 dealing with trading with the enemy, is not affected by any question as to the ownership of the goods supplied; and, accordingly, that the offence may be committed even though the person supplying the goods is not the owner and has no right of disposal, and even though the property in the goods has already vested in the enemy at the date when they are supplied. **Held** also that the offence is not affected by the existence of any contractual obligation to make the supply, or by any conditions as to payments or otherwise adjoined to the supply, or by the relation to the supplier of any intermediary through whom the supply is made.

H.M. Advocate v Hetherington, 1915 S.C. (J.) 79; 7 Adam, 663; 52 S.L.R. 742; 1915, 2 S.L.T. 90.

(26)

Declaration as to destination of goods—Customs (War Powers) Act, 1915, sec. 5 (1)—Customs (War Powers) Act, 1916, sec. 2 (2)—Recovery of penalties—Competency of defences—Defence that goods have not reached enemy territory—Defence that exporter took reasonable steps with regard to destination.

Where an exporter has made a declara-

tion, under the Order of the Commissioners of Customs and Excise of 26th April, 1915, as to the destination of goods shipped by him, and has been called upon, and has failed, to satisfy the commissioners that the goods have not reached an enemy country, it is not competent for him, in defence to an action for recovery of penalties under sec. 5 (1) of the Customs (War Powers) Act, 1915, to tender evidence that the goods have not de facto reached an enemy country. The only defence open to him is that, if they have, it has not been with his consent and connivance, and that he has taken all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declaration. Circumstances in which held that an exporter had failed to prove that he had taken all reasonable steps to secure that the ultimate destination of the goods should be the declared destination. **Observations** upon the scope and effect of sub-sec. (2) of sec. 2 of the Customs (War Powers) Act, 1916. *Lord Advocate v Van Weel*, 1917 S.C. 227; 54 S.L.R. 258; 1917, 1 S.L.T. 122.

(27)

Payment of money "to or for the benefit of an enemy"—"Branch" situated in British territory—"Transaction"—Sist of process—Trading with the Enemy Proclamation, No. 2, of 9th September, 1914 (Statutory Rules and Orders, 1914, No. 1376), secs. 5 (1) and 6.

The Trading with the Enemy Proclamation, No. 2, of 9th September, 1914, by sec. 5, warns all persons in His Majesty's dominions "(1) not to pay any sum of money to or for the benefit of an enemy." By sec. 6 the following exception is made:—"Provided always that where an enemy has a branch locally situated in British . . . territory . . . transactions by or with such branch shall not be treated as transactions by or with an enemy." A German company, having its head office in Berlin, and having manufacturing works in different parts of Germany, had also an office in London, in charge of a manager who had authority to enter into contracts and to sue and be sued on behalf of the company. In respect of this office the company was registered under the Companies Act, 1908, as a foreign company having a place of business in the United Kingdom. The company, having entered into a contract, through their London manager, with a Glasgow firm, brought an action against that firm in the Sheriff Court at Glasgow for payment of certain sums alleged to be due under the contract. The sheriff having granted decree in favour of the defenders, the company appealed to the Court of Session. While the case was standing in the short roll war was declared against the German Empire, and the proclamation quoted above was issued. **Held** (1) that the pursuers' office in the United Kingdom was not a "branch" in the sense of sec. 6 of the proclamation; (2) (per Lord President Strath-

clyde and Lord Johnston) that the payment of money after the date of the proclamation in fulfilment of a previous contract, was not a "transaction" in the sense of that section; and, in respect that no effective decree in favour of the pursuers could be pronounced, process sisted.

Orenstein & Koppel v Egyptian Phosphate Co., 1915 S.C. 55; 52 S.L.R. 54; 1914, 2 S.L.T. 293.

(28)

—Arrestment—Debt due to alien enemy arrested in hands of British subject—Debt not payable till after outbreak of war—Competency of forthcoming—Tantum et tale—Trading with the Enemy Proclamation, No. 2, sec. 5 (1).

A British firm arrested in the hands of another British firm a debt due by the latter to an alien enemy. The debt was not payable till twelve days after the outbreak of war. An action of forthcoming having been brought against the arrestee, held that, as the arrestee was not liable to make payment to the enemy alien during the continuance of the war, and as he could put forward against the arrester all defences competent against the common debtor, the action fell to be sisted meantime.

On appeal, the House of Lords, holding it to be inexpedient to express any opinion upon the questions raised in the action, continued the sist on the ground of convenience until the end of the war on caution being found by the arrestee, and dismissed an appeal against the judgment of the First Division without expressing any opinion upon the reasons on which that judgment was founded.

Fergusson & Co. v Brown & Tawse, 1917 S.C. 570; 54 S.L.R. 309; 1917, 1 S.L.T. 200; 1918 S.C. (H.L.) 125; 55 S.L.R. 437; 1918, 1 S.L.T. 404.

(29)

—Action for payment of debt admittedly due—Procedure—Duty of defender—Consignment of sum sued for—Right to withdraw from proceedings—Intimation to Lord Advocate—Trading with the Enemy Proclamation, No. 2, 9th September, 1914, sec. 5 (1).

In an action for the price of goods supplied by the pursuers to the defenders, the defenders admitted the debt, but, averring that the pursuers were agents of an alien enemy and that payment could not be made to them without violation of the Trading with the Enemy Proclamation, No. 2, of 9th September, 1914, they consigned the sum sued for with the Clerk of Court. The pursuers averred that in the transaction in question they acted as principals, and denied that they were agents of an alien enemy; and they asked for a proof of their averments. In allowing a proof, the Court held that the defenders having consigned the sum sued for, were under no obligation to take any further part in the proceedings; but ordered intimation to be made to the Lord

Advocate in order that, if so advised, he might compare for the public interest.

Guyot-Guenin & Son v Clyde Soap Co., 1916 S.C. 6; 53 S.L.R. 45; 1915, 2 S.L.T. 244.

(30)

Debt due to enemy—Arrestment before war—Recall.

Arrestments on the dependence of an action at the instance of an alien enemy against a British subject, laid on before the outbreak of war, recalled after, and owing to, its outbreak.

Van Uden v Burrell, 1916 S.C. 391; 53 S.L.R. 400; 1916, 1 S.L.T. 117.

(31)

—Arrestment—Forthcoming.

A debt due by a British firm to an Austrian firm was arrested in the hands of the debtors. In an action of forthcoming the Court, on the arrestees finding caution, sisted process and appointed the proceedings to be laid before the Custodian under the Trading with the Enemy Acts.

Brown v Willock, Reid & Co., 1918, 55 S.L.R. 744; 1918, 2 S.L.T. 159.

(32)

—Price payable by instalments—Arrestment of instalments of price paid to manufacturers.

A contract between a British firm and an Austrian firm, for the purchase by the latter of goods to be manufactured, provided for an extension of time for delivery if delay should occur owing to causes beyond the control of the sellers. The price was payable by instalments, of which £4620 was paid to account of the whole, when war broke out and it became illegal to implement the contract. None of the goods had at that time been delivered. Thereafter the goods were completed and sold in Great Britain at an enhanced price. Third parties, having obtained a decree against the purchasers of the goods, arrested money in the hands of the sellers of the goods. Held (per Lord Dewar, Ordinary) (1) that the contract was dissolved, not merely suspended, by the outbreak of war; (2) that the sum paid to account of the price of the goods belonged to the buyers and was validly arrested in the hands of the sellers. The Court of consent sisted the cause upon the arrestees finding caution.

Davis & Primrose v Clyde Shipbuilding and Engineering Co., (O.H.) 1918, 56 S.L.R. 24; 1917, 1 S.L.T. 297.

(33)

—Act 1916, sec. 1—Goods on sale and return.

In an application by the Controller under sec. 1 of the Trading with the Enemy (Amendment) Act, 1916, it appeared that the stock-in-trade of an alien enemy who was a bookseller consisted of foreign books, a quantity of which had been supplied on sale or return. The Controller was unable to discover what proportion of the books

had been so supplied. Held that the Controller was entitled to sell the whole stock, and if he sold at a loss the dealers who supplied the books had not a preferential claim for the contract price.

M'Lintock, (O.H.) 1918, 1 S.L.T. 137.

(34)

Enemy property—Vesting of property in Custodian—Executory contract terminated by war—Unfinished ship—Property passed to, and instalments paid by, enemy purchasers—Ship requisitioned and purchased by Admiralty—Right of Custodian to equivalent of instalments paid—Interest—Counter claims—Acts 1914, 1915, and 1916.

The property in a ship, which was being built by Scottish shipbuilders for Austrian shipowners, had passed to the latter at 12th August, 1914, the date of the declaration of war between Great Britain and Austria, and instalments of the price amounting to £79,732 had been paid. On 17th February, 1915, the Admiralty requisitioned the ship as she then stood at the price of £86,000, but it was not until 30th July, 1917, that the Admiralty paid the builders that sum, and they refused to pay any interest from the date of requisition. On 1st December, 1917, the Board of Trade pronounced an order vesting the sum of £79,732, with interest from the date of receipt of the instalments, in the Custodian for Scotland under the Trading with the Enemy Amendment Act, 1914, as "moneys owing to or held for or on behalf of or on account of" the enemy purchasers, and the Custodian brought an action against the builders for payment of this sum and interest. The builders resisted payment; and also stated two counter claims against the fund (1) for loss caused by the ship occupying a berth in their yard after the stipulated date of delivery, and (2) for the interest which the Admiralty had refused to pay. The House of Lords, in terms of an agreement entered into—at the suggestion of the House—by the parties during the hearing, found that the pursuer was entitled to decree for £79,732, with interest from the date of the interlocutor of the First Division, but under deduction from the sum of £79,732 of such sum, if any, as the defenders could prove to represent loss sustained by them under their first counter claim.

Penney v Clyde Shipbuilding and Engineering Co., 1920 S.C. (H.L.) 68; 57 S.L.R. 342; 1920, 1 S.L.T. 264.

(35)

—Vesting order—Amendment Act 1914, sec. 4—Act 1918, sec. 9—Part-owners.

A British subject, alleging he had claims against an enemy firm and an enemy subject, one of its partners, brought an application to the Court to make a vesting order vesting in the Custodian for Scotland a ship then lying in harbour in England, and also a sum of £20,000, being the freight earned by the ship while under requisition of the Admiralty. He averred that the enemy firm,

and the two partners thereof, were "the owners, or at least part-owners, of the" ship in question. Held that the application was irrelevant, in respect that the applicant had failed to aver a sufficient interest of the enemy firm and its partners in the ship to make the provisions of sec. 4 (1) of the Trading with the Enemy Amendment Act, 1914, applicable.

Burrell v Maashaven Steamship Co., 1919, 56 S.L.R. 434; 1919, 1 S.L.T. 306.

(36)

———Custodian of enemy property—Petition to ordain Custodian to pay money to creditor of ex-enemy firm—Competency.

The selling agent in England of an Austrian manufacturing firm obtained a decree in absence against them, arrested money due to them in the hands of a Scots firm, and brought an action of furthcoming against the Scots firm. The funds in the arrestees' hands were thereafter vested in the Custodian of enemy property. Held that a petition to have the Custodian ordained to pay the funds to the creditor was incompetent.

Brown, (O.H.) 1922 S.L.T. 190.

(37)

Duties of Custodian appointed under Act 1914.

The Custodian appointed under the Trading with the Enemy Act, 1914, is not bound to pay the creditor of a foreign debtor, or to pay interest on a debt which he may in his discretion pay, unless the debtor could have been compelled to pay interest. It is within the discretion of the Custodian to advertise for claims against the debtor.

David Rowan & Co., (O.H.) 1916, 2 S.L.T. 165.

(38)

Conjoined actions—Alien enemy party to one action only—Trading with the Enemy Proclamation, No. 2, of 9th September 1914 (Statutory Rules and Orders, 1914, No. 1376)—Sist of process.

In counter actions between a firm of steamship owners and a storage company the Lord Ordinary, having conjoined the actions, thereafter sisted a German subject as pursuer in the action at the instance of the storage company. A proof having been taken, the Lord Ordinary pronounced an interlocutor in which he decerned against the storage company in the action against them, and, in the action at their instance, assolized the defenders. After a reclaiming note against this interlocutor had been presented by the storage company, war was declared between Britain and Germany. The respondents then moved the Court to sist procedure quoad the action at the instance of the storage company in respect that the true pursuer therein was an alien enemy, and quoad the other action to sustain the Lord Ordinary's interlocutor. The Court sisted both actions.

Craig Line Steamship Co. v North British Storage and Transit Co., 1915 S.C. 113; 52 S.L.R. 65; 1914, 2 S.L.T. 326.

(39)

Petition to determine questions occurring in winding up of enemy business—Remit—Act of Sederunt, 15th December, 1914, sec. 1.

A petition to determine certain questions in connection with the winding up of an enemy business was presented to the Inner House. The Court remitted the petition to the Junior Lord Ordinary.

M'Lintock, (O.H.) 1918, 1 S.L.T. 137.

V. EMERGENCY LEGISLATION.

1. LIQUOR CONTROL.

(40)

Statutory Order—Ultra vires—Order by Food Controller regulating sale of liquor—Spirits (Prices and Description) Order, 1920 (No. 531 of 1920)—New Ministries and Secretaries Act, 1916, sec. 4—Defence of the Realm Regulations, 2 F.

Held that an Order made by the Food Controller, the Spirits (Prices and Description) Order, 1920, which regulates the sale of spirits in licensed premises, was not ultra vires of the Food Controller; and objection that such an Order could have been lawfully made only by the Liquor Control Board repelled.

M'Ninch v Auld, 1921 J.C. 13; 58 S.L.R. 99; 1920, 2 S.L.T. 408.

(41)

Definition of area.

The Privy Council had power to define an area in which the supply of intoxicating liquor should be controlled, in respect that troops were assembled therein, or that munitions were manufactured or handled in transit through the area. An Order in Council defined such an area, consisting of two counties, in one of which it was averred that no troops were stationed, and no munitions manufactured or handled. Held that the Order in Council was valid, it being within the discretion of the Privy Council to say when facts necessary to warrant the definition of an area had emerged, and that a decision of the Privy Council on questions of fact preliminary and incidental to an Order was not open to review by the Court.

Tewsley v Central Control Board (Liquor Traffic), (O.H.) 1918, 1 S.L.T. 123.

(42)

Total prohibition in area.

By an Order in Council the Liquor Control Board were empowered to regulate or prohibit the sale by retail or supply of intoxicating liquor in licensed premises within an area. The Liquor Control Board issued an Order totally prohibiting the sale or supply of spirits throughout the area. Held that the Order in Council empowering the Liquor Control Board to prohibit, and the Order of

the Liquor Control Board prohibiting, the sale of intoxicating liquor were valid.

Tewsley v Central Control Board (Liquor Traffic), (O.H.) 1918, 1 S.L.T. 123.

(43)

Hours for sale of spirits to be consumed off the premises—Order of Central Control Board (Liquor Traffic) for the Scotland, West Central, Area, of 12th August, 1915, articles 2 (2) and 3—Whether the restrictions in article 3 fall to be imported into article 2 (2).

Held, with regard to the provisions of the Order of the Central Control Board (Liquor Traffic) for the Scotland, West Central, Area, of 12th August, 1915, which deals with the sale and supply of liquor to be consumed off licensed premises, that the provisions of article 3 are imported into article 2 (2).

Mackenna v Sim, 1916 S.C. (J.) 24; 7 Adam, 732; 53 S.L.R. 411; 1916, 1 S.L.T. 297.

(44)

Power to regulate "consumption" of liquor on licensed premises—Defence of the Realm (Liquor Control) Regulations, 1915 (Order in Council of 10th June, 1915)—Order of Central Control Board (Liquor Traffic) for the Scotland, North-Western, Area, of 14th April, 1916, article 3.

The Defence of the Realm (Liquor Control) Regulations, 1915, by Reg. 2, confer on the Central Control Board power, by Order, to prohibit, or impose conditions or restrictions upon, "the sale by retail or supply" of intoxicating liquor in any licensed premises or club, including such "incidental and supplemental provisions" as may be necessary to give full effect to the Order. **Held** that that Regulation does not confer on the Board power to prohibit "consumption" on licensed premises of liquor obtained by the consumer elsewhere.

M'Elfrish v Barlow, 1917 J.C. 32; 54 S.L.R. 337; 1917, 1 S.L.T. 182.

(45)

Sale of spirits—Licensed premises having public bar—Sale of spirits in another part of premises after stock in public bar exhausted—Spirits (Prices and Description) Order of 30th April, 1919, clause 3 (a).

The proprietor of licensed premises, in which he conducted a restaurant business and also a public bar, allocated equally to the public bar and to each of three other departments in the premises the supply of whisky available for consumption within a certain period. **Held** that, by selling whisky within that period in one of these departments after the supply of whisky allocated to the public bar had been exhausted, he had contravened clause 3 (a) of the Spirits (Prices and Description) Order of 1919, which prohibits the sale of spirits in any part of licensed premises having a public bar, unless spirits are also on sale in the public bar.

Strathern v McKillop, 1920 J.C. 54; 57 S.L.R. 238; 1920, 1 S.L.T. 166.

(46)

"Public bar"—Spirits (Prices and Description) Order of 9th April, 1920 (No. 531 of 1920), article 3.

Held that the expression "public bar" as used in the Spirits (Prices and Description) Order of 9th April, 1920, was not limited by article 3 (a) of the Order, but was employed in its ordinary sense as meaning a bar open to the public without discrimination.

Howman v Doyle, 1921 J.C. 49; 58 S.L.R. 224; 1921, 1 S.L.T. 61.

(47)

Prohibition against permitting consumption of liquor after specified hours—Order of Central Control Board (Liquor Traffic) for the Scotland, West Central, Area, of 12th August, 1915, article 2 (1)—Previously supplied liquor finished after hours.

Held that a prohibition by a Liquor Control Board against selling or consuming, or permitting any person to consume liquor on licensed premises, except upon the days and between the hours specified, was absolute, and that not only the sale but also the consumption of liquor must immediately cease on the expiry of the hours specified; and that a publican or his barman, who did not take steps to prevent customers finishing after hours liquor supplied to them bona fide during hours, was guilty of the offence of permitting consumption after the specified hours.

Finnegan v Hart, 1916 S.C. (J.) 9; 7 Adam, 705; 53 S.L.R. 371; 1916, 1 S.L.T. 120.

(48)

Prohibition of treating—Publican "supplying" liquor to person who had not paid for it—Order of Central Control Board (Liquor Traffic) for the Scotland, East Central, Area, of 12th August, 1915, article 6.

Two women entered a public-house together, and one of them ordered and paid for half a glass of whisky and half a glass of port, which were supplied by the publican, who placed the two glasses on the counter before her. She drank the whisky herself, and the port was drunk by the other woman. **Held** that the publican was guilty of "supplying" liquor to a person who had not ordered and paid for it, within the meaning of an Order of a Liquor Control Board which prohibited "treating."

Brown v M'Kechnie, 1916 S.C. (J.) 20; 7 Adam, 725; 53 S.L.R. 397; 1916, 1 S.L.T. 218.

(49)

—Sale "by any servant or agent"—Sale without knowledge of licensee—Servant not in direct employment of licensee.

In each of two public-houses the servant or person in charge supplied excisable liquor to one person which was paid for by another, contrary to a Liquor Control Order of 12th August, 1915. One of the public-houses was occupied by the licensee-holder, the other was occupied by a firm of which the licensee-holder was a partner.

In the former case the servant was the servant of the licence-holder, in the latter case he was the servant of the firm. In both cases the sales were effected without the knowledge of the employers. Held that in both cases the licence-holders were guilty of a contravention of the Order, although the sales were effected without their knowledge, and also, in the case of the house occupied by the firm, although the servant was the servant of the firm and not of the licence-holder.

Gair v Brewster—Soutar v Hutton, 1916 S.C. (J.) 36; 7 Adam, 752, 753; 53 S.L.R. 547, 550; 1916, 1 S.L.T. 380, 388.

(50)

Licence-holder taking his own liquor from licensed premises during prohibited hours—“Supply”—Order of the Central Control Board (Liquor Traffic) for the Scotland, West Central, Area, of 12th August, 1915, article 2 (2), and article 3 (c) as added by Amendment Order of 16th November, 1916.

Under Orders dealing with the control of the liquor traffic it is an offence, except during specified hours, to “supply” liquor in licensed premises or to take such liquor away from such premises. All liquor to be consumed off the premises must also be labelled in a certain way. The licensee of certain premises, who was also the owner of the stock of liquor therein, was found at the door of the premises, during prohibited hours, in the act of taking from them, for his own use, certain bottles of exciseable liquor without labels. Held that the licence-holder was taking from the premises liquor “supplied” to himself, and was guilty of a contravention of the Orders.

Mackenna v Brady, 1918 J.C. 37; 55 S.L.R. 171; 1918, 1 S.L.T. 23.

(51)

Sale or supply “by any servant or agent”—Meaning of “agent”—Liability of licensee—Liquor Control Order of 12th August, 1915, for Scotland, West Central, Area, article 2 (2).

Under an Order dealing with the control of the liquor traffic it is made an offence for any person either “by himself or by any servant or agent” to sell exciseable liquor under circumstances specified. Held that the word “agent” was used with its ordinary legal signification, and therefore that a licensee of premises was not responsible for every sale which took place within his premises, no matter by whom effected, but only for sales by himself, his servant, or a person who could properly be described as his agent. Held, accordingly, that a licensee charged with contravening the Order had been rightly acquitted, where the liquor had been sold without any authority by a boy whom the licensee’s shopman was authorised to employ only as an occasional messenger.

Auld v Devlin, 1918 J.C. 41; 55 S.L.R. 174; 1918, 1 S.L.T. 33.

(52)

Illegal “dispatch” of liquor by licensee

or his servant—Liability of licensee—Fraudulent abstraction of liquor by servant—Liquor Control Order for Scotland, West Central, Area, of 12th August, 1915, article 2—Amending Order of 20th March, 1916, article 2—Amending Order of 16th November, 1916, article 2.

The holder of a public-house licence was convicted on a charge of contravening the Liquor Control Regulations by “dispatching” from his premises, by the hands of his servant, two half-bottles of whisky within prohibited hours, without receiving payment, and without having the bottles labelled in the prescribed manner. The facts were that a lad of fifteen employed by the accused had, without his knowledge, secreted the bottles in the premises, and thereafter removed them from the premises and handed them over, unpaid for and unlabelled, to a friend who had asked him to obtain the whisky. Held that the fraudulent abstraction of the whisky by the lad was not a “dispatch” of the whisky by the licence-holder or by his servant within the meaning of the Regulations; and conviction quashed.

Herriot v Auld, 1918 J.C. 16; 55 S.L.R. 55; 1917, 2 S.L.T. 178.

(53)

Sale of spirits—Illegal measure—Excessive price—Form of labelling offence—Proof—Evidence of strength of spirits—Spirits (Prices and Description) Order of 30th April, 1919, clauses 2, 4 (a), and 7.

The Spirits (Prices and Description) Order, 1919, by clause 2, prohibits the sale in licensed premises of spirits otherwise than by certain measures, including a gill; and, by clause 4 (a) and the second schedule, Part I., it fixes the maximum price for the sale of whisky weaker than 43 degrees under proof at 1s. 8d. per gill. A complaint was brought charging a publican with having, in response to a demand for one gill of whisky, sold a quantity of whisky of a strength under 43 degrees under proof which measured less than one gill, “and that for 1s. 8d. being at the rate of 2s. 2½d. per gill, and in excess of the maximum price of 1s. 8d. per gill for such spirits, contrary to clause 4 (a)” of the Order. It was proved that the whisky was drawn from a cask on which was conspicuously displayed (as required by clause 7 of the Order) a placard inscribed “1s. 8d. per gill. Strength less than 43 degrees under proof.” There was no further evidence as to the strength of the whisky. Held (1) that while the offence might have been consistently charged as a sale of an illegal measure in contravention of clause 2, it had been relevantly labelled as a sale at an excessive price in contravention of clause 4 (a); and (2) that, in the absence of challenge or of evidence to the contrary, the statement on the placard was sufficient evidence of the strength of the whisky, and that evidence of analysis was unnecessary.

O’Malley v Strathern, 1920 J.C. 74; 57 S.L.R. 640; 1920, 2 S.L.T. 251.

(54)

—Sample for analysis—Purchase by private individual—Spirits (Prices and Description) Order of 30th April, 1919, clause 8—Sale of Food and Drugs Act, 1875, sec. 14.

The provisions of sec. 14 of the Sale of Food and Drugs Act, 1875, as to the method of dealing with articles purchased for the purpose of analysis, are imported into the Spirits (Prices and Description) Order of 1919 by clause 8 thereof only with regard to purchases made by a person duly authorised under that Order, and do not apply to purchases made by ordinary members of the public. So held, in a prosecution of a publican under that Order, where an analysis had been made of spirits purchased from him by a member of the public, which had not been divided into three portions as required by the Sale of Food and Drugs Act.

Strathern v Graham & Sons, 1920 J.C. 82; 57 S.L.R. 644; 1920, 2 S.L.T. 255.

(55)

—Purchase by authorised persons—Spirits (Prices and Description) Order of 30th April, 1919, clause 8—Sale of Food and Drugs Act, 1875, sec. 14.

A person authorised to procure a sample of spirits for analysis under clause 8 of the Spirits (Prices and Description) Order, 1919, must conform to the procedure laid down by sec. 14 of the Sale of Food and Drugs Act, 1875, by dividing the sample into three parts, and, if required to do so, delivering one of these to the seller or his agent.

Strathern v Healy, 1920 J.C. 58; 57 S.L.R. 240; 1920, 1 S.L.T. 157.

(56)

Contract—Illegality—Permit to withdraw liquor from bond—Sale of permit to third party—Intoxicating Liquor (Output and Delivery) Order, 1917 (No. 270 of 1917), article 4.

A permit, issued by the authority of the Commissioners of Customs and Excise under the Intoxicating Liquor (Output and Delivery) Order, 1917, and empowering a particular person to take a specified quantity of wine or spirits out of bond, cannot be transferred by that person to another; and a contract for the sale of such a permit is illegal and unenforceable.

Trevalion & Co. v Blanche & Co., 1919 S.C. 617; 56 S.L.R. 567; 1919, 2 S.L.T. 142.

2. FOOD CONTROL.

(57)

Food Hoarding Order of 5th April, 1917—“Quantity required for ordinary use”—Complaint—Relevancy—Failure to specify quantity required—Summary Jurisdiction (Scotland) Act, 1908, sec. 19 (1).

Held that a complaint charging the accused with having purchased 56 lbs., or thereby, of butter “whereby the quantity of such butter in your possession or under your con-

trol at one time exceeded the quantity required by you for ordinary use and consumption in your household or establishment,” contrary to the Food Hoarding Order of 5th April, 1917, was irrelevant, in respect that, the expression “the quantity required by you for ordinary use and consumption in your household or establishment” being indeterminate, the accused was not sufficiently certiorated of the offence alleged to have been committed.

Shepherd v Howman, 1918 J.C. 78; 55 S.L.R. 396; 1918, 1 S.L.T. 300.

(58)

Milk (Winter Prices) Order of 17th September, 1918 (No. 1165 of 1918), article 12—“Make or demand any unreasonable charge”—Complaint—Relevancy—Failure of order to define “unreasonable.”

The Milk (Winter Prices) Order, 1918, which fixed maximum prices for the sale of milk, also provided by article 12 that no person should, in connection with the sale of milk, “make or demand any unreasonable charge.” A farmer was charged with a contravention of article 12 of the Order by having in connection with certain sales of milk made “the unreasonable demands” that the purchasers should pay certain specified sums in addition to the maximum prices fixed by the Order. Objection having been taken to the complaint, on the ground that there was no definition of what was an “unreasonable” demand, held that the complaint was relevant, in respect that any charge in addition to the maximum prices being an unreasonable charge, the word “unreasonable” did not require more precise definition.

Stirrat v Cameron, 1919 S.C. 11; 57 S.L.R. 427; 1920, 1 S.L.T. 321.

(59)

Flour and Bread (Prices) Order of 6th September, 1917, article 5—“Reasonable additional charge for making delivery”—Failure to define reasonable charge—Summary Jurisdiction (Scotland) Act, 1908, sec. 19 (1).

Article 5 of the Flour and Bread (Prices) Order, 1917, fixes the maximum price for bread at 2½d. per lb. and provides—“(b) A reasonable additional charge may be made . . . for making delivery.” A baker was charged with a contravention of article 5 of the Order by selling, without the authority of the Food Controller, five 2 lb. loaves of bread at the price of 2s. 1d., “being a price exceeding the cumulo amount of the maximum price of 1s. 10½d. . . . and any reasonable additional charge you were entitled to make for making delivery in terms of the said Order.” Held that the complaint was irrelevant, in respect that it did not state what was the reasonable additional charge for delivery which had been exceeded.

Allan v Howman, 1918 J.C. 50; 55 S.L.R. 273; 1918, 1 S.L.T. 181.

(60)

Maximum prices—Selling milk "whole-sale"—Milk (Summer Prices) Order of 8th March, 1918 (No. 296), article 3—Milk (Summer Prices) Amendment Order of 8th June, 1918 (No. 622), article 1—Milk (Registration of Dealers) Order of 8th January, 1918 (No. 24), article 19.

Held (1) that the definition of "whole-sale" in article 19 of the Milk (Registration of Dealers) Order of 8th January, 1918, viz., "17 gallons or more at one time," could not be imported into the Milk (Summer Prices) Order of 8th March, 1918, for the purpose of construing the word "whole-sale" as used in the latter Order; (2) that, as there used, "wholesale" meant the sale of milk to a retailer for sale by him to consumers irrespective of the quantity sold.

Mackenna v McMillan, 1919 J.C. 4; 56 S.L.R. 251; 1919, 1 S.L.T. 173.

(61)

Kosher meat—Retail price—Meat (Maximum Prices) Orders, 1917.

The Meat (Maximum Prices) Order, 1917, fixed a higher wholesale price for kosher than for ordinary meat. A kosher butcher retailed kosher meat at a price higher than the maximum retail price fixed by the local food control committee for "prime beef" and "prime mutton." **Held** that the maximum retail price applied to kosher meat, and that its retail sale at a price exceeding the maximum retail price was a contravention of the Food Control Regulations.

Mackenna v Joseph, 1918, 55 S.L.R. 740; 1918, 2 S.L.T. 147.

(62)

Milk Order of 7th September, 1917, article (1)—Sale of milk by servant at price exceeding authorised price—Liability of employer.

The Milk Order of 7th September, 1917, by article (1), prohibits any person from "directly or indirectly" selling milk at prices beyond the maximum rate fixed in pursuance of the Order. A servant, employed by a dairy company to sell its milk, in disobedience to his instructions charged a higher price for the milk than the authorised maximum rate, but he did not account to his employers for the portion of the price in excess of that rate. **Held**, in these circumstances, that the servant, in so far as he sold the milk at a price beyond the authorised rate, was acting outwith the scope of his employment; and that, accordingly, the company was not guilty of a contravention of the order.

City and Suburban Dairies v Mackenna, Scottish Farmers' Dairy Co. v Mackenna, 1918 J.C. 105; 55 S.L.R. 737; 1918, 2 S.L.T. 155.

(63)

Sale of live stock—Slaughter of pregnant animal—Ignorance of pregnancy—Live Stock (Sales) Order, 1918.

In a prosecution of a farmer for selling a

heifer in calf for slaughter contrary to the Live Stock (Sales) Order, 1918, **held** that the fact that the seller did not know the heifer was in calf was no defence to the charge.

Anderson v Rose, 1919 J.C. 20; 56 S.L.R. 574; 1919, 2 S.L.T. 86.

(64)

—Slaughter of pregnant animal—Justifiable ignorance of pregnancy—Live Stock (Sales) Order of 27th September, 1919.

A butcher, convicted in the Sheriff Court of a contravention of the Live Stock (Sales) Order, 1919, by causing the slaughter of an in-calf cow which he had bought at a public mart, appealed to the High Court by a stated case. The case set forth that the accused bought the cow at the mart, after she had been graded and allocated to him by the officials of the Food Controller, and sent her to be slaughtered eight days later; that at the time of the purchase neither the officials nor the accused considered the animal to be in calf; that, prior to her removal for slaughter, she was discovered by the allocator to be in that condition; but that he did not inform the accused, nor was the latter aware of this discovery. **Held** that the facts stated did not establish that the accused was justifiably ignorant of the animal's condition when it was slaughtered, and, accordingly (even assuming that such ignorance would have been a good defence to the charge), that the sheriff was entitled to convict.

Beattie v Waugh, 1920 J.C. 64; 57 S.L.R. 471; 1920, 2 S.L.T. 23.

3. COURTS (EMERGENCY POWERS) ACTS.

STATUTES.

Act 1914—Courts (Emergency Powers) Act, 1914—4 & 5 Geo. V. c. 78.

Act 1917—Courts (Emergency Powers) Act, 1917—7 & 8 Geo. V. c. 25.

Act 1919—Courts (Emergency Powers) Act, 1919—9 & 10 Geo. V. c. 64.

(65)

Leave to proceed with diligence—Arrestment—Forthcoming—Funds of alien enemy arrested in hands of British subject—Act 1914, sec. 1 (1) (a) and (7).

A British firm, who had obtained decree against an alien enemy for payment of a sum of money, arrested in the hands of another British firm a debt due by the latter to the alien enemy. The arresters thereafter brought an action of forthcoming against the arrestees for payment of the sum arrested. **Held** that, as the action of forthcoming was primarily a proceeding against the alien enemy for the purpose of transferring his rights to the arrestor, it could proceed without the leave of the Court. **Observed** that, after decree had been obtained in the forthcoming, diligence against the

British arrestees could not proceed without the leave of the Court.

Fergusson & Co. v Brown & Tawse, 1917 S.C. 570; 54 S.L.R. 309; 1917, 1 S.L.T. 200.

Appeal dismissed, 1918 S.C. (H.L.) 125; 55 S.L.R. 437; 1918, 1 S.L.T. 404, No. 23, *supra*.

(66)

Leave to proceed with diligence.

Decree having been obtained in the undefended roll, the pursuer applied for leave to proceed with diligence in terms of the Courts (Emergency Powers) Act, 1914. The defender appeared, and stated he was unable to make immediate payment by reason of circumstances attributable to the war. Execution stayed for three months.

Brandon Hill, Limited v Frater, (O.H.) 1915, 1 S.L.T. 199.

(67)

Charge to pay costs—Act 1914, sec. 1 (1) (a)—Courts (Emergency Powers) Order in Council, 1918.

Held, in a note of suspension of a charge to pay taxed costs of an English action, that it was not necessary to obtain the leave of the Court before proceeding to do diligence.

Findlay v Wickham, (O.H.) 1920, 2 S.L.T. 325.

(68)

Suspension of execution on decree for expenses—Act 1914, sec. 1 (2).

Circumstances in which the Court suspended execution on a decree for expenses for six weeks.

Crowe v Irvine, 1914, 52 S.L.R. 112; 1914, 2 S.L.T. 378.

(69)

Leave to petition for sequestration—Act 1914, sec. 1 (1).

Opinion (per Lord Johnston) that there is no necessity to apply to the Court under the Courts (Emergency Powers) Act, 1914, sec. 1 (1), prior to presenting a petition for sequestration.

Central Motor Engineering Co. v Gibbs, 1918, 55 S.L.R. 702; 1918, 2 S.L.T. 177.

(70)

Contract impossible of performance without serious hardship—Act 1917, sec. 1 (2)—Act 1919, sec. 1 (1).

In an action for declarator that a contract which had been partly implemented was null and void as having become impossible of performance without serious hardship within the meaning of the Courts (Emergency Powers) Acts, and for payment of a quantum meruit, circumstances in which the Court continued the cause to enable parties to negotiate.

Fasey v Eyemouth Harbour Trustees, 1921, 1 S.L.T. 109.

(71)

Suspension of contract—Contract fixing maximum fares for tramway—Act 1919, sec. 1 (1).

A company which leased tramways from a burgh corporation were bound by their lease not to charge more than certain maximum fares. Circumstances in which, of consent, this condition was suspended on the company agreeing to new maximum fares and agreeing not to found on this suspension in any proceedings under an option, which they possessed, to buy the undertaking.

Greenock and Port-Glasgow Tramways Co. v Greenock Magistrates, 1920, 57 S.L.R. 481; 1920, 2 S.L.T. 46.

(72)

Breach of contract—Cancellation—Non-fulfilment in compliance with government order.

A contract of sale was cancelled in consequence of advice from the War Trading Intelligence Department. In an action of damages for breach, held that this cancellation of the contract was "non-fulfilment" of the contract in the sense of sec. 3 of the Courts (Emergency Powers) Act, 1917, and that in the circumstances the sellers were not liable in damages.

Mas v Bookless Brothers, (O.H.) 1917, 2 S.L.T. 139.

(73)

Contract to feed deer—Act 1917, sec. 2 (a)—Deer (Restriction of Feeding) Order, 1918.

Circumstances in which held that a lessor of a deer forest who was bound by lease to expend a certain sum annually in feeding deer was entitled to statutory relief from this obligation.

Fowler v Higson, (O.H.) 1920, 1 S.L.T. 155.

(74)

Right in security—Action of maills and duties—Obtaining leave of Court before bringing action—Act 1914, sec. 1 (1) (b).

Held that, as the obtaining of a decree in an action of maills and duties did not have the effect of causing the creditor to "enter into possession" of the property within the meaning of the Courts (Emergency Powers) Act, 1914, sec. 1 (1), but was merely declaratory of his rights, it was not necessary for him to obtain the leave of the Court before bringing such an action. Observed that he would have to obtain the leave of the Court before putting a decree obtained in such an action into operation.

City of Glasgow Friendly Society v Bruce, 1916 S.C. 267; 53 S.L.R. 199; 1916, 1 S.L.T. 29.

(75)

Defender officer on service.

An application by a first bondholder for power to realise certain heritable property was opposed by an officer on active service

who was both the heir at law of the debtor and also a postponed bondholder. The Lord Ordinary granted the application.

Brown's Trustees v Mackinnon, (O.H.) 1919, 1 S.L.T. 108.

(76)

Bondholder—Power to sell heritage.

Application under the Courts (Emergency Powers) Act, 1914, for power to sell heritable property under a bond continued for three months on condition that the interest was increased by $\frac{1}{2}$ per cent.

Motherwell v Lang, (O.H.) 1916, 1 S.L.T. 204.

(77)

Date of debt.

In an action of accounting for the introduction of trust funds during a period prior to the war, decree was pronounced in terms of a minute of tender and acceptance. Held that the date of the debt was the date of the acceptance of the tender, and that an application under the Court (Emergency Powers) Act, 1914, was unnecessary.

Graham's Executrix v Gallatly's Judicial Factor, (O.H.) 1916, 1 S.L.T. 213.

(78)

Process — "Application" under the Act 1917, sec. 1 (2)—Form of application.

Held that a party to a contract, applying to the Court under sec. 1 (2) of the Courts (Emergency Powers) Act, 1917, for the suspension or annulment of the contract or for the stay of proceedings for its enforcement, cannot do so by pleading the Act in his defences to an action for enforcement of the contract, but must make an independent application to the Court.

Shankland & Co. v Robinson & Co., 1919 S.C. 180; 56 S.L.R. 107; 1919, 1 S.L.T. 2.

4. INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACTS.

Act 1915—Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915—5 & 6 Geo. V. c. 97.

Act 1920—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920—10 & 11 Geo. V. c. 17.

(79)

"Satisfactory ground" for ejection order—Act 1915, sec. 1 (3).

A tenant of a dwelling-house to which the Increase of Rent and Mortgage Interest (War Restrictions) Act applied gave notice to her landlord in February, 1919, that she intended to vacate the house at Whitsunday following. The landlord let the house to a new tenant. The old tenant then refused to vacate the house. The landlord brought an action of ejection. Decree granted. *Opinion* (per Lord Mackenzie) that, while it was not competent for a tenant to contract out of

the Act ab ante, it was competent for him to prevent tacit relocation.

Smith v Barclay, 1919, 57 S.L.R. 93; 1920, 1 S.L.T. 13.

(80)

Removing upon ground satisfactory to Court—Sheriff—Suspension.

The sheriff-substitute in an action of removing granted decree upon "some other ground which may be deemed satisfactory by the Court making such order" in terms of the Increase of Rent and Mortgage Interest (Restriction) Act, 1915, sec. 1 (3). In a note of suspension of said decree it was contended that the sheriff-substitute had not reasonably exercised the discretion given to him under the Act. Held that his judgment could not be suspended unless he had proceeded upon grounds which were wholly unreasonable.

Grandison v Mackay, (O.H.) 1919, 1 S.L.T. 95.

(81)

Permitted increase—Right of landlord to increase rent without formally terminating tenancy—Landlord and tenant—Act 1920, sec. 3 (1).

A dwelling-house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied was, in 1920, occupied by a tenant who had continued in possession since the expiry of his original lease granted for a month in 1916. The landlord, without giving notice of termination of the tenancy, gave notice of his intention to charge the increases of rent permitted by sec. 2 of the Act. Held that under sec. 3 (1) the landlord was not entitled to increase the rent without having given a notice terminating the tenancy.

Kerr v Bryde, 1922 S.C. 622; 59 S.L.R. 460; 1922 S.L.T. 400.

Affirmed, 1923 S.C. (H.L.) 12; [1923] A.C. 16; 59 S.L.R. 575; 1922 S.L.T. 576.

(82)

Application to sheriff for suspension of increase — Application by sanitary authority—Appeal to Court of Session—Competency—Act 1920, sec. 2 (2) and (6).

Sec. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as applied to Scotland), by sub-sec. (1) permits an increase of rent in certain specified cases, and enacts, sub-sec. (2), that, in certain of these cases, "the tenant or the sanitary authority may apply to the Sheriff Court for an order suspending such increase" on the ground of the bad condition of the house in question. It further provides that the Court, if satisfied that the house is in bad condition and that such condition has not been caused by the tenant, shall order that the increase be suspended until the Court is satisfied that the necessary repairs have been executed. Sub-sec. (6) enacts—"Any question arising under sub-sec. (1), (2), or (3) of this section shall be determined on the application either of the landlord or the tenant by

the Sheriff Court, and the decision of the Court shall be final and conclusive." **Held** that an appeal against the decision of the sheriff in an application presented by the sanitary authority was incompetent.

Glasgow Corporation v Mickel, 1922 S.C. 228; 59 S.L.R. 153; 1922 S.L.T. 160.

(83)

Act 1920, sec. 5—Servant possessing house as part of the remuneration for his services—Termination of contract of service—Right of master to eject.

Where a servant has had possession of a dwelling-house belonging to his employer as part of the remuneration for his services, he is not entitled, on the termination of his contract of service, to the benefit of the restrictions on a landlord's right to recover possession or to eject a tenant, imposed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

Marquis of Bute v Prenderleith, 1921 S.C. 281; 58 S.L.R. 290; 1921, 1 S.L.T. 175.

(84)

Act 1920, secs. 5 (1) (d) and 12 (1) (f) and (g)—Tenant of dwelling-house sub-letting house—Whether tenant a "landlord."

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides by sec. 5 (1) (d) that no order for the recovery of possession of any dwelling-house to which the Act applies, or for the ejectment of a tenant therefrom, shall be made unless the dwelling-house is reasonably required by the "landlord" for occupation as a residence for himself or for certain other persons enumerated. **Held** that the expression "landlord," as interpreted by sec. 12 (1) of the Act, was not limited to the proprietor of a dwelling-house, but included a tenant who had sub-let to a sub-tenant.

Logan v Fair, 1922 S.C. 76; 59 S.L.R. 138; 1922 S.L.T. 2.

(85)

Postponed bondholder.

In an action of mails and duties brought by the first bondholders over a property, decree was objected to by a postponed bondholder. The debtor in the bond consented to decree. It was maintained for the defender that the action was barred by the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. **Held** that, as the debtor had consented, the postponed bondholder had no interest to oppose, and the pursuers found entitled to decree.

Graham's Trustees v Dow's Trustee, (O.H.) 1917, 2 S.L.T. 154.

5. MISCELLANEOUS.

(86)

Motor car—Use of motor spirit—Motor Spirit (Consolidation) and Gas Restriction Order of 3rd January, 1918, article (3)—Where the journey cannot otherwise be

reasonably and conveniently accomplished"—Complaint—Relevancy.

The Motor Spirit (Consolidation) and Gas Restriction Order of 3rd January, 1918, prohibits the use of petrol for any purpose whatsoever, but by article (3) excepts from that prohibition the use of petrol for driving a private motor vehicle for the purposes of trade "where the journey cannot otherwise be reasonably and conveniently accomplished." By article (7) the onus is put upon the accused of proving that the petrol was used in accordance with the provisions of the Order. A manure manufacturer, having used his private motor car to convey him to and from a market, was charged on a complaint which set forth the use of the petrol and proceeded, "which journey . . . could have been reasonably and conveniently accomplished otherwise," but did not specify how the journey should have been accomplished. The Sheriff, **holding** that the journey could have been reasonably and conveniently accomplished by train, convicted the accused. **Held** (1) that the complaint relevantly charged an offence against the Order, and (2) that, on the facts proved, the sheriff was warranted in convicting the accused.

Rogers v Howman, 1918 J.C. 88; 55 S.L.R. 626; 1918, 2 S.L.T. 78.

(87)

—"Motor cab"—"Hire car"—Motor cab used as hire car.

The Motor Spirit (Consolidation) and Gas Restriction Order of 3rd January, 1918, defines a "motor cab" as a motor vehicle which, inter alia, is licensed to stand or ply for hire, and provides, by article (3) D, that petrol may be used for driving a motor cab within, or for a certain distance beyond, the area for which it is licensed. The Order also defines a "hire car" as a motor vehicle which is kept for hire and which is neither a motor cab nor an omnibus, and provides that petrol may be used for driving such a car when it is used, inter alia, for the conveyance of a person to or from the nearest convenient railway station. **Held** that the owner of a "motor cab," who used it to convey a person to a railway station beyond the limits within which it was entitled to ply as a "motor cab," was not guilty of a contravention of the Order, in respect that the vehicle was being used on the occasion in question as a "hire car."

Clelland v Archibald, 1918 J.C. 111; 55 S.L.R. 742; 1918, 2 S.L.T. 206.

(88)

—"Public duty"—Attending church—Order in Council, dated 10th May, 1917 (S.R. and O. 1917, No. 440), amending the Defence of the Realm Regulations—Defence of the Realm Regulations Consolidated, Reg. 8 GG.

A hotelkeeper who held a permit granted under the Defence of the Realm Regulations authorising him to let a motor car for hire,

"provided it [was] used only for business purposes, or public duties, or for the conveyance of passengers to or from a railway station or port," hired the car on a Sunday to take the hirer and his wife to church. They attended the Scottish Episcopal Church, and the church was about nine miles from their home. **Held** that it was a question of circumstances to be determined by the magistrate whether the hiring of a motor car to enable the hirer to attend church was a contravention of the Regulations regulating the use of motor spirit, and that, in the circumstances of the case, there was nothing to show that the sheriff-substitute had gone wrong in finding no contravention.

Maclean v Maxwell, 1917, 55 S.L.R. 170; 1918, 1 S.L.T. 38.

(89)

Jute (Export) Order, 1917, dated 23rd November, 1917, article 1—Construction—"On any sale."

Opinions (per Lord Justice-Clerk Scott Dickson and Lord Salvesen) that the words "on any sale" in article 1 of the Jute (Export) Order, 1917, did not exclude from the scope of that order contracts for the sale of goods concluded prior to its date.

M'Master & Co. v Cox, M'Euen & Co., 1920 S.C. 566; 57 S.L.R. 504; 1920, 2 S.L.T. 122; judgment reversed, 1921 S.C. (H.L.) 24; 58 S.L.R. 70; 1921, 1 S.L.T. 84.

(90)

Paper restriction—"Advertising circular"—Bookmaker's coupons—Paper Restriction (Posters and Circulars) Consolidation Order, 22nd October, 1917 (S.R. and O. 1917, No. 1078), articles 6 and 13—"Procuring" the commission of an offence—Placing order for prohibited article with printer—Defence of the Realm Regulations, 1914, Reg. 48.

A bookmaker employed a printer to print football coupons for him. In the coupons odds were offered weekly by the bookmaker upon the results of football matches. The coupons were designed to be used for placing bets with the bookmaker, but his name did not appear upon the coupons. He was, however, known as the sender of the coupons by persons in the habit of betting on football matches. The coupons were usually sent to regular customers of the bookmaker or to persons who asked for them. Several coupons were sent which could be handed on by the recipient to his friends, and the bookmaker's friends and agents were also in the habit of passing the coupons round amongst customers of the bookmaker and persons who asked for coupons. The coupons in question were seized in the printer's premises. The bookmaker was charged with making and printing by the hand of the printer 32,000 advertising circulars contrary to articles 6 and 13 of the Paper Restriction (Posters and Circulars) Order of October 22, 1917, or otherwise with causing the printer to make and print for him the advertising circulars

contrary to that article, and thus procuring the commission by the printer of an act prohibited by that Order, contrary to sec. 48 of the Defence of the Realm Regulations, 1914. **Held** (1) that the coupons were advertising circulars in the sense of the Paper Restriction Order; and (2) that the bookmaker was guilty of an offence in that he had procured the commission of a deed prohibited by the Paper Restriction Order.

Mackenna v Dunn, 1918, 55 S.L.R. 622; 1918, 2 S.L.T. 66.

(91)

Early closing of shops—Refreshments—"Sweets"—Strawberry water ice—"Ice cream"—Early Closing of Shops (Scotland) Order, 1917, 1, 2 (2) and 4 (b).

Under the Early Closing of Shops Order of 26th April, 1917, as amended by the Order of 28th June, 1918, an exception is made in favour of the sale of "refreshments for consumption on the premises," it being provided, however, that "refreshments shall not be deemed to include sweets, chocolate or other sugar confectionery or ice cream." **Held** that strawberry water ice fell under the category of "sweets." **Opinions** reserved upon the question whether it was "ice cream."

Jacovelli v Archibald, 1918 J.C. 13; 55 S.L.R. 33; 1917, 2 S.L.T. 175.

(92)

Timber—Timber Control Order of 16th July, 1918, part I., par. 2—Prohibition against contract for sale of timber except to holder of permit—Contract to sell subject to buyer obtaining permit—Contract—Legality—Pactum illicitum.

The Timber Control Order, 1918, part I., par. 2, enacts that no person shall "sell or enter into any contract for the sale of" any imported timber except to the holder of a permit from the Controller. **Held** that a contract fell within the prohibition and was illegal, although it contained the condition that the buyers should obtain a permit; and an action of damages by the seller against the buyers based on an alleged breach of the contract dismissed.

Eisen v M'Cabe, Limited, 1920 S.C. (H.L.) 146; 57 S.L.R. 534; 1920, 2 S.L.T. 133.

(93)

Corn production—Arbitration—Procedure—Review—Case stated for opinion of sheriff—Competency of appeal—Corn Production Act, 1917, part IV., sec. 11 (1)—Agricultural Holdings (Scotland) Act, 1908, second schedule.

An appeal against an opinion of a sheriff pronounced in a case stated upon questions of law arising in an arbitration under part IV. of the Corn Production Act, 1917, is incompetent.

Johnson-Ferguson v Board of Agriculture, 1921 S.C. 103; 58 S.L.R. 96; 1920, 2 S.L.T. 414.

(94)

Profiteering Act, 1919—Complaint—Excessive charge for cleaning and repairing suit of clothes.

Circumstances in which held that a complaint under the Profiteering Act, 1919, was irrelevant on the ground of want of specification.

Gibson & Reid v Glasgow Local Profiteering Committee, (O.H.) 1920, 2 S.L.T. 84.

(95)

Ship—Defence of compulsory pilotage.

Article 32 of sec. xvi. of the Firth of Forth Traffic Regulations, issued by the admiral commanding the coast of Scotland, excludes the defence of compulsory pilotage.

Paulsen v Johanson, (O.H.) 1916, 2 S.L.T. 349.

WARRANTICE. See ASSIGNATION; HERITABLE PROPERTY; LANDLORD AND TENANT.

WARRANTY. See INSURANCE; SALE OF MOVEABLES.

WASTING SECURITIES. See FEE AND LIFERENT.

WATER. See MINES AND MINERALS; PRESCRIPTION; RATES AND ASSESSMENTS; RIVER, LOCH, AND SEA; ROADS AND STREETS; SERVITUDE; VALUATION.

WATERWORKS CLAUSES ACTS. See COMPULSORY POWERS; JUSTICIARY.

WAYGOING CROP. See LANDLORD AND TENANT.

WAY-LEAVE. See MINES AND MINERALS; SERVITUDE.

WAY, RIGHT OF. See ROADS AND STREETS; SERVITUDE.

WEEK. See TIME.

WEIGHTS AND MEASURES. See JUSTICIARY.

WHINSTONE. See MINES AND MINERALS.

WHIPPING. See JUSTICIARY.

WHITEBONNET. See HERITABLE PROPERTY.

WILFUL MISCONDUCT. See CARRIER ACTS.

WINDING UP. See BUILDING SOCIETY ACTS.

WINTER HERDING ACT. See JUSTICIARY.

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I. WORKMEN'S COMPENSATION ACT, 1906.

(6 Edw. VII. c. 58.)

1. SEC. 1 (1).

(1) INJURY BY ACCIDENT.

(a) What is an accident.

[See also cases under Act 1897, II. 1 (2) (a), infra.]

(1)

Designed act of third party.

One of a party of workmen, employed in a woodyard to take the place of others who were on strike, was injured by the attacks of the strikers, who rushed the police guarding the yard and assaulted the workers. **Held** that this was not a case of "injury by accident" within the meaning of the Act.

Murray v Denholm & Co., 1911 S.C. 1087; 48 S.L.R. 896; 1911, 2 S.L.T. 125.

(2)

Observed (per Lord Justice-Clerk Macdonald) that it is now settled law that the word accident covers a case of intentional injury.

Macfarlane v Shaw (Glasgow), Limited, 1915 S.C. 273; 52 S.L.R. 236; 1915, 1 S.L.T. 30.

(3)

Voluntary act of workman—Immersion in water—Deafness following upon chill—Chill due to voluntarily waiting in water accumulated in mine through breakdown of a pump.

A miner, about to ascend to the surface at the end of his shift, in order to be among the first to obtain a place in the cage, stood for upwards of thirty minutes in a pool of water which had accumulated in the pit bottom owing to a defect in the pump. Had he waited his turn upon dry ground, as he might have done, he could have reached the cage comparatively dry. Owing to the wetting he contracted a chill which produced deafness, causing incapacity. **Held** that the incapacity was not due to injury by accident in the sense of the Workmen's Compensation Act, 1906.

M'Luckie v John Watson, Limited, 1913 S.C. 975; 50 S.L.R. 770; 1913, 2 S.L.T. 61.

(4)

Apoplexy brought on by over-exertion.

A gatekeeper employed in a flax mill in the course of his employment ran to the scene of an accident, and then back to the gate to telephone for a doctor. The exertion of running, and the excitement, brought on an apoplectic shock, from which he died in a few hours. **Held** that the death of the workman was due to an accident, within the meaning of the Act.

Aitken v Finlayson, Bousfield & Co., 1914 S.C. 770; 51 S.L.R. 653; 1914, 2 S.L.T.

27.

(5)

Cerebral hæmorrhage caused by exertion.

A workman, while engaged, in the course of his employment, in moving a weight, had an attack of cerebral hæmorrhage as the result of the exertion he was using. The work was being performed in the ordinary manner. He was put to bed, and four days later a second attack supervened, which caused permanent paralysis. At the time of the first attack his arteries were in a degenerate condition, which rendered such an attack more likely to occur. **Held** that the workman's final disablement had been caused by accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906.

M'Innes v Dunsmuir & Jackson, 1908 S.C. 1021; 45 S.L.R. 804; 16 S.L.T. 214.

(6)

Blood poisoning—Workman handling artificial manures—Time and manner of infection by germ not proved.

A workman employed in a manure works died from blood poisoning, the germs producing the disease having entered his system through a scratch or abrasion on his leg. These germs were present in large quantities in the bone dust which he handled in the course of his employment, but are also present in lesser degree in the air and in other substances. It was not proved when or how the deceased received the scratch or abrasion, nor could it be determined when the infection actually took place. The arbitrator found, upon the medical evidence, that it was from the bone dust that the infection was contracted, and further found that the workman had died from the effects of an accident arising out of and in the course of his employment. **Held** that the arbitrator was entitled to find that death was due to an accident, viz., the fortuitous alighting of the germs upon the abrasion, and that the injury by accident had arisen out of and in the course of the employment, in spite of the fact that the actual time and circumstances of the occurring of the accident were not established. **Observations** upon the question how far it is necessary, in a claim for compensation under the Act, to establish the actual time at which the alleged accident happened.

Grant v G. & G. Kynoch, 1919 S.C. (H.L.) 62; [1919] A.C. 765; 56 S.L.R. 345; 1919, 1 S.L.T. 280.

(7)

Cardiac breakdown.

A miner while engaged in holding back a hutch which was being wheeled down a gradient felt a severe pain in his chest and sat down saying that he thought he had jerked himself. He worked on four out of the following eleven days, but became then totally incapacitated. For a period prior to the date on which he felt the pain he had been engaged wheeling hutches, and the cause of his incapacity was cardiac breakdown due to the fact that the work in which

he had for some days been engaged was too heavy for him. He was not injured by any sudden jerk, but the repeated excessive exertion strained his heart unduly until finally it was overstrained. The sheriff-substitute, having the assistance of the medical referee as assessor, found that the injury was not an "injury by accident" within the meaning of the Act. **Held** that there was no ground for altering the sheriff's judgment.

Coe v Fife Coal Co., 1909 S.C. 393; 46 S.L.R. 328; 1909, 1 S.L.T. 170.

(8)

Heart disease—Lifting weight.

In an arbitration under the Workmen's Compensation Act, 1906, it was proved that a workman, while engaged in lifting a weight, felt a pain in the breast followed by palpitation of the heart; that he was found to be suffering from heart disease of long standing, which was bound to manifest itself sooner or later and probably in the way described; and that from that time his condition became gradually worse until he became permanently incapacitated for work as a result of the diseased state of his heart. It was not proved that the lifting of the weight had accelerated the progress of the disease. **Held** that the arbitrator was entitled to find that the workman had failed to prove that his incapacity was due to an "accident" within the meaning of the Workmen's Compensation Act, 1906.

Spence v William Baird & Co., 1912 S.C. 343; 49 S.L.R. 278; 1912, 1 S.L.T. 90.

(9)

Heart failure—No specific accident.

In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator found that a farm labourer, apparently in good health, died suddenly while engaged, in the course of his ordinary work, in lifting baskets of corn to feed a bruising machine; that the cause of death was "failure of the heart"; and that "a contributing cause of the failure of the heart's action was the strain arising from the exertion made by the deceased in repeatedly stooping to fill the basket with corn and then lifting it when full up to the level of his shoulders in order to feed the bruiser." **Held** that there were no facts stated from which the arbitrator could competently infer that the death was due to injury by accident within the meaning of the Workmen's Compensation Act, since there was no particular event or occurrence to which the death could be attributed.

Ritchie v Kerr, 1913 S.C. 613; 50 S.L.R. 434; 1913, 1 S.L.T. 216.

(10)

Rupture—Recurrence of rupture—No proof of specific accident.

A farm labourer, while engaged in his employment, had a recurrence of an old rupture, which became strangulated and caused his death. There was no proof of anything specific having happened to him to cause the rupture to recur, and the arbitrator refused compensation on the ground that it was

not proved that the workman had met with an "accident." The Court refused an application for an order to state a case on the ground that, on the facts alleged by the applicant, it could not be held that the arbitrator had come to an unreasonable decision.

Walker v Murray, 1911 S.C. 825; 48 S.L.R. 741; 1911, 1 S.L.T. 448.

(11)

Pleurisy following upon chill.

A collector and canvasser, who had contracted pleurisy, claimed compensation from his employers, averring that in order to finish his work timeously one day he had to over-exert himself in climbing the stairs of a tenement; that he became "sweated" and contracted a chill which developed into pleurisy; and that he thus sustained an accident in the course of his employment. The arbitrator dismissed the application as irrelevant, holding that the workman had failed to aver an "accident" within the meaning of the Act. In an appeal, **held** that the arbitrator was right.

M'Millan v Singer Sewing Machine Co., 1913 S.C. 346; 50 S.L.R. 220; 1912, 2 S.L.T. 484.

(12)

Exposure to cold air—Pneumonia following on chill—Wreck in mine involving withdrawal of workmen—Chill due to standing in a draught while waiting to be raised to the surface.

During the working time in a coal mine the miners in No. 2 pit, owing to a wreck in the shaft, were ordered to ascend to the surface by the shaft of No. 1 pit, which was the downcast shaft for the air current which ventilated the mine. The miners, who had been sweating at their work, were compelled to wait at a mid-landing for an hour and a half, exposed to the down draught of cold air, until the men from the lower levels, who usually ascended by this shaft, had been raised. On reaching the surface one of the miners, who had been exposed to the draught, complained of chill. On this chill pneumonia supervened, and resulted in the death of the miner. **Held** that there was evidence on which an arbitrator might competently find that the deceased's death was due to an "injury by accident." **Opinions** (per Lord Atkinson and Lord Shaw of Dunfermline) that the exposure to cold air was an accident in the sense of the Act.

Brown v John Watson, Limited, 1914 S.C. (H.L.) 44; [1915] A.C. 1; 51 S.L.R. 492; 1914, 1 S.L.T. 406.

(13)

Chill contracted by miner while waiting to be raised from shaft bottom.

A workman employed in a coal mine finished his work and went to the shaft bottom at the time when, as he knew, the statutory daily inspection of the shaft was taking place. The time occupied by the inspection varied with the amount of repairs that had to be effected, but the cage usually took

about half an hour to descend. On the day in question, owing to a breakdown of the bell wire, the repairs took longer than usual, and the cage occupied an hour in descending. During that time the workman was standing in a cold current of air, and he contracted a chill, which developed into pneumonia, of which he died. An arbitrator having found that the workman was not injured by accident arising out of and in the course of his employment, **held** that, on the evidence, the arbitrator was entitled so to find.

Lyons v Woodilee Coal and Coke Co., 1917 S.C. (H.L.) 48; 54 S.L.R. 404; 1917, 1 S.L.T. 274.

(14)

Immersion in water—Pneumonia following upon chill—Chill due to partial immersion in water accumulating in a mine through breakdown of a pump.

During the working time in a coalpit, which was a wet pit, water began to accumulate owing to a defect in the pump; and the pump being stopped for repair, the water accumulated still further. When the miners found the water rising they decided to leave the pit, and hastened to the pit bottom, where they were kept waiting for twenty minutes, during which time they were severely chilled by the water which rose to their knees, and by exposure to the current of cold air descending the shaft. One of these miners on reaching the pit head lingered there for at least twenty minutes, and on arriving at his home complained of chill, and next day suffered from a cough, hoarseness, and pains, but went to his work. After several days—on three of which he worked at the pit—he was found to be suffering from pneumonia, of which he ultimately died. **Held** (by a Court of seven judges) that the occurrence in the mine on the day in question was an "accident," and that there was evidence on which the arbitrator might competently find that the deceased's pneumonia was due to that occurrence.

Drylie v Alloa Coal Co., 1913 S.C. 549; 50 S.L.R. 350; 1913, 1 S.L.T. 167.

(15)

—Rheumatism caused by immersion while baling water in a pit.

The pumps in a coal pit broke down and the pit became flooded. Five days after the breakdown a workman, whose ordinary employment was that of a "brusher," went down the pit to his regular work, but on reaching the bottom he was directed to bale the water which had accumulated, and while doing so he remained immersed up to his chest for several hours. He subsequently became incapacitated by rheumatism, and claimed compensation under the Workmen's Compensation Act, 1906. An arbitrator having found that the rheumatism was caused by the extreme and exceptional exposure to cold and damp to which the workman was subjected on the occasion in question, **held** that, in view of this finding in

fact, the arbitrator was entitled to hold that the workman had met with an injury by accident within the meaning of sec. 1 of the Act.

Welsh v Glasgow Coal Co., 1916 S.C. (H.L.) 141; [1916] 2 A.C. 1; 53 S.L.R. 311; 1916, 1 S.L.T. 272.

(16)

Inhaling carbon-monoxide gas—Death resulting from pneumonia caused by inhaling carbon-monoxide gas—Gas not usually present in fatal quantity.

A miner in a coal mine, who had fired a shot, returned three minutes afterwards to the working place, while it was still full of smoke. Soon after he felt ill, and ultimately developed pneumonia, of which he died, the pneumonia being caused by the inhalation of carbon-monoxide gas. The firing of shots was of daily occurrence at the miner's working place and generated carbon-monoxide gas in quantities which varied with the ventilation. On former occasions the miner had frequently suffered from headache, giddiness, and nausea through inhaling the gas. The arbitrator having found that the death of the miner resulted from "injury by accident," the Court refused to disturb his decision, **holding** that the unexplained and unforeseen presence of the gas in fatal quantity on the occasion in question might reasonably be said to be an "accident."

Kelly v Auchenlea Coal Co., 1911 S.C. 864; 48 S.L.R. 768; 1911, 2 S.L.T. 23.

(b) Whether Death attributable to Accident.

[See 16, *infra*.]

(c) Whether Incapacity for Work Attributable to Accident.

[See 18, *infra*.]

(2) ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

[See also Cases under Act 1897, II. 1 (3), *infra*.]

(a) Proof—Sufficiency of Evidence.

(17)

Onus of proof.

In an application for compensation under the Workmen's Compensation Act, 1906, the onus is on the claimant to prove that the accident arose out of and in the course of the workman's employment.

O'Brien v Star Line, 1908 S.C. 1258; 45 S.L.R. 935; 16 S.L.T. 292.

(18)

—Actual time and circumstances of accident unknown—Blood poisoning—Infection by germ.

Grant v G. & G. Kynoch, 1919 S.C. (H.L.) 62; [1919] A.C. 765; 56 S.L.R. 345; 1919, 1 S.L.T. 280, No. 6, *supra*.

(19)

Miner found dead in mine at a distance from his work.

In an arbitration under the Workmen's Compensation Act, 1906, arising out of the death of a miner, it was proved that the miner, in descending the pit to go to his work, had left the cage at an intermediate level before it reached the level at which he was working; that he tried to get back into the cage, but that it had resumed its descent, and that he descended to the next level by means of an adjacent blind pit; that he then, for some unexplained reason, proceeded 600 or 700 feet along a road leading in the opposite direction from the road leading to his work; and there met his death by scalding from the exhaust steam from a pump. The arbitrator found that the accident had not arisen "out of and in the course of" the employment. **Held** that there was no evidence from which the arbitrator could properly arrive at that decision.

Sneddon v Greenfield Coal and Brick Co., 1910 S.C. 362; 47 S.L.R. 337; 1910, 1 S.L.T. 145.

(20)

Circumstances in which **held** there was evidence on which the arbitrator might reasonably find that a miner, killed by an explosion while in a place to which he did not require to go, had not been injured in the course of his employment, and that the Court therefore could not interfere with his decision.

Traynor v Robert Addie & Sons, 1910, 48 S.L.R. 820.

(21)

Unexplained accident—Ship's fireman found injured at bottom of hold—Inference from proved facts.

A fireman, whose duty it was to remain on board the ship where he was employed, went ashore without permission, and returned to the ship in the evening, intoxicated. In the morning he was found fatally injured at the bottom of a hold. The only access to the hold was in a part of the vessel where the fireman had no right to be, through a door which was kept locked, but which had been broken open. In a claim for compensation brought by dependants of the fireman, the above facts were proved. There was no evidence to show how the door of the hold had been broken open, or how the fireman had got to the hold, or how the accident had happened. **Held** that the claimants had failed to prove that the accident arose out of and in the course of the fireman's employment; and accordingly that they were not entitled to compensation.

O'Brien v Star Line, 1908 S.C. 1258; 45 S.L.R. 935; 16 S.L.T. 292.

(22)

Seaman found drowned—Inference from proved facts.

In an arbitration under the Workmen's Compensation Act, 1906, in which the de-

pendants of A, who had been employed as engineer on a steam tug, claimed compensation in respect of his death, the following facts were proved:—On the morning of 15th February, 1908, the tug was lying moored to a barge which was moored to a jetty, and at 5 a.m. A was seen in his bunk. An hour later it was found that A had disappeared, leaving his working clothes beside his bunk. Two days thereafter A's body, clothed in nightdress, was found by a diver in the sea near the place where the tug had been moored on the 15th February. According to the medical evidence A's death was due to drowning, but there was no evidence as to how he met his death. The deceased was a man of cheerful disposition and of steady habits, and his death was not caused by suicide. **Held** that the arbitrator was entitled to draw the inference that A's death was due to an accident arising out of his employment.

Mackinnon v Miller, 1909 S.C. 373; 46 S.L.R. 299; 1909, 1 S.L.T. 65.

(23)

Seaman found drowned—Inference from proved facts.

In a claim for compensation by the dependants of a ship steward, who was last seen alive in his bunk, and was found drowned next day in the harbour near to the place where his ship had been lying, the arbitrator awarded compensation. Circumstances in which the House of Lords affirmed the award of the arbitrator, holding that there was evidence from which a reasonable man might draw the inference that the accident which caused death arose out of the employment.

Lendrum v Ayr Steam Shipping Co., 1914 S.C. (H.L.) 91; [1915] A.C. 217; 51 S.L.R. 733; 1914, 2 S.L.T. 137.

(24)

Ship's cook disappearing during voyage.

A ship's cook during a voyage was last seen leaving the galley at 6.45 a.m. About 7.30 a.m. it was discovered that he was missing from the ship. **Held** that, even on the assumption that he had accidentally fallen overboard, it could not, in the absence of evidence, be inferred that the accident arose out of the employment.

Lynch v Crown Steamship Co., 1916 S.C. 695; 53 S.L.R. 575; 1916, 1 S.L.T. 370.

(25)

Dock labourer ordered to stop work because of intoxication—Subsequently found drowned.

A dock labourer, who was liable to be paid off without notice, was thought by the clerk in charge of the squad to be unfit to continue work owing to intoxication, and was directed by him to sit down in a shed where his wages would be brought to him. Shortly afterwards his body was found in the water opposite to the place where he had been working, but there was no evidence to show how he got into the water. **Held** that his

death was due to accident, but that the accident did not arise out of the employment. **Opinion** that the accident did not arise in the course of the employment.

M'Intyre v Stewart, 1916 S.C. 91; 53 S.L.R. 62; 1915, 2 S.L.T. 288.

(26)

Commercial traveller run over by train while drunk.

Renfrew v R. & J. M'Crae, 1914 S.C. 539; 51 S.L.R. 467; 1914, 1 S.L.T. 354, No. 90, *infra*.

(b) Workman going to or from Work.

(27)

Miner on way to pit—Accident on employers' premises, but before work commenced.

A workman employed at a coal mine, while going from his house to his work by the usual road, and while crossing a railway belonging to his employers, fell and was injured. The place of the accident was part of the mine within the meaning of the Coal Mines Regulation Act, 1887, and the workman might have been required to work there under his contract of service. In fact, his only duties at the time were those of a miner underground, and did not actually commence until he arrived at the lamp cabin, 360 yards distant from the scene of the accident. **Held** that the accident to the workman did not arise out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906.

Anderson v Fife Coal Co., 1910 S.C. 8; 47 S.L.R. 3; 1909, 2 S.L.T. 260.

(28)

Miner going to work mistaking his way.

Sneddon v Greenfield Coal and Brick Co., 1910 S.C. 362; 47 S.L.R. 337; 1910, 1 S.L.T. 145, No. 19, *supra*.

(29)

Workman injured while going to his work—Access road provided by employers.

A workman, employed in oil works, was going to his work at night by a path (which was one of several means of access available to him) situated on land leased by his employers, and provided and maintained by them as an access for their employees although members of the public were also allowed to use it. At a spot where the path ran alongside a switchback lye he strayed on to the lye and was run over by a railway wagon and killed. The ground on each side of the spot where the accident happened was occupied by bings and sidings in connection with the works, but the spot was 80 yards from the nearest building belonging to the works, and was 330 yards from that department of the works to which the deceased's employment was exclusively confined. **Held** that the accident arose out of and in the course of the employment.

Nicol v Young's Paraffin Oil Co., 1915 S.C. 439; 52 S.L.R. 354; 1915, 1 S.L.T. 159.

(30)

Miner killed while returning from work.

A workman, employed underground in a coal mine, on finishing his day's work returned to the surface and was proceeding home by a track along the side of a private branch railway line, the property of his employers, when he was knocked down and killed by an engine at a point 400 yards distant from the mouth of the pit. **Held** that the accident did not arise out of and in the course of his employment.

Graham v Barr & Thornton, 1913 S.C. 538; 50 S.L.R. 391; 1913, 1 S.L.T. 180.

(31)

Miner leaving his work by unauthorised route.

A miner on leaving the pit after his work was finished, instead of taking the recognised road from the mine provided by the mineowners, crossed over a gangway to a dirt-bing, down which he proceeded by a steep and very rough track. This track was not formed in any way, but was worn down into uneven steps, and although it was occasionally used by men who were short of time, there was no evidence that the mineowners knew of this, and the use of the track was neither sanctioned nor prohibited by them. While walking down the track the miner fell and received fatal injuries. The arbitrator found that the accident to the deceased did not arise out of and in the course of his employment, and assailed the mineowners. **Held** that the arbitrator's finding was not unreasonable, and could not be set aside.

Hendry v United Collieries, 1910 S.C. 709; 47 S.L.R. 635; 1910, 1 S.L.T. 386.

(c) Interruption of Employment—Returning to Work.

(32)

Ship's watchman returning to vessel—Fall from ladder leading from quay to vessel.

A workman was employed to watch four trawlers as they lay in harbour. He was on duty for twenty-five hours, during which time he had to provide his own food, and in connection with his duties it was occasionally necessary for him to be on the quay. In the course of his watch he left the boats and went to a hotel which was a short distance from the harbour, where he got refreshment. He was absent a very short time, and on his return, while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water and was drowned. In an arbitration under the Workmen's Compensation Act, 1906, **held** by the House of Lords that the above facts entitled the arbitrator to find that the accident arose out of and in the course of the deceased's employment.

Jackson v General Steam Fishing Co., 1909 S.C. (H.L.) 37; [1909] A.C. 523; 46 S.L.R. 901; 1909, 2 S.L.T. 227.

(33)

Seaman ashore by leave for his own purposes—Return to ship—Fall from dock before

reaching ship—Dock closed to public—Access by Admiralty pass.

A ship was lying in a public harbour, which had been taken over temporarily by the Admiralty and was closed to the public, only such persons as possessed an Admiralty pass having access to it. The chief engineer of the ship went ashore on leave for purposes of his own after obtaining a pass, and, while proceeding after dark along one of the quays of the harbour on his way back to the ship, but before reaching the place where the ship was lying, he fell into the dock and was drowned. **Held** that, as the accident had occurred prior to the engineer's arrival at the provided access to the ship, and at a time when he was not engaged on any duty forming part of his services to his employers, the accident did not arise out of his employment. **Opinions** that "in the course of the employment" does not mean "during the period of the employment," but means in the course of doing something which is part of, or incidental to, the workman's service to his employer; and that the employment is interrupted when the workman is absent on leave for his own purposes.

Officer v Davidson & Co., 1918 S.C. (H.L.) 66; [1918] A.C. 304; 55 S.L.R. 185; 1918, 1 S.L.T. 87.

(34)

Seaman returning to vessel—Fall from quay.

A seaman employed on a ship in port went ashore after work was over, as he was entitled to do, partly to buy food (which under his contract of employment he was bound to provide for himself) and partly to see the town. On returning to the vessel, before he had reached the gangway, which was the only access from the quay to the vessel, he accidentally fell from the quay into the water and was drowned. The passage-way along the quay from the gangway to beyond the point where the man fell was narrowed to a width of two feet by a row of barrels which were standing on the quay. **Held** that there was evidence to warrant an arbitrator's finding that the accident did not arise out of the employment.

Craig v Owners of s.s. "Calabria," 1914 S.C. 765; 51 S.L.R. 657; 1914, 2 S.L.T. 30.

(35)

Seaman drowned while rowing to island on which his ship was beached.

A seaman was employed on board a ship, which was hauled up on an island for the purpose of its annual repair. The work of the crew ceased at 5.30 p.m., and they were then free either to remain on board or to spend the night elsewhere. Another member of the crew, who desired to go to the mainland on his own business after his work was over but to return to the ship the same night, arranged with the seaman that the latter should bring a boat across for him at 10.30 p.m. For this purpose the seaman borrowed

a small boat from a man on the island and rowed over to the mainland. On the return journey to the island with his fellow-employee the boat was swamped and the seaman was drowned. **Held** that there was no evidence to support a finding by the arbitrator that the accident arose out of the employment.

M'Lean v David Macbrayne, Limited, 1916 S.C. 338; 53 S.L.R. 254; 1916, 1 S.L.T. 76.

(d) Scope of Employment.

(36)

Incidents of employment—Miner not at work going to pithead for wages—Injured while waiting for his pay lines.

A boy, employed as a coal picker, who was absent from his work on a pay day, went to the pithead, where pay lines were usually distributed, for the purpose of getting his line. While waiting for the pithead gaffer who distributed the pay lines, he sat down by a fire, which was burning in the centre of a line of rails, with his back towards a railway wagon, which was spragged so as to prevent it from moving towards the fire. Owing to the carelessness of some workers a wagon further up the line got out of control and ran into the spragged wagon, causing it to run over the boy and injure him. It was a regular custom for the pithead workers to gather round the fire to eat their "pieces" during their time off. **Held** that the arbitrator was entitled to find that the accident arose out of and in the course of the boy's employment.

M'Graw v William Baird & Co., 1920 S.C. (H.L.) 155; 57 S.L.R. 491; 1920, 2 S.L.T. 136.

(37)

Assisting fellow-servants to work for a third party.

A carter in the service of carting contractors was employed to deliver goods to consignees. It was his duty to sling the goods from his lorry into tackle provided by the consignees, but he had no duty to receive or stow the goods inside the consignees' warehouse. A custom prevailed among the carters, which was not proved to have been known to their employers, that, when several were delivering goods at the same time, one remained outside and slung the goods from all the lorries, while the others entered the warehouse and helped the consignees' servants to receive and stow the goods. For these services each carter, including the one who remained with the lorries, received remuneration from the consignees. When the carter, in accordance with this custom, was slinging goods from several lorries belonging to his employers, he was injured by accident while working on a lorry other than that of which he was in charge. **Held** that the accident did not arise out of and in the course of his employment with the contractors.

Carlton v William Sinclair, Limited, 1914 S.C. 871; 51 S.L.R. 759; 1914, 2 S.L.T. 105.

(38)

Workman taking upon himself duty not entrusted to him.

A repairer was engaged in making repairs on an air course in a mine, and it was necessary for him to bring wood to that place for the purpose. This could be done by hauling the wood up the air course, or by taking it up in hutches by a wheel brae, and the repairer was directed to take it by the air course and not by the wheel brae. He elected, however, to take it by the latter, and in the absence of the person in charge he loaded the empty hutch in an unskilful manner, with the result that the chain broke, and he was struck by the descending full hutch and killed. **Held** that the repairer was killed while arrogating to himself a duty which he was neither engaged nor entitled to perform, and accordingly that the accident did not arise out of his employment.

Burns v Summerlee Iron Co., 1913 S.C. 227; 50 S.L.R. 164; 1912, 2 S.L.T. 469.

Kerr v William Baird & Co., 1911 S.C. 701; 43 S.L.R. 646; 1911, 1 S.L.T. 446, No. 80, *infra*.

Smith v Fife Coal Co., 1914 S.C. (H.L.) 40; [1914] A.C. 723; 51 S.L.R. 496; 1914, 1 S.L.T. 385, No. 81, *infra*.

(39)

Ropeworker removing threads from a machine at which she was working.

A girl in a ropework, employed with her mate at an intermediate drawing frame, was removed from that work by the foreman, and the frame was put in charge of two other workers. The girl, without orders to do so, then started working at an adjoining finishing frame, but after a few minutes she left to ask the foreman for instructions as to what work she was to take up. When passing the intermediate frame at which she had formerly been working she attempted, of her own accord, to remove some loose threads which had become entangled in its rollers, and her hand and arm were caught in the machine and injured. It was customary to remove such threads while the machines were in motion, but at the time it was no part of her duty to do so. **Held** that the accident arose out of and in the course of her employment.

Beattie v Tough & Sons, 1917 S.C. 199; 54 S.L.R. 127; 1917, 1 S.L.T. 27.

(40)

Ambulance employee—Duty to telephone for doctor—Accident to workmen not directly employed by millowners.

A gatekeeper employed at a flax mill—whose duty it was, besides attending to the gate, to take charge of the ambulance appliances for use in cases of accidents occurring in the works, to telephone for the doctor in case of necessity, and to attend personally to minor accidents—was informed while on duty of a scaffold accident in the works to some slaters, who were not in the employment of the flax spinners, but were engaged

in doing work in the mill. The gatekeeper ran to the scene of the accident, and then back to the gate to telephone for the doctor. The exertion of running and the excitement brought on an apoplectic shock, from which he died in a few hours. He had no instructions not to attend to accidents to workmen who, though not in the employment of the flax spinners, were engaged in doing work for them on the premises. **Held** that the gatekeeper's death was due to an accident arising out of and in the course of his employment.

Aitken v Finlayson, Bousfield & Co., 1914 S.C. 770; 51 S.L.R. 653; 1914, 2 S.L.T. 27.

(41)

Workman entering saw pit to recover fellow-workman's tea can.

A boy, employed as an assistant attendant at a circular saw, entered the saw pit for the purpose of recovering a fellow-workman's tea can which had fallen into it, and was injured by coming into contact with the revolving saw. In the ordinary performance of his duties he was never required to enter the pit. **Held** that the accident did not arise out of and in the course of the employment.

Espie v British Basket Co., 1920 S.C. 655; 57 S.L.R. 529; 1920, 2 S.L.T. 89.

(42)

Place where workman had no right to be—Unnecessary risk.

A craneman, whose duty it was to attend to two travelling cranes in an engineering shop, was crushed to death while on another crane, on to which he had climbed. It was found that he had no right to be on the crane on which he met his death, and there was no evidence to show why he went there. **Held** that it had not been proved that the accident arose out of and in the course of the deceased's employment.

Miller v North British Locomotive Co., 1909 S.C. 698; 46 S.L.R. 755; 1909, 1 S.L.T. 519.

(43)

Getting off wagon to pick up pipe.

A workman, whose duty it was to load and accompany a train of wagons drawn by a traction engine, dismounted from a wagon on which he was riding in order to recover a pipe he had dropped. In doing so he fell and was run over by the wagon. **Held** that the accident arose out of and in course of the employment.

M'Lauchlan v Anderson, 1911 S.C. 529; 43 S.L.R. 349; 1911, 1 S.L.T. 127.

(44)

Getting off moving lorry to recover his coat—Added risk.

A workman, who was employed to accompany the driver of a motor lorry and help in delivering goods, was sitting beside the driver when his coat, which he had taken off for the purposes of his work, blew on to the road. While the driver was stopping the lorry to enable him to recover his coat, and while the lorry was still moving at four

or five miles an hour, the workman stepped down with his face turned towards the rear. He fell, and was seriously and permanently injured. He was not prohibited by law or by the terms of his employment from leaving a lorry in motion. **Held** that the accident arose out of and in the course of the employment.

Strong v Wright & Co., 1922 S.C. 515; 59 S.L.R. 414; 1922 S.L.T. 342.

(45)

Saving fellow-workman from danger—Fellow-workman not engaged on employer's business.

Mullen, a workman, justifiably left the works in which he was employed, to obtain refreshment. While returning to his work he met a squad of his fellow-workmen, who were engaged in hauling a bogie across a public street which intersected the works. M'Ginlay, a fellow-workman of Mullen, came up, and improperly seized the rope by which the bogie was being hauled, and began to pull against the squad. In doing this M'Ginlay slipped and fell over the rope, and was in danger of being injured by the bogie. Mullen came to M'Ginlay's assistance, and succeeded in rescuing him from danger, but before he himself could get out of the way he was jammed by the bogie, and sustained severe injuries. **Held** that Mullen had not been injured by accident arising out of and in the course of his employment.

Mullen v Stewart & Co., 1908 S.C. 991; 45 S.L.R. 729; 16 S.L.T. 172.

(e) Risks Incidental to Employment.

(i.) Whether Danger Peculiar to Employment.

(46)

Common risk — Unusual heat — Heat apoplexy—Plumber stooping at work.

A plumber, who was engaged in laying and jointing iron pipes in the open air on a day of unusual heat and who had to stoop at his work, was taken ill while so employed, and died some days afterwards from heat apoplexy. **Held** that, even assuming that there had been an "accident," it did not arise "out of" the deceased's employment, as there was no peculiar danger to which he had been exposed by the nature of his employment beyond that to which other persons who had to stoop at outdoor labour on the day in question were exposed.

Blakey v Robson, Eckford & Co., 1912 S.C. 334; 49 S.L.R. 254; 1912, 1 S.L.T. 81.

(47)

Abnormal exposure to common risk—Ship's carpenter burned by shavings accidentally set on fire—Carpenter working in oily trousers.

A ship's carpenter, working on the poop of a vessel lying in harbour, was severely burned owing to some shavings by which he was surrounded being ignited by a match carelessly thrown down by a shore labourer. The carpenter's trousers happened to be saturated

with inflammable oil which had leaked from a barrel he had shifted in the course of his work, and thus readily caught fire from the shavings. **Held** that he was injured by an accident arising out of and in the course of his employment.

Manson v Forth and Clyde Steamship Co., 1913 S.C. 921; 50 S.L.R. 687; 1913, 1 S.L.T. 475.

(48)

Risk unconnected with nature of employment—Wall on adjoining property falling on building in which workman employed.

While a woman, employed in a fish-curing establishment, was working in a shed belonging to her employer, a brick wall in course of erection on neighbouring property fell by reason of its own instability on the shed, bringing down the roof and part of one of the walls of the shed, so that the woman was buried in the wreckage and was injured. **Held** that the accident arose out of, as well as in the course of, the woman's employment.

Simpson v Sinclair, 1917 S.C. (H.L.) 35; [1917] A.C. 127; 54 S.L.R. 267; 1917, 1 S.L.T. 211.

(49)

Risk unconnected with nature of employment—Injury by falling slate during a gale.

During a severe gale a carter in charge of a horse and lorry within his employer's yard was struck by a sheet of corrugated iron blown from the roof of an adjoining building. **Held** that the arbitrator was not entitled to find that the accident arose out of the employment.

Guthrie v Kinghorn, 1913 S.C. 1155; 50 S.L.R. 863; 1913, 2 S.L.T. 153.

(50)

Risk unconnected with nature of employment—Abnormal exposure to common risk—Injury by falling slate during a gale.

During a severe gale an engineer's fitter was engaged in erecting machinery in an open yard near to a building from the roof of which slates were being blown. While stooping to adjust a large piece of machinery he was struck on the head by a falling slate and injured. **Held** that the arbitrator was entitled to find the accident arose out of the employment.

Adamson v George Anderson & Co., 1913 S.C. 1038; 50 S.L.R. 855; 1913, 2 S.L.T. 139.

(51)

Workman seized with a fit—Injury due to falling on concrete floor of working place.

A workman employed in a bonded store, having been seized with a fit in the course of his work, fell on the floor, which was made of concrete, and fractured his skull. **Held** that the arbitrator was entitled to find that the workman was injured by an accident arising out of his employment.

M'Kendry v Wright & Greig, 1919 S.C. 98; 56 S.L.R. 39; 1918, 2 S.L.T. 282.

(52)

School janitor injured by falling on the street.

A school janitor, conveying a message on school business through the streets of Paisley about noon on a hot July day, was overcome by giddiness or faintness brought on by the heat, and fell, struck his head against the pavement, and sustained injuries of which he died. **Held** that the accident did not arise out of his employment.

Rodger v Paisley School Board, 1912 S.C. 584; 49 S.L.R. 413; 1912, 1 S.L.T. 271.

(53)

Collector injured in street accident.

A salesman and collector in the employment of a firm of sewing machine manufacturers, whilst riding in the street on a bicycle in the course of his employment, was kicked on the knee by a passing horse, and incapacitated from work. **Held** that the accident arose out of his employment.

M'Neice v Singer Sewing Machine Co., 1911 S.C. 12; 48 S.L.R. 15; 1910, 2 S.L.T. 210.

(54)

Falling on slippery road—Workman using the road in carrying out the duties of his employment.

It was the duty of a machine-fitter, employed by a firm of weighing-machine erectors, to attend at inspections of their machines by the county inspectors of weights and measures. On one occasion he had to attend inspections at two villages—the one village being about half-an-hour's walk from the other. When the inspection at one village was completed the inspector got on his bicycle to ride to the other, and, as there was no convenient train, the machine-fitter started to walk to the other village, in order to keep in touch with the inspector. While so walking he slipped upon ice which had formed on the road, and fell and was injured. **Held** that the accident arose out of and in the course of the employment.

White v W. & T. Avery, 1916 S.C. 209; 53 S.L.R. 122; 1915, 2 S.L.T. 374.

(55)

Street dangers—Coachman riding a bicycle to fetch letters for his employer—Man lurching against bicycle.

A coachman, in obedience to his orders, had, from time to time, to fetch his employer's letters from a post office in a small country town four miles off, and in doing so he generally, as his employer was aware, rode a bicycle. When his employer was at home he might have to go to the post office every evening, at other times he might not go for a fortnight. On one occasion, when returning with letters, he was injured through a man lurching against his bicycle and knocking him over. **Held** that the accident arose out of the employment.

Hughes v Bett, 1915 S.C. 150; 52 S.L.R. 93; 1914, 2 S.L.T. 337.

(56)

Collector falling on stair.

A collector for an assurance company, whose duty it was to make a door-to-door collection of premiums, fell upon a stair which he had occasion to use while seeking to collect a premium, and was injured. **Held** that the accident arose "out of and in the course of" the employment.

Millar v Refuge Assurance Co., 1912 S.C. 37; 49 S.L.R. 67; 1911, 2 S.L.T. 361.

(57)

Workman injured by unintentional blow from fellow-servant while passing on stair.

A post office sorting clerk, while ascending some wheeling steps in a stair of the post office, was struck in the eye and seriously injured by another employee, who was descending the stair and, not noticing the sorting clerk, waved his hand, as he passed, to a third employee. **Held** that the accident arose out of the employment, in respect that the construction of the stair necessarily brought the employee when using it into such close proximity to other employees who might happen to pass him as to expose him to the risk of injury due to their careless gestures.

Clark v Lord Advocate, 1922 S.C. 561; 59 S.L.R. 442; 1922 S.L.T. 389.

(ii.) Act of Third Party.

(58)

Workman assaulted and falling against box of molten metal.

A workman in an iron foundry, while engaged in his employment there, was struck by a stranger who had found his way into the works in a state of intoxication. When the blow was struck the workman was working in a stooping position in proximity to boxes of molten metal. In consequence of the blow, and of his position when he was struck, the workman lost his balance and fell between the boxes, burning and bruising his arm. **Held** that the arbitrator was entitled to find that the workman was injured by an accident arising out of his employment.

Macfarlane v Shaw (Glasgow), Limited, 1915 S.C. 273; 52 S.L.R. 236; 1915, 1 S.L.T. 30.

(59)

Designed act of third party—Strike breakers—Attack by strikers.

One of a party of workmen, employed in a woodyard to take the place of others who were on strike, was injured by the attacks of the strikers, who rushed the police guarding the yard and assaulted the workers. **Opinions** (per Lord Justice-Clerk Macdonald and Lord Salvesen) that if the occurrence were an accident it did not arise "out of" the employment of the injured man.

Murray v Denholm & Co., 1911 S.C. 1087; 48 S.L.R. 896; 1911, 2 S.L.T. 125.

(60)

Horseplay of fellow-servant.

A domestic servant, while in the course of her duties, was struck on the eye and blinded by a ball thrown at her in play by a fellow-servant. **Held** that the accident was not one arising out of the employment of the injured servant.

Wilson v Laing, 1909 S.C. 1230; 46 S.L.R. 843; 1909, 2 S.L.T. 18.

(61)

Unintentional blow from fellow-servant.

Clark v Lord Advocate, 1922 S.C. 561; 59 S.L.R. 442; 1922 S.L.T. 389, No. 57, *supra*.

(iii.) Peril added by Act of Workman.

(62)

Miner sitting on cover of haulage pulley while waiting for cage.

A miner, while waiting at the bottom of the shaft for the cage to take him to the surface, entered a heading 10 to 15 yards from the shaft in order to escape the draught down the shaft. He had no duty to be in the heading, but it had been a regular practice for years, known to the oversman, for the workmen to go there while waiting for the cage. In the heading was a tension pulley round which ran an endless haulage rope. When the miner entered the heading the rope was at rest, and about that particular hour it usually stopped for the day. He seated himself on the flat wooden cover of the pulley with his leg close to the rope, and, on the rope unexpectedly starting, his leg was dragged into the pulley, and he was seriously and permanently injured. **Held** that the act of the workman in sitting on the cover of the pulley was in no way incidental to the discharge of his duty and exposed him to an unnecessary danger; and, accordingly, that the accident did not arise out of the employment.

Fraser v Lochgelly Iron and Coal Co., 1920 S.C. 667; 57 S.L.R. 589; 1920, 2 S.L.T. 147.

(63)

Brakesman riding on lorry when it was his duty to walk behind it.

A workman was employed to attend to the screw brakes at the rear of a lorry, and it was his duty to walk behind it continuously to be ready to apply the brakes at any moment. There was a rule, of which the workman was aware, that no one but the driver should ride on the lorry, but in spite of this he took his seat beside the driver. On being required by the driver, under whose orders he was, to put on the brakes, he fell in attempting to jump off the lorry, and was injured. **Held** that the accident did not arise out of the employment, the workman having created for himself a risk which was not incidental to his employment.

Revie v Cumming, 1911 S.C. 1032; 48 S.L.R. 831; 1911, 2 S.L.T. 81.

(64)

Dock employee jumping on to railway wagon for lift home.

A workman employed as a capstanman in a dock, going home at the dinner hour, was, before he reached the dock gates, overtaken by an engine and trucks on an adjoining railway. The workman in attempting to mount one of the trucks, for the purpose of being carried to the dock gates, was seriously injured. He attempted to climb on to the truck, not for any purpose of his employers, the dock trustees, but for his own pleasure. **Held** that the accident did not arise out of his employment.

Morrison v Clyde Navigation Trustees, 1909 S.C. 59; 46 S.L.R. 40; 16 S.L.T. 454.

(65)

Message clerk boarding a tramway car in motion.

A boy, employed as a message clerk, was sent on an errand and given money to pay for his tramway fare. While attempting unnecessarily to board a tramway car in motion—which, as he knew, was forbidden—he fell, and was injured. **Held** that the accident did not arise out of the boy's employment.

Symon v Wemyss Coal Co., 1912 S.C. 1239; 49 S.L.R. 921; 1912, 2 S.L.T. 127.

(66)

Workman getting off moving lorry to recover his coat.

Strong v Wright & Co., 1922 S.C. 515; 59 S.L.R. 414; 1922 S.L.T. 342, No. 44, *supra*.

(67)

Message boy injured while using hoist not intended for his use.

A message boy was employed by a fishmonger to deliver fish at the kitchen of an infirmary situated on the third storey of the building. The ordinary means of access to the kitchen was a stair, but there was also a hoist, with, however, a notice, publicly displayed, announcing that it was to be used only by servants of the institution and worked only by those specially authorised by the directors. The message boy when on his way to deliver fish at the infirmary, found the gate of the hoist standing open, entered the hoist and set it in motion, and his foot was jammed between the floor of the hoist and the wall, and injured. He knew he was doing wrong in using the hoist, for on several previous occasions, and in particular on the evening before the accident, the porter had seen him making his way to the hoist, and had rebuked him, and forbidden him to use it, and sent him up by the stair. **Held** that the accident did not arise out of and in the course of the boy's employment.

M'Daid v Steel, 1911 S.C. 859; 48 S.L.R. 765; 1911, 2 S.L.T. 13.

(68)

Workman returning to vessel—Fall while jumping from quay to vessel.

A workman engaged in overtime work on a vessel went ashore at night, against the orders of his foreman, to purchase bread.

The vessel was moored 6 or 7 feet from the quay, and a gangway was to the knowledge of the workman placed between the vessel and the quay. The deck of the vessel was 3 feet above the quay. The workman in returning went past the end of the gangway, and attempted to jump from the quay to the vessel, but fell into the water and was drowned. It was a rule of the employment (which, however, was frequently broken) that men should not jump between the vessel and the quay, and the deceased had been warned against this practice. **Held** that the accident did not arise out of and in the course of the deceased's employment.

Martin v Fullerton & Co., 1908 S.C. 1030; 45 S.L.R. 812; 16 S.L.T. 219.

(69)

Seaman attempting to reach ship in a boat without oars.

A ship's engineer who had been ashore in the course of his employment attempted to reach his vessel, which was moored 100 yards from the shore, alone and without oars in a 27 foot lifeboat, trusting that the boat would be carried in the direction of the vessel by the force of wind and tide, his only means of directing its course being by paddling with the rudder. He was blown out to sea and was drowned. **Held** that the accident did not arise out of the employment.

Halvorsen v Salvesen, 1912 S.C. 99; 49 S.L.R. 27; 1911, 2 S.L.T. 376.

(70)

Workman walking on railway instead of on the road.

A canal overseer, having occasion, in the course of his employment, to walk from a railway station to his office on the banks of the canal, proceeded thither along the railway line, where, at a narrow and dangerous spot, he was knocked down by a passing train and was killed. There was no necessity for the deceased to go along the railway line, for he could have proceeded to his office by the public road, the distance being only slightly longer. He had no right to walk on the railway line, and had been warned by one of his superiors not to do so. **Held** that, although the accident arose "in the course of" the employment, it did not arise "out of" the employment.

M'Laren v Caledonian Railway Co., 1911 S.C. 1075; 43 S.L.R. 885; 1911, 2 S.L.T. 117.

(71)

Electrician injured by electric current—Neglect to remove fuse.

An electrician, employed in a mine, while doing a job connected with a "gate-end box," noticed that the box was dirty. The work of cleaning the box could not safely be performed without cutting off the current, and this the electrician was entitled to do by removing a fuse situated at the pit-bottom some 600 yards distant. Noticing, however, from the stopping of an electric pump, that the current had been switched off at the surface, he took the opportunity of cleaning out

the box, although he knew the danger involved from the fact that the current might be turned on again at any moment. While he was cleaning the box the current was turned on, and he was injured. **Held** that the accident did not arise out of the employment, but was due to a peril added by the workman's own actings and not reasonably incidental to his employment.

Brown v Baton Colliery Co., 1921 S.C. 323; 58 S.L.R. 268; 1921, 1 S.L.T. 181.

(72)

Miner taking on himself duty not entrusted to him.

Burns v Summerlee Iron Co., 1913 S.C. 227; 50 S.L.R. 164; 1912, 2 S.L.T. 469, No. 38, supra.

(f) Breach of Rules and Orders.

(73)

Statutory regulations—Regulations imposed by employer.

Observed that in determining whether a regulation limits the sphere of a workman's employment, there is no distinction in principle between a statutory regulation and a regulation imposed only by the employer.

Donnelly v A. G. Moore & Co., 1921 S.C. (H.L.) 41; [1921] 1 A.C. 329; 53 S.L.R. 85; 1921, 1 S.L.T. 94.

(74)

Breach of statutory regulations—Miner returning prematurely to unexploded shot—Miner passing fence and entering prohibited area.

A miner employed as a shot-firer lighted a fuse and retired to a place of safety. The shot missed fire, and he returned to the shot-hole in less than one hour in contravention of par. 3 (a) of the Explosives in Coal Mines Order of 1st September, 1913. As he approached the shot-hole the shot exploded, and he received injuries causing serious and permanent disablement.

A miner working at the pit face went in search of brattice nails which he required for the purpose of his work. He passed a fence and entered a disused working in contravention of Regulations (4) and (9) of 10th July, 1913, made under the Coal Mines Act, 1911. While in the prohibited area he was overcome by gas, and died as the result of gas poisoning. **Held** in each case that the miner, in disobeying the statutory regulations, was acting outwith the sphere of his employment, and that consequently the accident did not arise out of and in the course of his employment.

Donnelly v A. G. Moore & Co.; *Colville v Fife Coal Co.*; *Gordon v Fife Coal Co.*, 1921 S.C. (H.L.) 41; [1921] 1 A.C. 329; 53 S.L.R. 85; 1921, 1 S.L.T. 94.

(75)

Miner returning prematurely to unexploded shot—"If a shot misses fire"—Explosives in Coal Mines Order of 1st September, 1913, par. 3 (a).

In a mine in which par. 3 of the Explosives in Coal Mines Order of 1st

September, 1913, was in force, two miners were engaged together in firing shots at their working place by means of fuses and naked lights. One lit the fuse of his shot, and the other attempted to light the fuse of his shot but believed he had not succeeded in lighting it. Both men then retired to a place of safety, and the shot that was known to be lit duly exploded. The men waited for the smoke to clear away, and meanwhile ate a meal and had a smoke. After between thirty and forty minutes the miner whose shot had not exploded returned to the shot-hole, when the second shot exploded and he was seriously and permanently disabled. On a remit from the Court the arbitrator found as a fact that the miner had failed to light the fuse of his shot. **Held** (1) that the shot had "missed fire" within the meaning of par. 3 of the Order; and (2) that, as the miner had accordingly acted in breach of that Order in approaching the shot-hole within an hour, the accident did not arise out of and in the course of his employment.

Costello v Addie & Sons' Collieries, 1922 S.C. (H.L.) 72; [1922] 1 A.C. 164; 59 S.L.R. 116; 1922 S.L.T. 106.

(76)

—Miner returning prematurely to unexploded shot—"Person firing the shot"—Fuse lit by another—Explosives in Coal Mines Order of 1st September, 1913, par. 3 (a).

In a mine in which par. 3 of the Explosives in Coal Mines Order of 1st September, 1913, was in force, a miner and his son together bored and charged a shot-hole, and the son, with his father's knowledge, applied a light to the fuse. The shot missed fire, and the father believing that the fuse had not been ignited, returned within an hour in order to re-light it. As he approached, the shot exploded, and he was seriously and permanently injured. **Held** that "the person firing the shot" within the meaning of the Order and prohibited from returning within an hour was the person who actually applied the light to the fuse, and, accordingly, that the father had not acted in breach of the Order in returning to the shot-hole, and that, in so doing, he had not taken himself outside the sphere of his employment.

Baillie v Coltness Iron Co., 1922 S.C. (H.L.) 76; [1922] 1 A.C. 170; 59 S.L.R. 118; 1922 S.L.T. 108.

(77)

—Miner returning prematurely to unexploded shot—"If a shot misses fire"—Miner returning to shot in belief that it had exploded—Explosives in Coal Mines Order of 1st September, 1913 (No. 953 of 1913), par. 3 (a).

The Explosives in Coal Mines Order of 1st September, 1913, provides, par. 3—"If a shot misses fire (a) the person firing the shot shall not approach or allow any one to approach the shot-hole until an interval has elapsed of not less than . . . an hour in the case of shots fired by other means" than electricity or a squib. In a mine in which par. 3 was in force, a miner was

engaged in firing, by means of a naked light, shots prepared in a series along the working face. He had ignited the fuses of three of the shots when his lamp failed, and he retired to refill it and to await the explosions. Having heard two separate explosions, the miner came to the conclusion, erroneously but honestly and in good faith, that two of the three shots had exploded simultaneously (as sometimes occurs when two or more shots are fired by fuses at the same time), and that the two reports accounted for all three shots. He accordingly returned to the face within four minutes of the time when he had fired the shots, and the last of the three shots then exploded, and he was seriously and permanently injured. **Held** that the workman was not entitled to assume that the exceptional case of two shots exploding simultaneously had occurred, and, accordingly, that he had acted in breach of the order in returning to the shot-hole, and that the accident did not arise out of and in the course of the employment.

Sloan v Shotts Iron Co., 1922 S.C. 294; 59 S.L.R. 253; 1922 S.L.T. 270.

(78)

—Workman lighting match in mine.

A coal miner, during the customary interval in the middle of a shift, struck a match to light his pipe. An explosion immediately occurred, and the miner received injuries of which he died. To have matches in the pit was an offence under sec. 35, and the lighting of a match in the pit was an offence under sec. 32 of the Coal Mines Act, 1911, which was posted up, and in force, at the colliery. The prohibitions were known to the miner. **Held** that the accident did not arise out of the miner's employment.

Robertson v Woodilee Coal and Coke Co., 1920 S.C. (H.L.) 71; 57 S.L.R. 343; 1920, 1 S.L.T. 282.

(79)

Miner going into forbidden place to get a tool required for work.

A fireman discovered a dangerous accumulation of gas in an "upset" in a mine, and accordingly placed a fence across the entrance with "no road up here" chalked upon it. A miner, for the purpose of getting a pick which he required for his work, crossed the fence with a naked light in his cap, and was killed by an explosion of gas. The miner, who had been in conversation with the fireman and had watched him erecting the fence, had been told not to enter the "upset," and understood that there was a dangerous accumulation of gas there, besides being aware of a special rule forbidding miners to pass any fence. **Held** that the accident arose out of and in the course of the deceased's employment. **Observations** on disobedience to an order as affecting the question whether an accident arises "in the course of" the employment.

Conway v Pumpherston Oil Co., 1911 S.C. 660; 48 S.L.R. 632; 1911, 1 S.L.T. 440.

(80)

Miner endeavouring to fire a blast contrary to rule.

A miner was employed in a pit, the rules of which provided, *inter alia*—(1) that every charge should be fired by a competent person appointed in writing, and (2) that detonators should be under the control of a person specially appointed in writing, and should be issued only to shot-firers. The mineowners had in writing duly appointed a shot-firer, and had also appointed him to have the control of the detonators. In the absence of the shot-firer the miner, who had in the course of his employment been preparing a shot for firing, and who had in his possession a detonator, which, however, he had not obtained from the shot-firer, determined to fire the shot himself, and inserted the detonator in it for that purpose. The insertion of detonators was usually performed by the miners, and not by the shot-firer. When the miner attempted to ignite the fuse the shot exploded prematurely and killed him, the cause of the explosion being an accidental ignition of the fuse prior to the miner's attempt to ignite it. **Held** that the accident happened while the miner was arrogating to himself a duty which he was neither engaged nor entitled to perform, and accordingly that it did not arise out of and in course of the employment.

Kerr v William Baird & Co., 1911 S.C. 701; 48 S.L.R. 646; 1911, 1 S.L.T. 446.

(81)

Miner doing shot-firer's work contrary to rule—Breach of rule not cause of accident.

The use of explosives in a mine was regulated by statutory rules, which provided that every charge should be fired by a specially appointed shot-firer, and that, where the firing was done by electricity, it was the duty of the shot-firer himself to connect the charge with the cable, and thereafter to connect the cable with the firing apparatus, after seeing that all persons in the vicinity had taken shelter. A duly appointed shot-firer was in the habit of getting the miners to connect the charges with the cable, and on one occasion he handed the cable to a miner for the purpose of having it so connected, and, without waiting till this had been done, and without ascertaining that all persons in the vicinity had taken shelter, coupled the cable to the firing apparatus. He then fired the shot, and the miner, who had attached the cable to the charge and had not had time to retire to a place of safety, was seriously and permanently disabled by the explosion. **Held** that the accident arose out of and in the course of the miner's employment, in respect that the accident was really due to the premature firing of the charge by the shot-firer, and could not be attributed to the miner having arrogated to himself a duty which he was neither engaged nor entitled to perform.

Smith v Fife Coal Co., 1914 S.C. (H.L.) 40; [1914] A.C. 723; 51 S.L.R. 496; 1914, 1 S.L.T. 385.

(82)

Riding on hutch in breach of rule.

A miner on leaving his work jumped on to a hutch for the purpose of getting a ride to the pit bottom, and was injured by reason of his doing so. By a special rule in force in the mine, of which the miner was aware, miners were forbidden to ride on hutches. **Held** that the injury was not caused by an accident arising "out of" the employment.

Kane v Merry & Cuninghame, 1911 S.C. 533; 48 S.L.R. 430; 1911, 1 S.L.T. 113.

(83)

Railway porter jumping on to footboard of incoming train in breach of rules.

A railway porter, whose duty it was to unload passengers' luggage, was seriously and permanently injured by falling on to the rails while attempting to jump on to the footboard of an incoming train in order to be ready to remove the luggage as quickly as possible when the train stopped. This act was in breach of the company's rules, a copy of which the porter had received but had not read, and he had been reprimanded by the stationmaster for doing the same thing on previous occasions. **Held** that the accident arose out of and in the course of his employment.

M'William v Great North of Scotland Railway Co., 1914 S.C. 453; 51 S.L.R. 414; 1914, 1 S.L.T. 294.

(84)

Dangerous method of doing work—Disobedience to instructions.

A machine moulder, working on piece-work at a hydraulic press, required in the course of his duties to remove from time to time the loose sand which collected at the top of the moulding box below the moveable upper plate of the press. For this purpose he was supplied by his employers with a wooden scraper, and express instructions were issued that the sand from the top of the moulding boxes should be removed by means of these scrapers. In disregard of these instructions, and in order to increase his output and so to earn a higher wage, he was in the habit of removing the sand, whenever it accumulated, by inserting his hand between the moulding box and the upper plate. While doing so his hand was caught by the hydraulic press and crushed. **Held** that the accident did not arise out of the employment.

Gaunt v Babcock & Wilcox, 1918 S.C. 14; 55 S.L.R. 28; 1917, 2 S.L.T. 147.

(85)

Prohibited act outwith employment—Cleaning machinery in motion.

A workman was employed in a factory as underman at a mangle. His duties were to carry the cloth to and from the mangle and to assist the headman in putting it on to the rollers. It was no part of his duty to be inside the rail fencing the mangle or to interfere with the mangle while working. Cleaning machinery while in motion was prohibited, but on two days in each week the machinery was stopped in the

early morning for cleaning, and it was the duty of the workman to assist the headman to clean the mangle at these times. While the machinery was in motion, and in the absence of the headman, the workman, without orders, went inside the rail and attempted to clean a part of the mangle, and was injured. **Held** that the accident did not arise out of and in the course of his employment.

M'Diarmid v Ogilvy Brothers, 1913 S.C. 1103; 50 S.L.R. 883; 1913, 2 S.L.T. 133.

(86)

Dock labourer ordered to stop work because of intoxication—Subsequently found drowned.

M'Intyre v Stewart, 1916 S.C. 91; 53 S.L.R. 62; 1915, 2 S.L.T. 288, No. 25, *supra*.

(87)

Message boy injured while using hoist—Notice displayed that hoist to be used only by servants of institution to which message boy sent.

M'Daid v Steel, 1911 S.C. 859; 48 S.L.R. 765; 1911, 2 S.L.T. 13, No. 67, *supra*.

(88)

Workman on ship jumping from quay to vessel—Contrary to rule—Rule frequently broken.

Martin v Fullerton & Co., 1908 S.C. 1030; 45 S.L.R. 812; 16 S.L.T. 219, No. 68, *supra*.

(g) Effect of Intoxication.

(89)

Intoxicated seaman falling from ladder leading from quay to ship.

While a vessel was lying in port some of the crew were allowed to go ashore to make purchases for themselves. One of them returned at a late hour in a dazed condition due to intoxication, and endeavoured to get on board by means of a ladder 40 feet long, which reached from the quay to the bulwark and formed the only means of access to the ship from the quay. The arbitrator stated that the seaman "caught hold of the sides of the ladder and went up without help, but in stepping from the ladder on to the rail of the bulwark, he, as the result of his dazed condition due to the liquor he had consumed, let go his grip of the ladder with both hands, lost his footing and fell back, struck the quay, and falling into the water was drowned." **Held** that the arbitrator's finding must be read as a finding in fact that the sole cause of the accident was the seaman's intoxicated condition, and, accordingly, that the accident had not arisen out of his employment.

Scrimgeour v Thomson & Co., 1922 S.C. (H.L.) 64; 59 S.L.R. 66; 1922 S.L.T. 47.

(90)

Commercial traveller run over by train while drunk—Unexplained death.

A commercial traveller, in the course of his rounds, arrived late in the day at a

town where he had customers. He, however, did not attempt to transact business, but proceeded to get intoxicated, and while in this condition found his way to the railway station (where he could get a train for his home), and when last seen uninjured he was sitting on a seat on the platform. After a goods train had passed, he was found on the line, having been run over by the train and having sustained injuries from which he died. No one saw how he got, or fell, on to the line. **Held** that the accident did not arise out of the employment of the deceased.

Renfrew v R. & J. McCrae, 1914 S.C. 539; 51 S.L.R. 467; 1914, 1 S.L.T. 354.

(91)

Driver of traction-engine falling from engine while drunk.

The driver of a traction-engine, while driving the engine, fell from the footplate and was run over and killed. The arbitrator found that the accident did not arise out of his employment, in respect that the man was under the influence of drink and unfit for his work at the time of the accident. **Held** that the accident arose out of and in the course of the employment.

Fraser v Riddell & Co., 1914 S.C. 125; 51 S.L.R. 110; 1913, 2 S.L.T. 377.

(h) Miscellaneous.

(92)

Mistake of workman—Seaman drinking water containing caustic soda.

The crew of a vessel lying in a Mediterranean harbour were in the habit, with the sanction of the officers, of cooling their drinking water, after drawing it from the ship's pump, by placing it in tins in a cool part of the ship. There was a good deal of give and take in the matter, one man often drinking water which had been carried from the pump by another. A seaman found a tin at a place where there was hawse holes, and, thinking it contained sometimes a draught of air through the water which had been placed there to cool, he drank from it. The tin, which belonged to the boatswain, contained a solution of caustic soda, and the seaman was seriously and permanently disabled. **Held** that there was no evidence to justify an arbitrator in finding that the accident arose out of the seaman's employment.

M'Kinnon v J. & P. Hutchison, 1916 S.C. (H.L.) 111; [1916] 1 A.C. 471; 53 S.L.R. 232; 1916, 1 S.L.T. 158.

(93)

Resorting to wrong place for necessary purpose.

A workman, who was employed to attend to the boilers at a colliery, left his work on one occasion for a necessary purpose; but instead of going to the water-closets provided by his employers, he went into a space under the table-engine about four feet in height. While there he accidentally plunged his foot into a cistern in the floor of this place, which received the escape

water from the engine, and his foot was thereby scalded. **Held** that the accident did not arise out of and in the course of his employment.

Thomson v Flemington Coal Co., 1911 S.C. 823; 48 S.L.R. 740; 1911, 1 S.L.T. 438.

2. SEC. 1 (2) (b)—OPTION TO CLAIM COMPENSATION OR TO TAKE PROCEEDINGS AGAINST EMPLOYER INDEPENDENTLY OF ACT.

[See Cases under Act 1897, II. 2, *infra*.]

3. SEC. 1 (2) (c)—SERIOUS AND WILFUL MISCONDUCT.

[See also Cases under Act 1897, II. 3, *infra*.]

(1) WHAT CONSTITUTES.

(a) Breach of Rules and Orders.

[See also Cases under Act 1897, II. 3 (1) (a), *infra*.]

(94)

Coal mine—Bottomer opening gate fencing shaft before cage stopped—Question of fact or law.

By the additional special rules in force in a coal mine, under the provisions of the Coal Mines Regulations Act, 1887, it was provided, rule 3:—"The bottomer at a mid-working in a vertical shaft . . . shall not open the gate fencing the shaft until the cage is stopped at such mid-working." A bottomer at a mid-working who required a cage signalled for a cage at the bottom of a shaft to be sent to the mid-working. He did so by the ordinary method in use in that mine, viz., by calling to the bottomer at the foot of the shaft, who thereupon signalled to the engineman at the surface to draw up the cage. On receiving such a signal the engineman usually stopped the cage in the course of its ascent at the mid-working, but was not bound to do so, and did not invariably do so. On the signal to raise the cage being given the bottomer opened the gate, and, without ascertaining whether the cage had really stopped, went behind a hutch to push it into the cage, but the cage on the occasion in question had not been stopped at the mid-working, and the hutch fell to the foot of the shaft, drawing the bottomer with it, whereby he was injured. **Held** that the facts proved entitled the arbitrator to find that the injuries were attributable to the serious and wilful misconduct of the workman.

George v Glasgow Coal Co., 1909 S.C. (H.L.) 1; [1909] A.C. 123; 46 S.L.R. 28; 16 S.L.T. 463.

(95)

—Workman handling explosive and permitting naked light to remain in cap.

By the special rules in force in a coal mine

it was provided that a workman while handling any explosive "shall not . . . permit a naked light to remain in his cap, or in such a position that it could ignite the explosive." A miner in that mine, with the intention of counting the charges of powder in his canister, sat down on the ground, placing the canister on his left, and his cap with a naked light in it on his right, at a distance of five feet from the canister. In counting the charges he brought them nearer the light than the canister, and nearer than was necessary. They were ignited by a spark from the light, and an explosion resulted, causing injuries which temporarily incapacitated the miner. **Held** that the above facts were sufficient to entitle the arbitrator to find that the workman's injuries were attributable to his serious and wilful misconduct.

Donnachie v United Collieries, 1910 S.C. 503; 47 S.L.R. 412; 1910, 1 S.L.T. 251.

(96)

Approaching shot-hole after misfire contrary to regulations—Unexplained motive of workman.

A miner ignited two fuses, each attached to a separate shot-hole, and then retired to shelter. On charge exploded within a minute; and a minute and a half after hearing the sound of that explosion the miner returned towards the shot-hole of the unexploded charge, contrary to rule 3 of the Explosives in Coal Mines Order, 1913, which requires that, when a shot fired by a fuse misses fire, the firer must not approach the shot-hole within an hour. As the miner was approaching the shot-hole the charge exploded and he was injured, but not seriously and permanently. There was no evidence to explain how the miner came to return so soon to the shot-hole, except a statement by him (which the arbitrator rejected as contrary to the evidence) that he had lighted only one fuse. **Held** that, on these facts, the arbitrator was justified in holding that the miner had been guilty of serious and wilful misconduct.

M'Kenna v Niddrie and Benhar Coal Co., 1916 S.C. 1; 53 S.L.R. 1; 1915, 2 S.L.T. 234.

(97)

Miner returning prematurely to unexploded shot—"If a shot misses fire"—Explosives in Coal Mines Order of 1st September, 1913 (No. 953 of 1913), par. 3 (a).

The Explosives in Coal Mines Order of 1st September, 1913, provides, par. 3:—"If a shot misses fire—(a) the person firing the shot shall not approach . . . the shot-hole until an interval has elapsed of not less than . . . an hour in the case of shots fired by other means" than electricity or a squib. In a mine in which par. 3 was in force, two miners were engaged together in firing shots at their working-place by means of fuses and naked lights. One lit the fuse of his shot, and the other simultaneously applied a light to the fuse of his shot, but believed he had not suc-

ceeded in lighting it. Both men then retired to a place of safety. The shot that was known to be lit duly exploded, and the other miner, in the belief that his shot had not been lit, immediately went back to light it. As he was approaching the shot it exploded and injured him, but not seriously and permanently. No notice had been posted in the mine directing that the rule should be held to apply to attempts to light a shot as well as to actual lighting. **Held** (1) that the shot had "missed fire" within the meaning of par. 3 of the Order, and, accordingly, that the miner was in breach of the Order in returning to the shot-hole within an hour; and (2) that, although the miner honestly believed that the shot had not been lit and accordingly that the Order did not apply, the arbitrator was entitled to hold that he had been guilty of serious and wilful misconduct; and compensation refused.

Smith v Archibald Russell, Limited, 1921 S.C. 335; 58 S.L.R. 284; 1921, 1 S.L.T. 171.

(98)

Return to working place when a shot had been lighted and had not exploded.

Held that a rule against returning to a place when "a shot has been lighted and does not explode" applied whenever a light had been applied to a fuse, and that a workman who disobeyed the rule was guilty of serious and wilful misconduct.

Waddell v Coltness Iron Co., 1912, 50 S.L.R. 29; 1912, 2 S.L.T. 301.

(b) Other Cases.

[See also Cases under Act 1897, II. 3 (1) (b).]

(99)

Dangerous act — Miner crossing working shaft.

A roadsman, working at a pit bottom, crossed the working shaft to fetch a tool in order that he might help to repair a breakdown in another shaft. He waited for the cage to be raised before crossing, but it was lowered again without warning, and he was severely crushed by it. A "bont-gate" or by-pass round the shaft was provided for the workmen, and though it was also used for the hutchies, it was never so crowded as to prevent a man passing. Though there was no special rule prohibiting workmen from crossing the shaft, it was recognised by them that there was great risk in doing so, and in practice no one crossed it unless the cage was in its seat. **Held** that the above facts were sufficient to entitle the arbitrator to find that the injuries were attributable to the serious and wilful misconduct of the workman.

Leishman v William Dixon, Limited, 1910 S.C. 498; 47 S.L.R. 410; 1910, 1 S.L.T. 273.

(2) WHETHER INJURY ATTRIBUTABLE TO MISCONDUCT.

[See II. 3 (2), *infra*.]

(3) QUESTION OF FACT OR LAW.

[See Cases under Act 1897, II. 3 (3), *infra*.]

4. SEC. 1 (3)—SETTLEMENT OF DISPUTES.

[See also Cases under Act 1897, II. 4, *infra*.]

(1) AGREEMENTS.

[Cf. I. 2 and 3, *infra*.]

(100)

Constitution of agreement — Admission of liability and payment of compensation.

In an application to an arbitrator for an award of compensation under the Workmen's Compensation Act, 1906, the pursuer averred: "The defenders admitted liability to pursuer in respect of said accident and the said injuries sustained by him under said Workmen's Compensation Act, 1906, and paid pursuer compensation at the rate of 10s. per week up to and including payment for the week ending 9th December, 1914, since which date defenders refuse to continue payment." The defenders objected to the competency of the proceedings, on the ground that these averments disclosed that the questions between the parties had been settled by agreement. **Held** that the averments did not instruct an agreement within the meaning of sec. 1 (3) of the Act, and accordingly that the application was competent.

Kane v John G. Stein & Co., 1915 S.C. 863; 52 S.L.R. 689; 1915, 2 S.L.T. 33.

(101)

Agreement in settlement of claim for compensation — Liability denied, but claim settled as though compensation due.

Held that an agreement between a workman and his employers for the settlement of a claim for compensation by payment of a lump sum may be an "agreement" in the sense of the Workmen's Compensation Act, even though the employers dispute liability to pay compensation, if, in fact, they have agreed to the amount of the compensation being fixed as though they were liable under the Act.

M'Guire v Paterson & Co., 1913 S.C. 400; 50 S.L.R. 289; 1913, 1 S.L.T. 32.

(102)

Reduction of agreement—Agreement for redemption of compensation by payment of lump sum—Mutual error as to extent of injury.

A workman, with the advice of his law agent, agreed with his employers to accept a lump sum in settlement of a claim for compensation due to him in respect of injuries caused by an accident, and a memorandum of the agreement was recorded. In a subsequent action for reduction of the memorandum he averred that both parties were in error as to the extent of his injuries at the time when the agreement was made, both being under the belief that he would recover

in a few weeks, whereas, as it turned out, he was permanently incapacitated. **Held** that these averments did not disclose a relevant ground for setting aside the agreement. *M'Guire v Paterson & Co.*, 1913 S.C. 400; 50 S.L.R. 289; 1913, 1 S.L.T. 32.

(103)

Reduction on ground of minority and lesion.

A minor, injured by an accident in the course of his employment, agreed, without consulting his father, to accept compensation under the Workmen's Compensation Act, 1906. After compensation had been paid for some time he brought an action of damages for his injury at common law, in which he averred that he had accepted the statutory compensation in ignorance of his common law claim; and contended that he being a minor, the agreement should be reduced on the ground of minority and lesion. **Held** that the pursuer was entitled to an inquiry into the facts.

M'Feetridge v Stewarts & Lloyds, 1913 S.C. 773; 50 S.L.R. 505; 1913, 1 S.L.T. 325.

(104)

Reduction of registered memorandum of agreement—Competency—A.S., June 26, 1907, sec. 12 (C.A.S., L. xiii. 12).

John Brown & Co. v Orr, 1910 S.C. 526; 47 S.L.R. 437; 1910, 1 S.L.T. 138, No. 293, *infra*.

Mackinnon v Fairfield Shipbuilding and Engineering Co., (O.H.) 1920, 2 S.L.T. 118; 1921, 2 S.L.T. 270, No. 294, *infra*.

(2) ARBITRATION—COMPETENCY.

[See also I. 25 and under Act 1897, II. 4 (2), *infra*.]

(105)

Compensation being paid — "Question" arising under the Act.

A workman, who was receiving full compensation for total incapacity under the Workmen's Compensation Act, 1906, applied for the registration of a memorandum of agreement for payment of compensation at that rate until ended, diminished, &c., in terms of the Act. The genuineness of this memorandum was objected to by the employers, on the ground that the workman had signed a receipt bearing that he had agreed that compensation should be paid only while his employers were of opinion that his incapacity continued. The workman accordingly abandoned the application. He then presented an application for arbitration to fix the amount of compensation, to the competency of which the employers objected on the ground that, as full compensation was being paid, there was no "question" arising in any proceedings under the Act within the meaning of sec. 1 (3) thereof. **Held**, in the circumstances, that there was a "question" in the sense of the Act, and that the workman was

entitled to apply for and to obtain an award of compensation.

Hunter v John Brown & Co., 1912 S.C. 996; 49 S.L.R. 695; 1912, 1 S.L.T. 487.

(106)

Whether any "question" as to compensation has arisen—Delay in replying to request for admission of liability.

The employers of an injured workman, in response to a letter inquiring whether they admitted liability to pay him compensation, requested him to submit himself to medical examination. The workman did so. Thirteen days later, as no further communication had been received from his employers, the workman initiated arbitration proceedings for an award of compensation. **Held** that these proceedings were incompetent, in respect that, as the employers could not be held to have refused to admit liability, no "question" for arbitration had arisen, within the meaning of sec. 1 (3) of the Act.

Crone v Donaldson Line, 1916 S.C. 532; 53 S.L.R. 540; 1916, 1 S.L.T. 373.

(107)

Question as to liability to pay compensation—Validity of discharge.

In an arbitration arising out of a claim under the Workmen's Compensation Act, 1906, the employers pleaded in defence a discharge signed by the injured workman acknowledging receipt of a payment of £2 1s. 2d., as "in full satisfaction and discharge of all claims past and future," competent to him in consequence of his injuries. The arbitrator found that the workman had signed the discharge in the belief that it was merely a receipt for past due compensation. He also found that the employers' cashier, who took the discharge, believed that the workman had fully recovered, while in point of fact he was still totally incapacitated. On these findings he held that the discharge was not a bar to the recovery of compensation, and found the workman entitled to compensation. On an appeal **held** that the effect of the discharge was a question arising in the proceedings as to the liability to pay compensation in the sense of sec. 1 (3) of the Act, and that the arbitrator was acting within his jurisdiction in determining it.

Ellis v Lochgelly Iron and Coal Co., 1909 S.C. 1278; 46 S.L.R. 960; 1909, 2 S.L.T. 224.

(108)

Competency—"Question" as to duration of compensation—Act of Sederunt, 26th June, 1907, sec. 2 (C.A.S., L. xiii. 2).

The employers of a workman, who had been totally incapacitated by an accident, admitted liability under the Workmen's Compensation Act, tendered the amount of compensation due (as to which there was no dispute), and requested the workman to sign a receipt which contained this clause—"At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week

by week when application for payment is made." The workman objected to this clause on the ground that he was entitled to have an unqualified admission of liability, refused to sign the receipt, and initiated arbitration proceedings. **Held** that there was a question between the parties as to the duration of the compensation which had not been settled by agreement, and accordingly, that the arbitration was competent.

Freeland v Summerlee Iron Co., 1913 S.C. (H.L.) 8; [1913] A.C. 221; 50 S.L.R. 518; 1913, 1 S.L.T. 239.

(109)

Application by employers to have compensation ended at certain date—Workman not claiming payments in respect of period subsequent to date in question.

A workman claimed £1 15s. 11d. as compensation for 2 5-6th weeks ending on 13th April, 1908. He made no claim for any period subsequent to that date. The employers, while admitting that they were due the amount claimed, averred that the workman's incapacity had ceased on 13th April, 1908, and craved the arbitrator to grant an order ending the compensation as at that date. The arbitrator decreed for the sum claimed; but, on the ground that there was no dispute between the parties as to the period subsequent to 13th April, 1908, submitted to arbitration, he made no further order. **Held** that the arbitrator, besides issuing a finding as to the amount due, should have proceeded to determine whether the compensation should be ended as at 13th April, 1908.

Malcolm v Bowhill Coal Co., 1909 S.C. 426; 46 S.L.R. 354; 1909, 1 S.L.T. 177.

(110)

Arbitration to obtain award of compensation—Simultaneous application for warrant to record memorandum of agreement—Conjunction.

A workman presented an application in the sheriff court for warrant to record a memorandum of agreement for payment of compensation under the Workmen's Compensation Act, 1906, in respect of an accident. The genuineness of the memorandum was disputed by his employers. While the application was pending he initiated arbitration proceedings to obtain an award of compensation under the Act in respect of the same accident. **Held** that the two proceedings could not competently be conjoined, and that the arbitration should be sisted until the application for the warrant had been determined.

King v Arniston Coal Co., 1913 S.C. 892; 50 S.L.R. 685; 1913, 1 S.L.T. 451.

5. SEC. 1 (4)—ASSESSMENT OF COMPENSATION ON FAILURE OF ACTION OF DAMAGES.

[See also II. 5, *infra*.]

(111)

Parties entitled to assessment of compensa-

tion—Dependants not parties to action for damages—Claim not made within six months.

Held that the privilege given by sec. 1 (4) of the Workmen's Compensation Act, 1906, of having compensation in terms of the Act assessed by the Court in which an unsuccessful action for damages has been brought, is a privilege personal to the pursuer in the action for damages, and that other persons, who have not claimed compensation within six months, are not entitled to be sisted as parties to the compensation proceedings.

M'Ginty v Kyle, 1911 S.C. 589; 48 S.L.R. 474; 1911, 1 S.L.T. 272.

(112)

Time for making application to assess compensation—Procedure—Expenses of application.

Held (after consultation with the judges of the other division) that where a workman, who has been unsuccessful before a jury in the Court of Session in an action of damages for personal injuries directed against his employer, desires to move the Court to assess compensation under the Workmen's Compensation Act, the motion must be made before the verdict of the jury is applied, and if not so made it will be too late. **Observations** on the character of the proceedings and the scope of the inquiry that will follow on the granting of such a motion. Circumstances in which **held** that a workman, who had been unsuccessful in an action of damages for personal injuries against his employers, but had thereafter applied for, and been awarded, compensation under sec. 1 (4) of the Workmen's Compensation Act, was entitled to the expense of obtaining the award of compensation.

Slavin v Train & Taylor, 1912 S.C. 754; 49 S.L.R. 93 and 577; 1911, 2 S.L.T. 410; 1912, 1 S.L.T. 349.

(113)

Cause appealed for jury trial—Motion to fix compensation.

A workman raised an action of damages for personal injuries against his employer in the sheriff court. The cause having been appealed to the Court of Session for jury trial, an issue was approved and the cause remitted to the Lord Ordinary "to proceed as accords." The pursuer, being satisfied that he could not support the only averments on which he had obtained an issue in the motion roll, moved the Lord Ordinary, under sec. 1 (4) of the Workmen's Compensation Act, to allow a proof of what was due as compensation under the Act, or alternatively to remit to the sheriff to deal with the question. No claim had been made under the Act within six months of the accident. The Lord Ordinary refused the motion on the ground that (1) since the action had not been tried or evidence led before him, there were no materials before him on which he could determine the question whether compensation was due or what the amount thereof might

be, and (2) no claim had been made under the Act within six months of the accident.

M'Carten v M'Robbie, (O.H.) 1909, 2 S.L.T. 469.

(114)

Action not raised within six months of accident.

A workman who had met with an accident raised an action of damages against his employers in which a verdict was returned for the defenders. Before the verdict was applied a motion was made to have compensation assessed under the Workmen's Compensation Act. **Held** that the motion was incompetent in respect that the action had not been raised within six months of the date of the accident.

Durkin v Distillers Company, (O.H.) 1913, 2 S.L.T. 450.

6. SEC. 2—TIME FOR TAKING PROCEEDINGS—NOTICES AND CLAIMS.

[See also II. 6, *infra*.]

(115)

Computation of time — Claim within six months of accident.

A workman who was injured through an accident occurring at 11.30 a.m. on 24th November, 1908, lodged with his employers a claim for compensation under the Workmen's Compensation Act, 1906, at 5.30 p.m. on 24th May, 1909. In an application for compensation by the workman **held** that the claim had been made within six months from the occurrence of the accident as required by sec. 2 (1) of the Act.

Peggie v Wemyss Coal Co., 1910 S.C. 93; 47 S.L.R. 149; 1909, 2 S.L.T. 448.

(116)

"Mistake or other reasonable cause"—Failure to give notice of accident.

On 9th May, 1910, a collector for an assurance company fell, in the course of his employment, on a stair and sustained injuries. A day or two after the accident, and again on 8th June, while he still believed that his injuries were temporary, he gave verbal notice of the accident, but made no claim for compensation. On 29th June he left the service of the company, and from that date onwards he was incapacitated. On 12th September, when he had ascertained from medical advice that his condition was much more serious than he had at first supposed, he gave formal notice of the accident. Circumstances in which **held** that the delay in giving notice was due to "mistake . . . or other reasonable cause" within the meaning of sec. 2 (1) (a) of the Workmen's Compensation Act, and so was not a bar to the maintenance of proceedings for compensation.

Millar v Refuge Assurance Co., 1912 S.C. 37; 49 S.L.R. 67; 1911, 2 S.L.T. 361.

(117)

Ignorance of serious nature of injuries—Delay in giving notice and making claim.

Held that, where a delay of more than six

months in giving notice and claiming compensation was due to the workman's ignorance of the serious nature of his injury, it was occasioned by "mistake or other reasonable cause," within the meaning of sec. 2 (1) of the Act, and so was not a bar to the maintenance of proceedings for compensation.

Ellis v Fairfield Shipbuilding and Engineering Co., 1913 S.C. 217; 50 S.L.R. 137; 1912, 2 S.L.T. 485.

(118)

Failure to realise seriousness of injury—Delay in giving notice.

A workman, who could not read or write, sustained an apparently trifling injury to his finger on 2nd December, 1913. His doctor treated the case as one of septic poisoning, but disapproved of his returning to work. The workman, however, continued to work until 22nd February, 1914, when he became disabled. In March he consulted another doctor, upon whose advice he went into hospital, and remained there from 24th March until 22nd April. He was found to be suffering from an obscure constitutional disease, which might be awakened into activity by such an injury as he had sustained. It was not until he consulted the second doctor in March that he began to regard his injury as serious, and not until he was in hospital that he began to consider the question of compensation. Formal notice was first given to the employers on his behalf on 22nd April. **Held** that, on these facts, the arbitrator was entitled to find that the workman's failure to give notice as soon as practicable was due to a "reasonable cause" within the meaning of sec. 2 (1) (a) of the Workmen's Compensation Act, 1906.

Flood v Smith & Leishman, 1915 S.C. 726; 52 S.L.R. 471; 1915, 1 S.L.T. 340.

(119)

Reasonable cause—Failure to make claim within six months.

A workman, who had been injured, was offered compensation under the Act. He resolved not to accept it, and instructed an agent to recover damages. This agent threatened on his behalf to raise an action at common law against his employers, and had several meetings with the agent of the insurance company which insured the employers, who was anxious to avoid litigation and to get the workman to accept compensation. Nothing, however, had been arranged, and no action had been raised by the workman, when the period of six months from the accident expired. On the workman subsequently initiating proceedings under the Act, the arbitrator found that he had failed to make a claim timeously in terms of sec. 2 (1) of the Act, and that there was no "reasonable cause" for this failure, and dismissed the application. **Held** that there was no ground for disturbing the arbitrator's findings.

Devons v Anderson & Sons, 1911 S.C. 181; 48 S.L.R. 187; 1910, 2 S.L.T. 401.

(120)

Workman suffering from injury but hopeful of recovery—Delay in giving notice.

A miner was struck in the abdomen by a hutch on 22nd December, 1920, and, though suffering from the effect of the injury so as to require assistance in his work, he continued to work until 31st December in the hope that he would recover during the New Year holidays. On 3rd January, 1921, he had to take to bed, and on 20th January an operation was performed on him for opening an abscess on the abdominal wall. Notice of the accident was first given to the employers on his behalf on 11th January, 1921. **Held** that, on the facts, the arbitrator was entitled to find that the workman's failure to give notice as soon as practicable was not occasioned by "mistake . . . or other reasonable cause" within the meaning of sec. 2 (1) (a) of the Workmen's Compensation Act, 1906.

Livingstone v Summerlee Iron Co., 1922 S.C. 272; 59 S.L.R. 212; 1922 S.L.T. 209.

(121)

"Prejudice" to the employer in his defence—Failure to give notice of accident.

A miner was subjected to severe exertion on 28th December, 1914, while engaged in his work, and died that afternoon, the cause of death being found by an arbitrator acting under the Workmen's Compensation Act to be heart failure the result of heart strain. No notice of the accident or intimation of a claim for compensation was given to the employers until 6th January, 1915, some days after the funeral. After notice had been given, no application was made by the employers for the exhumation of the body. **Held** that the arbitrator was entitled to hold that the employers had not been prejudiced in their defence by the delay which had occurred in giving notice, and that accordingly he was entitled to award compensation.

Kirk v Lochgelly Iron and Coal Co., 1917 S.C. (H.L.) 18; 54 S.L.R. 22; 1916, 2 S.L.T. 230.

7. SECS. 3 AND 15—CONTRACTING OUT.

(122)

Scheme certified under Act of 1897—Recertification.

The Workmen's Compensation Act, 1906, came into operation on 1st July, 1907. A workman entered an employment on 9th August, 1907, and agreed to accept a scale of compensation provided by a scheme certified under the Workmen's Compensation Act, 1897, the certificate bearing that the scheme was to expire on 31st December, 1908. On 15th August, 1907, when the scheme had not been re-certified under sec. 15 of the Workmen's Compensation Act, 1906, the workman was injured by an accident arising out of and in the course of his employment. **Held**, on a construction of secs. 3 and 15 of the Act of 1906, that, the workman having entered on his employment

after 1st July, 1907, he was not barred from obtaining compensation under the Act by having agreed to accept the provisions of a scheme certified under the Act of 1897, but which had not been re-certified under the Act of 1906.

Wallace v Hawthorne, Leslie & Co., 1908 S.C. 713; 45 S.L.R. 547; 15 S.L.T. 977.

8. SEC. 4—SUB-CONTRACTING.

[See also Cases under Act 1897, II. 7, *infra*.]

(123)

Work "undertaken" by the principal.

A firm of chemical manufacturers contracted with a certain person to tar the outside of tanks used in their business to protect them from the weather, and a workman in the employment of the contractor was killed by an accident while engaged on the works. In a claim for compensation by the workman's widow, **held** that the work of tarring the tanks was not part of the work "undertaken" by the chemical manufacturers, within the meaning of sec. 4 (1) of the Workmen's Compensation Act, 1906, and that they were not liable to pay compensation.

Zugg v J. & J. Cunningham, 1908 S.C. 827; 45 S.L.R. 670; 16 S.L.T. 52.

(124)

Work undertaken by principals "in the course of or for the purposes of" their business.

Shipowners entered into a contract with A for the cleaning of the boilers of one of their ships which was lying in Glasgow harbour. B, one of several boiler scalers employed and paid by A to do the work, was accidentally injured while so employed. Shipowners on the river Clyde occasionally have the work of boiler scaling performed by their own men without calling in a contractor. **Held** that the work which A contracted to do, and at which B was engaged at the time of the accident, was not work undertaken by the shipowners in the course of or for the purposes of their trade or business in the sense of sec. 4 (1) of the Workmen's Compensation Act, 1906; and that accordingly they were not liable to pay compensation to B.

Spiers v Elderslie Steamship Co., 1909 S.C. 1259; 46 S.L.R. 893; 1909, 2 S.L.T. 107.

9. SEC. 5—BANKRUPTCY OF EMPLOYER.

(125)

Liquidation of insurance company—Subsequent liquidation of employers' company.

An employee who was entitled to compensation was ranked for his claim in the liquidation of the insurance company with which his employers were insured. On the subsequent liquidation of the employers' company, he lodged a claim to be ranked

for the full amount of compensation due to him. **Held** that sec. 5 (1) was not applicable and that he was entitled to be ranked for his claim on assignment to the liquidator of his claim against the insurance company.

Liquidator of Thrashbush Coal Co. v M'Inally, (O.H.) 1915, 1 S.L.T. 430.

10. SEC. 6—REMEDIES AGAINST EMPLOYER AND THIRD PARTY.

[See also Cases under Act 1897, II, 8, *infra*.]

(126)

Election of remedy—Recovery of compensation from employer—Competency of action against third party—Personal bar.

A workman, who had been injured on 15th January, intimated a claim of damages against a third party by whose fault he alleged the injuries had been caused, and thereafter brought an action of damages against the third party. He made no claim for compensation against his employers, but, in accordance with the custom of their firm with regard to workmen who were off work through illness, they paid him half-wages from the date of the injury. On 14th March the workman entered into an agreement with his employers to refund these payments should he succeed in recovering damages from the third party, and he thereafter signed receipts for the payments that had been made. **Held** that the payments made to the workman were not made or received as compensation under the Workmen's Compensation Act, 1906, and, accordingly, that he was not barred, under sec. 6 (1) of the Act, from recovering damages from the third party.

Frame v Taylor, 1918 S.C. 343; 55 S.L.R. 288; 1918, 1 S.L.T. 203.

(127)

"Recovery" of compensation—Reservation of claims against third parties.

An injured workman obtained compensation from his employers, for which he granted receipts which bore that he had "elected to take compensation under the Workmen's Compensation Act." They further bore to be granted "under reservation of my claims against third parties," and he agreed with his employers to repay the sums received from them if he recovered damages from the third parties whom he alleged to be responsible for the accident. In an action of damages by the workman against these third parties, **held** that he had not "recovered" compensation in the sense of sec. 6 of the Workmen's Compensation Act, 1906, so as to be barred from pursuing the action.

Wright v Lindsay, 1912 S.C. 189; 49 S.L.R. 210; 1911, 2 S.L.T. 444.

(128)

Footings on which payments made.

An injured workman intimated to his employers that he intended to take proceedings for damages against a third party, and re-

quested them meanwhile to pay whatever compensation was due to him under the Workmen's Compensation Act, 1906, "on the understanding that should he succeed in obtaining damages" from the third party, he would repay to them whatever compensation they might have paid. On that footing weekly payments, corresponding to the amount of compensation due to him, were made to the workman by his employers. In an action of damages at his instance against the third party, **held** that, as the workman had not de facto recovered compensation from his employers, but had merely received payments in terms of a special agreement, he was not barred, under sec. 6 (1) of the Workmen's Compensation Act, 1906, from recovering damages.

Kelly v North British Railway Co., 1916 S.C. 19; 53 S.L.R. 53; 1915, 2 S.L.T. 247.

(129)

An injured workman received weekly payments for more than a year from his employers, and granted a receipt for the first payment as "being compensation for accident sustained." The word "compensation" did not appear in subsequent receipts, and they ultimately bore to be granted "without prejudice and under reservation of any claim against third parties." In a subsequent action of damages at the instance of the workman against a third party through whose fault he alleged that he had been injured, he averred that, at the time when the payments by his employers began, he was a minor and was unaware of his legal rights, and that he was willing, in the event of his recovering damages from the defender, to repay to his employers the money received from them. **Held** that, as the workman had de facto recovered compensation from his employers, he was barred under sec. 6 (1) of the Workmen's Compensation Act, 1906, from recovering damages; and action dismissed.

Aldin v Stewart, 1916 S.C. 13; 53 S.L.R. 49; 1915, 2 S.L.T. 239.

(130)

Compensation awarded in absence of workman.

A workman brought an action of damages in the Court of Session for personal injuries against a stranger who was not his employer. While the action was still pending the workman presented a petition in the sheriff court craving compensation from his employer under the Workmen's Compensation Act, 1906, and the sheriff, on the motion of the employer, there being no appearance for the workman, made an award of compensation. The workman refused to accept the award of compensation. **Held** that the workman had recovered compensation within the meaning of sec. 6 (1) of the Act, and accordingly was barred under the section from insisting in the common law action.

Buchanan v Alexander Cross & Sons, (O.H.) 1911, 2 S.L.T. 33.

(131)

Action of damages by father against railway company for death of son—Railway company not son's employers—Bar of action by son having recovered compensation from his employers.

A workman, employed by a colliery company as brakesman on a branch line of railway belonging to his employers, was incapacitated for work as the result of an accident, and received from his employer compensation under the Workmen's Compensation Act for three years, until he died from his injuries. His father thereupon brought an action of damages in respect of his son's death against a railway company, owing to whose fault, he averred, the accident had happened. The Court dismissed the action, holding that the pursuer's claim was excluded by sec. 6 of the Workmen's Compensation Act, 1906, on account of his son having recovered compensation from his employers.

Gray v North British Railway Co., 1915 S.C. 211; 52 S.L.R. 144; 1914, 2 S.L.T. 435.

11. SEC. 7—APPLICATION OF ACT TO SEAMEN.

(132)

Date from which compensation payable—Suspension of compensation during maintenance of injured seaman—Discharge of claim for maintenance—Injured seaman deserting during conveyance to return port—Merchant Shipping Act, 1906, sec. 34 (1).

A seaman, who had been injured during a round voyage from Bombay to the United Kingdom and back to Bombay, rejoined his ship after treatment in hospital, though still partially incapacitated. While in course of being returned to Bombay, in terms of the Merchant Shipping Act, 1906, he deserted his ship; and thereafter he applied for compensation. The arbitrator, holding that the seaman's right to compensation was excluded until he returned to Bombay, refused, *hoc statu*, to make an award of compensation. Held that the liability for the seaman's maintenance imposed on the owners by sec. 34 (1) of the Merchant Shipping Act, 1906, ceased at the date of his desertion, and, accordingly, that, under sec. 7 (1) (e) of the Workmen's Compensation Act, 1906, their obligation to pay compensation under the Act commenced as from that date.

Mohad v Anchor Line, 1922 S.C. (H.L.) 53; [1922] 1 A.C. 146; 59 S.L.R. 61; 1922 S.L.T. 38.

(133)

Fishing vessel—Fisherman partly remunerated by share in earnings.

A fisherman was employed as a member of the crew of a steam trawler upon a contract of service with the master, representing the owner, under which he received wages at the rate of 30s. a week, and a commission of 2d. per £ on the gross value of the fish landed under deduction of the cost of carriage. During the only week of his employment his commission

amounted to 7s. Held that he was not "remunerated" by a share in the profits or the gross earnings of the working of the vessel, and accordingly was not excluded by sec. 7 (2) of the Workmen's Compensation Act, 1906, from claiming compensation under the Act.

Colquhoun v Woolfe, 1912 S.C. 1190; 49 S.L.R. 911; 1912, 2 S.L.T. 169.

(134)

Fireman on fishing vessel partly remunerated by share of gross earnings—Right to share in proceeds of "scum."

A fireman on a steam drifter was employed upon a contract of service, under which he received a fixed wage of 35s. a week, and, along with the engineer and the cook, was also entitled to the proceeds of the "scum"—the name given to fish which fell from the nets as they were being hauled on board and were caught by the engineer in a hand net. The proceeds of the "scum" amounted to a substantial sum. Held that, in respect of his interest in the "scum," the fireman was partly remunerated by a share in the gross earnings of the working of the vessel; and, accordingly, that a claim for compensation under the Act in respect of his death was excluded by the sub-section. Opinion (per Lord Dundas), that Colquhoun v Woolfe, 1912 S.C. 1190, is overruled by Costello v Owners of ship "Pigeon," [1913] A.C. 407.

Buchan v Scottish Steam Herring Fishing Co., 1917 S.C. 565; 54 S.L.R. 482; 1917, 1 S.L.T. 343.

(135)

Remuneration by share in profits or gross earnings.

The sole remuneration of the mate or first fisherman of a steam trawler while at sea was one and one-eighth share (each share being one-fourteenth) of the net balance of the gross price of the fish caught on a trip after deducting certain specified expenses, which did not include the wages of other members of the crew who were paid by fixed wages. Held that such remuneration was a share in the profits or the gross earnings of the vessel, and that the fisherman so paid fell under the exception contained in sec. 7 (2) of the Workmen's Compensation Act, 1906, and was consequently precluded from claiming compensation under that Act.

Gill v Aberdeen Steam Trawling and Fishing Co., 1908 S.C. 323; 45 S.L.R. 247; 15 S.L.T. 641.

(136)

Cargo boat—Member of crew paid by share of gross earnings.

Clark v G. R. & W. Jamieson, 1909 S.C. 132; 46 S.L.R. 73; 16 S.L.T. 450, No. 162, *infra*.

12. SEC. 8—INDUSTRIAL DISEASES.

(1) GENERALLY.

(137)

"Employment."

Observations (per Lord Johnston and Lord Skerrington) as to the meaning of the term

"employment" in sec. 8 of the Workmen's Compensation Act, 1906.

M'Gowan v Merry & Cuningham, 1915 S.C. 34; 52 S.L.R. 30; 1914, 2 S.L.T. 298.

(138)

Disease "due to the nature of any employment"—Disease "contracted."

Observations (per Lord Skerrington) on the interpretation to be put on the words "due to the nature of any employment" and the word "contracted," used in sec. 8 of the Workmen's Compensation Act, 1906, with regard to industrial diseases.

M'Taggart v William Barr & Sons, 1915 S.C. 224; 52 S.L.R. 125; 1914, 2 S.L.T. 430.

(139)

Disease due to nature of employment "at or immediately before" disablement—Workman not employed for eight months prior to disablement—Onus of proof—Sub-sec. (2).

A miner obtained from a certifying surgeon a certificate that he was disabled for work by miner's nystagmus, one of the industrial diseases scheduled to the employment of mining in the Workmen's Compensation Act, 1906. For eight months prior to the date of disablement he had been out of employment, having been incapacitated, while working as a miner, by an accident, which, however, was not proved to have caused or accelerated the nystagmus. The miner having claimed compensation from the employer with whom he was last employed, i.e., eight months before the disablement, **held** that the employment was not "at or immediately before the date of disablement" in the sense of sec. 8, sub-sec. (2), of the Act; and, consequently, that the miner was not entitled to the benefit of the statutory presumption that his disease was due to the nature of his employment, but that the onus was upon him to prove that it was so.

M'Taggart v William Barr & Sons, 1915 S.C. 224; 52 S.L.R. 125; 1914, 2 S.L.T. 430.

(140)

Disease due in part to nature of employment within twelve months previous to date of disablement—Liability of last employer—Onus of proof.

A miner was employed by A between 28th January and 16th April, 1913. From 16th April, 1913, till 27th January, 1914, he was out of employment owing to an injury to his leg. Having recovered from that injury, he entered the employment of B on 27th January, 1914. He worked in that employment on that day and the following day, but did not return to his work after 28th January, 1914, owing to trouble with his eyesight. He was afterwards certified to be suffering from miner's nystagmus, the disablement being found to date from 28th January, 1914. In an arbitration in which the miner claimed compensation from B, the sheriff-substitute held that the disease was in part due to the nature of the workman's employment before 28th January, 1913, and in part due to the nature of his employment between 28th January, 1913, and 16th

April, 1913; and on 27th and 28th January, 1914; and awarded compensation. **Held** that it was not necessary for the workman, in order to succeed in his application, to prove either (1) that the disease was due to any particular thing done to or suffered by him on the two days he was in the employment of B; or (2) that it was solely due to the nature of his employment during the period of twelve months prior to his disablement to the exclusion of any previous period; and award upheld.

M'Gowan v Merry & Cuningham, 1915 S.C. 34; 52 S.L.R. 30; 1914, 2 S.L.T. 298.

(141)

Disablement "the happening of the accident"—Claim by workman who has left employment prior to date of disablement.

Sec. 8 of the Workmen's Compensation Act, 1906, which makes disablement by industrial disease equivalent to injury by accident for purposes of compensation, contains a proviso that "the disablement . . . shall be treated as the happening of the accident." **Held** that the proviso merely fixes the date of disablement as the date from which compensation is payable, and does not have the effect, where the workman has left the employment prior to the date of the disablement, of excluding a claim for compensation on the ground that the accident did not happen in the course of the employment.

Keary v Archibald Russell, Limited, 1915 S.C. 672; 52 S.L.R. 447; 1915, 1 S.L.T. 283.

(142)

Duty to furnish names and addresses—Correct information accompanied by false statement—Sub-sec. (1) (c) (i.).

A workman claiming compensation for lead poisoning produced in an arbitration, as required by sec. 8 of the Act, a correct list of names and addresses of former employers to enable his last employers to operate relief against them. He, however, falsely added a statement that he did not use white lead when employed by them. **Held** that the mere fact that he had made this false statement did not bar the workman from obtaining compensation, the last employers having not in fact been prejudiced by it.

Taylor v Burnham & Co., 1910 S.C. 705; 47 S.L.R. 643; 1910, 1 S.L.T. 362.

(143)

Information as to former employer—Liability of employer at date of disablement—Disease contracted prior to last employment—Sub-sec. (1) (c).

A workman, who had been employed in mining during the greater part of his life, ceased to work underground owing to trouble with his eyesight, and obtained employment on the surface for three years. He then returned to work underground, and within two months of doing so became disabled from miner's nystagmus. The workman having claimed compensation from the employers who had employed him dur-

ing these two months, and having supplied them with information as to his employment (which was on the surface) with other employers during the twelve months preceding the disablement, they maintained that they were freed from liability under the provisos to sec. 8 (1) (c) of the Act, in respect that they had proved that the disease was not contracted while the workman was in their employment, and that he had failed to supply them with such information as was sufficient to enable them to operate their relief against his previous employers. **Held** that the employers were liable although the disease was not contracted in their employment; and that they were not freed from liability by the insufficiency of the information supplied, in respect that the workman had given them all the information in his possession, and that it was insufficient only because there were no employers who during the previous twelve months had employed him in the work of mining. **Opinions** (per Lord President Strathclyde and Lord Johnston) that the time limit of twelve months was impliedly imported into proviso (ii.) of sec. 8 (1) (c) of the Act.

Docherty v Archibald Russell, Limited, 1918 S.C. 115; 55 S.L.R. 140; 1918, 1 S.L.T. 2.

(144)

Process of "mining"—Surface labour—Sub-secs. (1) and (2), third schedule.

Held that a man employed at the pithead of a colliery as a surface labourer was not employed in the process of "mining" in the sense in which that expression is used in relation to industrial diseases in the Workmen's Compensation Act, 1906.

Scullion v Cadzow Coal Co., 1914 S.C. 36; 51 S.L.R. 39; 1913, 2 S.L.T. 271.

(145)

Review of weekly payment—Recovery from industrial disease—Susceptibility to recurrence—Question whether susceptibility due to original attack—Onus of proof—First schedule (16).

Darroll v Glasgow Iron and Steel Co., 1913 S.C. 387; 50 S.L.R. 226; 1912, 2 S.L.T. 506, No. 201, *infra*.

(2) CERTIFICATES OF CERTIFYING SURGEON AND OF MEDICAL REFEREE.

(146)

Regulations, 25th June, 1907, as to certifying surgeons—Form of certificate of certifying surgeon—Statement of "process" in which workman employed.

Held (1) that the word "process" in the form of certificate prescribed by the regulations, dated 25th June, 1907, for issue by certifying surgeons to workmen alleging disablement by industrial disease must be read as equivalent to "employment," and is not limited to the industrial "processes" set forth in the third schedule to the Act; and (2) that a certificate by a certifying surgeon that a workman, who had not been engaged in one of the scheduled "pro-

cesses," was suffering from an industrial disease, was invalid because it did not set forth the employment in which he stated he had been engaged.

Marr v Leadhills Co., 1918 S.C. 815; 55 S.L.R. 732; 1918, 2 S.L.T. 170.

(147)

Certificate of certifying surgeon—Production of certificate—Sec. 8 (1) (i).

In proceedings by a workman for recovery of compensation under the Workmen's Compensation Act, 1906, on the ground that he is suffering from an industrial disease, the certificate of a certifying surgeon that he is so suffering does not require to be obtained before the initiation of proceedings, but may be obtained and produced in the course of the proceedings.

Taylor v Burnham & Co., 1909 S.C. 704; 46 S.L.R. 482; 1909, 1 S.L.T. 321.

(148)

Certificate of certifying surgeon referred to medical referee—Form of medical referee's decision—Duty to return a categorical answer—Sec. 8 (1) (i).

When a certificate by a certifying surgeon as to whether a workman is suffering from an industrial disease is objected to, and is referred under sec. 8 (1) (f) of the Workmen's Compensation Act to a medical referee, it is the duty of the medical referee to decide categorically whether the certificate has been rightly granted or not. **So held** where a medical referee had pronounced a decision "subject to" a note, the terms of the note being contradictory of what purported to be the effect of the decision.

Winters v Addie & Sons' Collieries, 1911 S.C. 1174; 48 S.L.R. 940; 1911, 2 S.L.T. 279.

(149)

—Scope of medical referee's decision—Sec. 8 (1) (i).

Held that under sec. 8, sub-sec. (1) (f) of the Act, a medical referee can only decide whether a certifying surgeon's certificate was rightly granted; and accordingly that, where a medical referee had upheld the granting of a certificate of disablement, an addendum by him to the effect that, at the date of his (the medical referee's) examination, the workman was again able for his work, was incompetent, and fell to be treated *pro non scripto*.

Garrett v Waddell & Son, 1911 S.C. 1168; 48 S.L.R. 937; 1911, 2 S.L.T. 276.

(150)

—Scope of medical referee's decision—Sec. 8 (1) and (2).

Opinions that it is competent for a medical referee, while affirming the certificate of a certifying surgeon that a claimant is suffering from a scheduled disease, to vary that certificate by finding that the disease is not due to the nature of his employment.

M'Ginn v Udston Coal Co., 1912 S.C. 668; 49 S.L.R. 531; 1912, 1 S.L.T. 339.

(151)

Certificate of certifying surgeon—Validity—Certificate that workman "is suffering from" ulceration of eye—Eye removed prior to granting of certificate.

A workman, claiming compensation under the Workmen's Compensation Act, 1906, in respect of his disablement by an industrial disease, founded upon the certificate of a certifying surgeon, granted in terms of sec. 8 (1) of the Act, which bore that the workman "is suffering from" ulceration of the corneal surface of the eye, one of the scheduled diseases. Under the heading in the certificate "leading symptoms of disease," it was stated, "He has lost his right eye as the result of corneal ulceration." The right eye, which was the eye affected, had been removed by a surgical operation some weeks before the date of the certificate. **Held** that the words in sec. 8 (1), "is suffering from" an industrial disease, included suffering from the results of a surgical operation rendered necessary by the disease, and that, accordingly, the certificate that the workman was suffering from the disease therein specified was not invalidated by the fact that, prior to the date of the certificate, the eye had been removed.

Corser v Archibald Russell, Limited, 1921 S.C. (H.L.) 31; [1921] 1 A.C. 351; 58 S.L.R. 80; 1921, 1 S.L.T. 113.

(152)

Certificates of certifying surgeon and of medical referee — Claimant certified to be suffering from scheduled disease—Finding by medical referee that disease not due to employment—Claimant's right to prove contrary—Onus—Sec. 8 (1) and (2) and third schedule.

A miner, claiming compensation under the Workmen's Compensation Act, 1906, in respect of an industrial disease, obtained from a certifying surgeon a certificate that he was suffering from, and disabled by, "nystagmus," one of the scheduled diseases applicable to the employment of "mining." A medical referee, to whom the matter was referred on the application of the employers, found that the claimant suffered from nystagmus, but that it was not miner's nystagmus but one of the other forms of that disease. The arbitrator dismissed the claim on the ground that, in view of the referee's finding, the claimant had not obtained the certificate, required by sec. 8 of the Act, that he was suffering from a scheduled disease. In an appeal **held** (1) that the claimant had obtained the necessary certificate that he was suffering from a scheduled disease, (2) that the decision of the medical referee was not final as to whether that disease was or was not due to the claimant's employment, and (3) that the effect of the finding that it was not due to his employment was to displace the presumption in his favour, and to throw on him the onus of proving affirmatively that it was; and case remitted to the arbitrator to allow a proof.

M'Ginn v Udston Coal Co., 1912 S.C. 668; 49 S.L.R. 531; 1912, 1 S.L.T. 339.

13. SEC. 13—DEFINITIONS.

[See also II. 10, *infra*.]

(1) EMPLOYER.

(153)

Owner or charterer of vessel—Accident to seaman.

The registered owner of a vessel was, under a charter party, bound to provide and pay a crew of two men, and had the sole power to dismiss them. The possession, control, and management of the vessel under the charter party belonged to the charterer. After the vessel had been delivered to the charterer one of the crew appointed by the owner was killed. **Held** that the owner, and not the charterer, was the person liable in compensation under the Workmen's Compensation Act, 1906.

Mackinnon v Miller, 1909 S.C. 373; 46 S.L.R. 299; 1909, 1 S.L.T. 65.

(154)

Harbour commissioners or shipping agents—Accident to coal trimmer—Coal trimmer selected by harbour commissioners, and paid and superintended by shipping agents.

A firm of shipping agents, acting as managers of a vessel lying in Leith harbour, contracted with a firm of merchants to load and carry a cargo of coal. The operation of loading was carried out by a squad of trimmers, who, according to the harbour regulations, were selected by a gaffer, nominated by the harbour commissioners and having the power to dismiss the men. The commissioners had no responsibility for the conduct of the trimmers, who were directly under the control and superintendence of the shipping agents, by whom they were paid. The expenses of loading were deducted from the freight, the balance of which, less charges, was handed by the agents to the owners of the vessel. One of the trimmers sustained injury by an accident while engaged in the work of loading the coal. **Held** that he was in the employment of the shipping agents at the date of the accident, and was entitled to claim compensation from them.

Gorman v Gibson & Co., 1910 S.C. 317; 47 S.L.R. 394; 1910, 1 S.L.T. 177.

(155)

Distress committee—Poor person employed by distress committee—Unemployed Workmen Act, 1905, sec. 1 (1) (3) and (5), sec. 2 (1) and sec. 5.

Gilroy v Mackie, 1909 S.C. 466; 46 S.L.R. 325; 1909, 1 S.L.T. 141, No. 159, *infra*.

(2) WORKMAN.

(156)

"Employment"—"Contract of service"—Voidable contract — Deserter from army entering employment—Widow's right to compensation.

A deserter from the army entered the employment of a firm of shipowners as a fireman on one of their vessels, the employers

not knowing that he was a deserter. He was drowned through the loss of the vessel at sea. **Held** that, as the fact that he was a deserter did not render the contract of service between him and his employers void but merely voidable, and as that contract was in force at the date of his death, his widow was not debarred from obtaining compensation under the Workmen's Compensation Act.

M'Lelland v J. & P. Hutchison, 1919 S.C. 68; 56 S.L.R. 77; 1918, 2 S.L.T. 264.

(157)

Casual employment—Employment for the purposes of employer's trade or business—Window cleaner.

A jobbing window cleaner was in use about once a month to clean the windows of the house of a medical practitioner, who used a portion of the house in connection with his professional practice. There was no formal contract between the parties, and the window cleaner called and did the work without receiving on each occasion a special invitation or special permission to do so. On one occasion while cleaning the window of the dining-room he fell and was injured. **Held** that the window cleaner's employment was of a casual nature, and that he was not employed for the purposes of the employer's trade or business, and that he was, therefore, not entitled to compensation.

Rennie v Reid, 1908 S.C. 1051; 45 S.L.R. 814; 16 S.L.T. 222.

(158)

Inmate of charitable institution receiving monthly payments in course of industrial training.

A blind pauper was injured while working in the industrial department of a charitable institution. The department, which supplied industrial training to blind persons, was not self-supporting, but depended partly on charitable aid. On account of the pauper the institution received £14 8s. per annum from his parish, and £20 per annum from a charitable fund, and, on the other hand, supplied him with his board, lodging, and clothing, and paid him 5s. a month. **Held** that the pauper was a "workman" in the sense of the Workmen's Compensation Act.

MacGillivray v Northern Counties Institute for the Blind, 1911 S.C. 897; 48 S.L.R. 811; 1911, 2 S.L.T. 57.

(159)

Poor person employed by distress committee—Unemployed Workmen Act, 1905, sec. 1 (1) (3) and (5), sec. 2 (1), and sec. 5.

A man employed on temporary work by a distress committee under the Unemployed Workmen Act, 1905, was injured by accident arising out of and in the course of the employment. **Held** that the injured man was a workman in the employment of the distress committee within the meaning of the Workmen's Compensation Act, 1906, and was entitled to compensation under that statute.

Gilroy v Mackie, 1909 S.C. 466; 46 S.L.R. 325; 1909, 1 S.L.T. 141.

(160)

Fisherman partly remunerated by share of profits—Sec. 7 (2).

Colquhoun v Woolfe, 1912 S.C. 1190; 49 S.L.R. 911; 1912, 2 S.L.T. 169, No. 133, supra.

(161)

Fireman on fishing vessel partly remunerated by share of gross earnings—Right to share scum.

Buchan v Scottish Steam Herring Fishing Co., 1917 S.C. 565; 54 S.L.R. 482; 1917, 1 S.L.T. 343, No. 134, supra.

(162)

Member of crew of cargo boat paid by share of gross earnings.

Circumstances in which held that a member of the crew of a small cargo boat, who were remunerated by a share of the gross earnings of the vessel, was a workman within the meaning of the Workmen's Compensation Act, 1906, and not a partner in a joint adventure.

Clark v G. R. & W. Jamieson, 1909 S.C. 132; 46 S.L.R. 73; 16 S.L.T. 450.

(163)

Partner—Co-owner of ship employed as master.

Sharpe, the owner of ten sixty-fourth shares of the "Dolphin," was employed by the managing owner as master at a fixed remuneration. In a claim by his widow for compensation in respect of his death under the Workmen's Compensation Act, 1906, against the managing owner, **held** (1) that the deceased was a workman employed by the defender in the sense of the Act; (2) that the fact that the deceased held shares in the vessel did not bar the claim under the Act; and (3) that the fact that he held these shares did not make him a partner or joint adventurer in the trading of the vessel, although ultimately he would bear part of the loss.

Sharpe v Carswell, 1910 S.C. 391; 47 S.L.R. 335; 1910, 1 S.L.T. 80.

(164)

Workman or contractor.

A workman, whose trade was the fixing of enamel letters to windows, had been for a year in the habit of calling on a firm, who made and dealt in enamel letters, and obtaining work from them. He was paid by the piece, defrayed his own travelling expenses, and was under no obligation to undertake any particular job. He frequently canvassed for orders for the firm, being only paid for the orders he received. He was at liberty to accept, and occasionally accepted, work from other employers. The arbitrator having held that he was a "workman" within the meaning of the Workmen's Compensation Act, 1906, the Court refused to interfere with the judgment, **holding** that it was impossible to say that on the facts the arbitrator was wrong.

Taylor v Burnham & Co., 1910 S.C. 705; 47 S.L.R. 643; 1910, 1 S.L.T. 362.

(165)

Held that a stonebreaker, who was engaged by a contractor to break stones for road metal at the rate of 2s. 2d. per cubic yard of metal broken, and who was subject to the orders of the contractor, and to dismissal by him, was a "workman" within the meaning of sec. 13 of the Workmen's Compensation Act, 1906, and was not himself an independent contractor.

Doharty v Boyd, 1909 S.C. 87; 46 S.L.R. 71; 16 S.L.T. 429.

(166)

—C agreed with a firm of timber merchants to bring his horse, when required, to drag logs from one place to another, for which he was paid at the rate of 8s. per day. His share of the work was confined to leading the horse, and this he might have done by means of a substitute, there being no contract that he should perform the work personally. C having sustained injury by an accident while engaged in this work claimed compensation. Held that he was an independent contractor, and not a "workman" within the meaning of sec. 13 of the Workmen's Compensation Act, 1906.

Chisholm v Walker & Co., 1909 S.C. 31; 46 S.L.R. 24; 16 S.L.T. 395.

(167)

"Member of the employer's family dwelling in his house"—Son paying board—Accident occurring while temporarily absent on a job.

A glazier, aged twenty-six, was employed as an ordinary workman by, and lived with, his father in Glasgow, paying for his board and lodging. While engaged on a job for his father in Oban, where he lived in lodgings, he was accidentally injured. Held that at the time of the accident he was "a member of the employer's family dwelling in his house," within the meaning of sec. 13 of the Act, and accordingly was not a workman entitled to compensation under the Act.

M'Dougall v M'Dougall, 1911 S.C. 426; 48 S.L.R. 315; 1911, 1 S.L.T. 96.

(3) DEPENDANTS.

[See also Cases under Act 1897, II. 10 (8) (b), *infra*.]

(168)

Workman's grand-daughter acting as his housekeeper—Servant or dependant.

An able-bodied girl of eighteen claimed compensation under the Workmen's Compensation Act in respect of the death by accident of her grandfather. She had acted as housekeeper to her grandfather for a period of a year prior to his death, and, in consideration of her services, she received her food and clothing and also pocket money amounting to about 3s. a week, but no other money wage. She resided in her father's house, but was absent at her grandfather's house every day from 5.30 a.m. to 6 p.m. The sheriff-substitute having found that the

grand-daughter was not dependent on the earnings of her grandfather, in respect that her relation to him was under a contract of service, held that there was evidence on which he was entitled so to find.

Mitchell v Scottish Iron and Steel Co., 1920 S.C. 184; 57 S.L.R. 162; 1920, 1 S.L.T. 73.

(169)

Brothers and sisters living in family.

Opinion reserved whether, when a family live together and some of the children work and some do not, and the workers contribute to the family purse, the result in law is that the children who do not work are dependants of those who do.

M'Ginty v Kyle, 1911 S.C. 589; 48 S.L.R. 474; 1911, 1 S.L.T. 272.

(170)

Illegitimate child—Dependency on mother—Child maintained gratuitously by stranger.

The mother of an illegitimate child gave it, on its birth, to a woman who had agreed to adopt it without payment. In handing over the child to the woman, the mother stated that she would contribute something to its support, and she subsequently contributed 3s. 6d. including the materials for a shawl. Apart from this contribution the child was maintained by the woman who had adopted it. Two months after the child's birth the mother was killed through an accident in the course of her employment. Held that the mother's legal liability to support the child was not in itself sufficient to establish the child's dependency on her, and that, in the circumstances, the child was not wholly or in part dependent upon the earnings of the mother at the date of her death, and was, therefore, not entitled to compensation.

Briggs v Mitchell, 1911 S.C. 705; 48 S.L.R. 606; 1911, 1 S.L.T. 293.

(171)

Decree for aliment—No sums recovered under decree.

The mother of an illegitimate child obtained a decree for aliment of £6 6s. annually for ten years against the father. On account of the father having worked under an assumed name, she was unable for some time to enforce the decree, but on his being discovered she arrested the wages due to him in the hands of his employers, and the father agreed that these wages, to the extent of £22, should be uplifted for behoof of the child. Shortly afterwards the father met with an accident in the course of his employment, from the effects of which he died before any portion of the £22 had been uplifted for behoof of the child. In a claim for compensation at the instance of the child, the arbitrator found in fact that the child was partially dependent on its father at the time of his death, and awarded compensation. Held that the finding of dependency was a finding in fact; that the finding in fact had not been arrived at by a wrong inference in law from the other

facts in the case, and was consequently final.

Bowhill Coal Co. v Smith, 1909 S.C. 252; 46 S.L.R. 250; 1909, 1 S.L.T. 31.

(172)

Persons not in receipt of support, but with legal right and prospect of enforcing—Children deserted by father.

Dependency is always a question of fact; and, even where children have been deserted by their father for three years before his death and have received no support from him during that time, they may still be held to be partially dependent upon him if there was a reasonable probability that, had he lived, he would in the future have contributed to their support.

Dobbie v Egypt and Levant Steamship Co., 1913 S.C. 364; 50 S.L.R. 222; 1912, 2 S.L.T. 509.

(173)

Children deserted by their father and maintained chiefly by their brothers—Competency of appeal—Fact or law.

Held that a person may be dependent upon a workman at the time of his death within the meaning of the Workmen's Compensation Act, and so entitled to compensation, although he was in fact receiving at the time no support from the workman, provided that he had at the time a legal right to support, and that there was also a reasonable prospect of his being able to enforce and of his enforcing the right to a greater or less extent at some future period.

Observed that the question of dependency is one of fact upon which the decision of the arbitrator is final, unless there is no evidence to support it, or unless he has misdirected himself upon a question of law.

Circumstances in which held that there was evidence to justify the finding of an arbitrator that two pupil children were wholly dependent on their father's earnings at the time of his death in April, 1911, and accordingly entitled to compensation under the Workmen's Compensation Act, although they had received practically no support from him since March, 1907.

Young v Niddrie and Benhar Coal Co., 1913 S.C. (H.L.) 66; [1913] A.C. 531; 50 S.L.R. 744; 1913, 2 S.L.T. 63.

(174)

"Wholly dependent."

A widow who had five sons, working miners, four of whom were married and had children, lived with and was entirely supported by her unmarried son. Held that notwithstanding her right to relief from the four other sons, who were able to contribute to her support, she was wholly dependent upon the earnings of the son who supported her at the time of his death.

Rintoul v Dalmeny Oil Co., 1908 S.C. 1025; 45 S.L.R. 809; 16 S.L.T. 212.

(175)

Total or partial dependency of daughter on father—Daughter wholly supported out of

common fund to, which father and brothers contributed.

In an arbitration under the Workmen's Compensation Act, 1906, in which the question at issue was whether the daughter of a miner, who had been accidentally killed, was wholly or only in part dependent upon her father's earnings, the following facts were proved:—The miner's household consisted of himself, two brothers, three sons, and the daughter. Towards a fund amounting to £8 17s. 6d. weekly, of which £4 was set aside for food, the miner contributed his whole earnings amounting to £3 16s. 6d.; out of their earnings the two elder sons each contributed £2 2s., and the youngest son 17s. The daughter and one of the miner's brothers earned nothing, and made no contribution; the other brother paid 30s. into the food fund, but the whole of this sum was expended upon his sustenance. Out of the balance of the general fund the miner paid for clothes and other necessities required by his sons and daughter, and by the brother who earned no wages. It was admitted that the latter and the youngest son were in part dependent upon him. No facts were proved as to the proportion of expenditure made on behalf of the various members of the family.

Held that the arbitrator was entitled to assess the compensation due to the daughter on the basis of partial dependency, in respect that the existence of a common fund from which she was supported led to a prima facie inference that she was dependent upon all the contributors to the fund, and that it had not been proved that she was, in fact, wholly dependent upon her father's contributions to it.

Sinnerton v Robert Addie & Sons' Collieries, 1920 S.C. 660; 57 S.L.R. 585; 1920, 2 S.L.T. 153.

Ascertainment of dependants in arbitration.

[See 21, *infra*.]

14. SECS. 13 AND 14—APPEALS IN ACTIONS AGAINST EMPLOYER AT COMMON LAW AND/OR UNDER EMPLOYERS' LIABILITY ACT.

STATUTES.

Act 1907—*Sheriff Courts (Scotland) Act*, 1907—7 Edw. VII. c. 51.

Act 1913—*Sheriff Courts (Scotland) Act*, 1913—2 & 3 Geo. V. c. 28.

(176)

Removal to Court of Session for jury trial—Competency—Action of damages by father of deceased employee against son's employers—Act 1907, sec. 30.

The father of a deceased workman brought an action in the sheriff court against his son's employers concluding for damages under the Employers' Liability Act in respect of his son's death. A proof having been allowed, the action was, on the pursuer's motion, remitted to the Court

of Session for trial by jury under sec. 30 of the Sheriff Courts Act, 1907. On the pursuer moving for issues in the single bills the defenders objected that the removal of the action to the Court of Session was rendered incompetent by the provisions of sec. 14 of the Workmen's Compensation Act, 1906. **Held** that the cause had been competently removed to the Court of Session, and issues allowed.

Brown v Glenboig Union Fireclay Co., 1911 S.C. 179; 48 S.L.R. 245; 1911, 1 S.L.T. 36.

(177)

—Competency—Action of damages by father of deceased workman against son's employers—Alleged dependency of father on the deceased—Act 1907, secs. 30 and 52.

In an action in the sheriff court at the instance of a father whose son had been accidentally killed against his son's employers for damages under the Employers' Liability Act, or alternatively at common law, the pursuer averred that the deceased paid his earnings to his parents for the maintenance of the house. The cause having, on the motion of the pursuer, been remitted to the Court of Session for jury trial under sec. 30 of the Sheriff Courts Act, 1907, the defenders objected to the competency of the remission on the ground that the pursuer, being a dependant of the deceased, was in virtue of sec. 13 of the Workmen's Compensation Act, 1906, a "workman" in the sense of that Act, and accordingly, by sec. 14 of that Act, his right to have the cause removed to the Court of Session for jury trial was excluded. **Held** that even if the right of one in the position of the pursuer to have the cause remitted to the Court of Session for jury trial had been taken away by secs. 13 and 14 of the Workmen's Compensation Act, 1906, the right had been restored by secs. 30 and 52 of the Sheriff Courts (Scotland) Act, 1907.

Lawrie v Banknock Coal Co., 1912 S.C. (H.L.) 20; [1912] A.C. 105; 49 S.L.R. 98; 1911, 2 S.L.T. 475.

Cf. Sheriff Courts (Scotland) Act, 1907, as amended by Act 1913, sec. 3 (g).

(178)

Appeal in action of damages by father of deceased workman against son's employers—Competency.

Held that the limitation of appeal to the Court of Session imposed by sec. 14 of the Workmen's Compensation Act with regard to actions of damages at the instance of injured workmen was made applicable by sec. 13 to actions at the instance of the persons specified in the latter section; and accordingly that an appeal (not on a question of law) in an action of damages for the death of a workman, brought by his father against the employers at common law or under the Employers' Liability Act, 1880, was incompetent.

Cook v Bonnybridge Silica and Fireclay Co., 1914 S.C. 740; 51 S.L.R. 529; 1914, 1 S.L.T. 430.

(179)

Form of appeal — Second schedule (17)—Act, 1907, sec. 28.

In an action in the sheriff court concluding for damages for personal injury at common law or alternatively under the Employers' Liability Act, 1880, the sheriff pronounced an interlocutor setting forth the questions for the jury, and granted leave to appeal. The defenders having appealed, the pursuer objected to the competency of the appeal as not being in the form of a stated case on a question of law, and pointed out that by the Workmen's Compensation Act, 1906 (sec. 14, and second sched. (17)), it was enacted that in such actions appeal should be taken only by way of stated case on a question of law. **Held** that, as the question raised by the appeal was a question of law, and as the whole of the facts which would have been set forth in a stated case were before the Court, the sheriff, by granting leave to appeal, had in effect stated a case for the determination of a point of law; and objection repelled.

Whitton v Ewing, Aitken & Edgar, 1911 S.C. 781; 48 S.L.R. 672; 1911, 1 S.L.T. 322.

15. SEC. 16—COMMENCEMENT OF ACT.

(180)

Accident happening before commencement of Act—Application of Act—Right of appeal to House of Lords—"Proceedings consequential" on medical reference.

The Workmen's Compensation Act, 1906 (which provides for an appeal to the House of Lords that did not exist under the Act of 1897), enacts, sec. 16, that the Act shall not apply to cases where the accident happened before its commencement, "except so far as it relates to references to medical referees and proceedings consequential thereon." In an arbitration with regard to an accident which had happened before the commencement of the Act of 1906, the arbitrator made a remit, under par. 15 of the second schedule to that Act, to a medical referee to examine and report, and thereafter pronounced an interlocutor which was appealed to the Court of Session. An appeal having been taken from the judgment of the Court of Session to the House of Lords, **held** that the judgment of the Court of Session was not a "proceeding consequential" on the medical reference and accordingly that the provisions of the Act of 1897, and not those of the Act of 1906, applied, and excluded the appeal.

Rosie v Mackay, 1912 S.C. (H.L.) 7; 49 S.L.R. 48; 1911, 2 S.L.T. 401.

(181)

Workman ceasing to be employed prior to commencement of Act—Death of workman after commencement of Act—Secs. 8 (1) (iii) and 8 (4) (b).

A stereotyper in the employment of a newspaper contracted lead poisoning. He left the employment on 22nd June, 1907, and

died on 14th September, 1907. The Act came into operation on 1st July, 1907. Held that the provisions of the Act were not applicable, and that the workman's widow was not entitled to recover compensation.

Greenhill v "The Daily Record," Glasgow, 1909, 46 S.L.R. 483; 1909, 1 S.L.T. 344.

FIRST SCHEDULE.

16. "WHERE DEATH RESULTS FROM THE INJURY"—First Schedule (1) (a).

[See also Cases under Act 1897, II. 11, *infra*.]

(182)

Death from disease following on an accident.

A workman had a fall from a ladder whereby his ankle was injured, and he also suffered from general pain and shock, which lasted until, about a month after the accident, he was seized with violent internal pains and died from appendicitis peritonitis. In an arbitration upon a claim by his widow for compensation, in which two doctors were examined for each side, there was a conflict of medical evidence, one doctor, for the pursuer, saying that probably the workman "would have been alive now had he not met with the accident," the other that the condition of which the workman died "was consequent, indirect if you will, of the accident," and that "in all probability" he "would not have died but for the accident." The two doctors examined for the defenders could see no connection between the accident and the cause of death. Held that there was evidence to support the arbitrator's finding that death was the result of the accident.

Euman v Dalziel & Co., 1913 S.C. 246; 50 S.L.R. 143; 1912, 2 S.L.T. 464.

(183)

Pneumonia following upon chill—Chill due to partial immersion in water accumulating in mine through breakdown of a pump.

Drylie v Alloa Coal Co., 1913 S.C. 549; 50 S.L.R. 350; 1913, 1 S.L.T. 167, No. 14, *supra*.

(184)

Pneumonia following on chill—Wreck in mine involving withdrawal of workmen—Chill due to standing in draught while waiting to be raised to the surface.

Brown v John Watson, Limited, 1914 S.C. (H.L.) 44; [1915] A.C. 1; 51 S.L.R. 492; 1914, 1 S.L.T. 406, No. 12, *supra*.

(185)

Death due to chill—Chill contracted by miner while waiting to be raised from shaft bottom—Delay due to statutory inspection of shaft.

Lyons v Woodilee Coal and Coke Co., 1917 S.C. (H.L.) 48; 54 S.L.R. 404; 1917, 1 S.L.T. 274, No. 13, *supra*.

(186)

Death from operation not confined to injury caused by accident.

A workman accidentally ruptured himself and was obliged to undergo an operation for hernia. In the course of the operation he was discovered to be suffering also from another old hernia, and both were operated upon. He subsequently died from heart weakness and degeneracy "set up by the strain of the operation." Held that there was evidence to justify the arbitrator in finding that death was the result of the accident.

Thomson v Mutter, Howey & Co., 1913 S.C. 619; 50 S.L.R. 447; 1913, 1 S.L.T. 213.

(187)

Duty of arbitrator to decide question whether death results from injury—Death accelerated by workman's conduct.

In an application by the widow of a deceased workman for compensation under the Workmen's Compensation Act, 1906, the arbitrator obtained a report from a medical referee which stated that the workman's folly in leaving a hospital to which he had been sent after meeting with the accident, "probably accelerated his death," but that this circumstance could not "disestablish the conclusion that but for the accident" the workman "would not have died how and when he did die." On considering this report and the facts of the case, the arbitrator "found in fact that but for the accident the deceased would not have died at the time at which and in the way in which he did die, and found, in fact and law, that the said injury by accident was thus the cause of the death." On appeal, held that it was the duty of the arbitrator to decide, in terms of the actual words of the first schedule, whether the workman's death had "resulted" from the accident, and, as the arbitrator in his finding had not decided that question, case remitted to him to do so, and to report. The arbitrator having thereafter reported that he found as a fact that death "resulted" from the accident, the Court held that there was evidence on which he was justified in coming to this conclusion.

Dunnigan v Cavan & Lind, 1911 S.C. 579; 48 S.L.R. 459; 1911, 1 S.L.T. 187 and 274.

17. INCAPACITY FOR WORK—First Schedule (1) (b) and (3).

[See also Cases under Act 1897, II. 12, *infra*.]

(188)

Observations (per Lord President Dunedin) as to the meaning of wage earning capacity.

Petrie v Smith, 1913, 50 S.L.R. 749; 1913, 1 S.L.T. 470.

(189)

In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator found that the workman was permanently incapacitated for work at his trade as a stonebreaker, and that there was no proof of his being able

to earn wages in his present condition, and awarded compensation. In an appeal the employer maintained that there was no finding in fact to the effect that the workman was incapacitated for other work than stone-breaking. The Court refused to interfere with the determination of the arbitrator, Lord McLaren observing—"It has been the practice of the Court not to interfere with a sheriff's judgment when any possibility of injustice can be obviated by subsequent application for review."

Observations upon the meaning of "incapacity" for work.

Doharty v Boyd, 1909 S.C. 87; 46 S.L.R. 71; 16 S.L.T. 429.

(190)

Physical capacity—Inability to get work.

Observed (per Lord Salvesen), "Incapacity for the purposes of the Workmen's Compensation Act is primarily physical incapacity."

It does not, in my opinion, include inability to get employment which arises from something not personal to the workman."

Carlin v Stephen & Sons, 1911 S.C. 901; 48 S.L.R. 862; 1911, 2 S.L.T. 19.

(191)

Inability to obtain work on account of injured condition—First schedule (1) (b).

Held that a workman's inability to obtain work owing to his injured condition is "incapacity for work" within the meaning of the Act, although he is physically capable of doing work.

Duris v Wilsons & Clyde Coal Co., 1912 S.C. (H.L.) 74; [1912] A.C. 513; 49 S.L.R. 708; 1912, 1 S.L.T. 459.

(192)

Wage earning capacity—First schedule (1) (b).

A miner, who lost one eye by an accident and who had been given work above ground and was receiving partial compensation, was examined by a medical referee, who reported that he was "as fit as any other one-eyed man to resume his work underground." The employers having applied to have the compensation ended, the arbitrator, after a proof, found that the miner had made various applications for work underground without success, and that he "is presently working on the surface and is only able on account of his injuries to earn 18s. a week," and dismissed the application. In an appeal the Court refused to disturb the arbitrator's finding.

Arnott v Fife Coal Co., 1912 S.C. 1262; 49 S.L.R. 902; 1912, 2 S.L.T. 143.

(193)

Profits made in public-house business.

In an application to end or diminish weekly payments of compensation made to a miner, the arbitrator found that the workman had not sufficiently recovered to resume his occupation as a miner, but that he had for a year been carrying on a public-house business; that after deducting interest on

capital, wages, and other expenses, the net profits of that business amounted to £98 per annum, which sum he treated as the measure of the workman's earning capacity; and that as this sum exceeded the workman's average earnings prior to the accident (£94 per annum), his incapacity for work had terminated; and accordingly he ended the payments. **Held** that the profits made in business were not the measure of the workman's earning capacity; and case remitted to the arbitrator to inquire what services the man actually performed in his business, and what these services would have been worth if, instead of serving himself, he had been serving another.

Paterson v A. G. Moore & Co., 1910 S.C. 29; 47 S.L.R. 30; 1909, 2 S.L.T. 291.

(194)

Workman fit for light work but unable to walk from place of residence to such work—Refusal to reside near work.

In an arbitration under the Workmen's Compensation Act, it was proved that the injured workman, a miner, was fit for light work; that his employers had offered him light work at their pit, but that, by reason of his injury, he was unable to walk the distance between his residence and the pit; and that, although he could be provided with a house close to the pit, he, without assigning any reason, refused to change his residence. **Held** that the arbitrator was entitled to assess the compensation on the basis of the workman's earning capacity if he resided close to his work.

Pearson v Archibald Russell, Limited, 1916 S.C. 536; 53 S.L.R. 377; 1916, 1 S.L.T. 214.

(195)

Workman receiving same wages as before the accident—Minor workman—First schedule (3) and (16).

A minor workman was injured, and received compensation till 13th April, 1908, when he returned to work, and thereafter the employers lodged a minute craving an order finding that the workman's incapacity had ceased at 13th April, 1908, and declaring the compensation at an end. After sundry procedure, which delayed the decision till more than twelve months after the accident, the arbitrator found that the workman had not completely recovered from the effects of the injury (which was rupture), and refused the employers' crave. In a case for appeal, he found in fact that after 13th April, 1908, the workman had earned "much the same wages as before the accident"; and the question of law was whether the fact that the workman earned the same wages after as before the accident in itself entitled the employers to have the compensation declared at an end. The Court, without answering the question, remitted to the arbitrator to determine whether the workman's earning capacity was the same as, or less than, it would have been had he not been injured.

Malcolm v Bowhill Coal Co., 1910 S.C. 447; 47 S.L.R. 449; 1910, 1 S.L.T. 322.

(196)

—State of labour market—Possibility of supervening incapacity—Suspensory order.

Mulligan v Corporation of Glasgow, 1917 S.C. 450; 54 S.L.R. 352; 1917, 1 S.L.T. 230, No. 262, *infra*.

(197)

Workman unfit to perform previous work, but earning previous wages at work provided by employers.

Kilpatrick v Wemyss Coal Co., 1922 S.C. 71; 59 S.L.R. 89; 1921, 2 S.L.T. 278, No. 252, *infra*.

18. "WHERE . . . INCAPACITY FOR WORK RESULTS FROM THE INJURY"—First Schedule (1) (b).

[See also Cases under Act 1897, II. 13, *infra*.]

(198)

Cessation of incapacity due to accident—Loss of eye—Diseased condition of other eye—Risk of future incapacity—Concurrent causes of incapacity—Ending of compensation.

A miner lost his right eye through an accident arising out of his employment, and for a time received from his employers compensation for total incapacity. Subsequently, in proceedings for review, the arbitrator ended the compensation, on the ground that the miner's incapacity had ceased, and that he was fit to resume his former work as a miner. He, however, also found that there was incipient cataract in the remaining eye, which would gradually produce incapacity for work, but that the cataract was not due to the accident. Held that the arbitrator was right in ending the compensation.

Hargreave v Haughhead Coal Co., 1912 S.C. (H.L.) 70; [1912] A.C. 319; 49 S.L.R. 474; 1912, 1 S.L.T. 361.

(199)

Obesity—Natural tendency increased by enforced inactivity following injury.

A miner, aged sixty, received injuries by an accident arising out of and in the course of his employment, which for a time totally incapacitated him for active work. Three years after the accident he had recovered from the direct effects of it, but had become unfit for any except sedentary work. This partial incapacity for work was due to age and obesity, and the obesity was the result of a natural tendency increased by the enforced inactivity following on the accident. In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator found that the partial incapacity did not result from the accident, and terminated the compensation. Held that there was evidence to justify the arbitrator's finding. Opinions that in order to entitle a workman to compensation it is not necessary that the incapacity in respect of which he makes his claim should be the direct result of the accident injury, or that there should be no

contributory source of weakness in the workman.

Clark v Taylor & Co., 1914 S.C. (H.L.) 104; 51 S.L.R. 740; 1914, 2 S.L.T. 145.

(200)

Supervening aneurism.

A miner strained his back on 7th December, 1911, and in consequence became incapacitated for work, but on 27th May resumed and continued at full work until 15th August, when he became totally incapacitated owing to dilation of the heart caused by an aneurism of the aorta. He did not feel pain in the cardiac region or show any symptoms of heart trouble until July. Held that the arbitrator, who was of opinion that the aneurism was caused by the miner being engaged between May and August at work which was beyond his physical powers, was entitled to find that his present incapacity was not due to the accident of 7th December.

Paton v William Dixon, Limited, 1913 S.C. 1120; 50 S.L.R. 866; 1913, 2 S.L.T. 149.

(201)

Industrial disease—Susceptibility to recurrence—Question whether susceptibility due to original attack—Onus of proof.

In an application by employers for the ending or diminishing of a weekly payment of compensation, it was proved that the workman, after being duly certified as suffering from miner's nystagmus (an industrial disease), was awarded compensation, that he had "now completely recovered from this attack," but that he was susceptible to a recurrence of the disease. It was not proved whether the susceptibility was due to the original attack or to constitutional predisposition, the evidence being inconclusive. Held that, as the workman had recovered from the original attack, and as he had failed to discharge the onus which lay on him of proving that his susceptibility to recurrence of the disease was due to that attack, the compensation fell to be ended.

Darroll v Glasgow Iron and Steel Co., 1913 S.C. 387; 50 S.L.R. 226; 1912, 2 S.L.T. 506.

(202)

Refusal to undergo surgical operation—Unreasonable refusal—Onus of proof.

Where an employer contends that a workman's incapacity is attributable to his unreasonable refusal to undergo a surgical operation and not to the injury, the onus probandi rests upon the employer. The fact that the workman's refusal is in accordance with the advice of his own doctor, while affording *prima facie* evidence that his conduct has been reasonable, is not conclusive. Circumstances in which held that an arbitrator was entitled to reach the conclusion that the employers of a workman had failed to prove that the workman's incapacity was due to unreasonable refusal to undergo an operation.

Cant v Fife Coal Co., 1921 S.C. (H.L.) 15; 58 S.L.R. 74; 1921, 1 S.L.T. 88.

(203)

A workman accidentally injured in the foot and thereby incapacitated refused to undergo a simple operation which, it was reasonably certain, would have cured him. He acted on the advice of his own doctors, who were of opinion that the operation, though safe, would be useless. **Held** that he was precluded from claiming a continuance of compensation.

O'Neill v John Brown & Co., 1913 S.C. 653; 50 S.L.R. 450; 1913, 1 S.L.T. 210.

(204)

Circumstances in which **held** that a mill girl's present incapacity was due to an accident to her hand, and could not be attributed to unreasonable conduct on her part in refusing to undergo an operation, which might have restored or improved the capacity of her hand, but which her own doctor advised her not to undergo. **Opinion** (per Lord President Strathclyde) that "save in very special circumstances, the proximate cause of incapacity never can be the unreasonable refusal of a workman to undergo an operation, if his own medical adviser advises him against undergoing that operation."

Gracie v Clyde Spinning Co., 1915 S.C. 906; 52 S.L.R. 706; 1915, 2 S.L.T. 46.

(205)

Unreasonable conduct of workman—Incapacity due in whole or in part to workman's failure to return to work.

In an application for termination or review of compensation which was being paid to an injured workman, the arbitrator found that the workman had for some time been fit for light work, but had made no attempt to obtain work, and that, though partial incapacity still existed, it was "due in whole or in part to the defender's failure to return to work when able to do so"; and ended the payments of compensation until further order. **Held** that, as the arbitrator's findings did not exclude the conclusion that incapacity was still partly due to the workman's injuries, he was not entitled to end the compensation. **Observations** on the effect of a workman's unreasonable conduct on his right to continue to receive compensation, and **opinions** (per Lord Mackenzie and Lord Skerrington) that unreasonable conduct cannot, per se, deprive a workman of his right to compensation, but can only do so if it is proved that the existing incapacity is due to that conduct.

Devlin v Chapel Coal Co., 1915 S.C. 71; 52 S.L.R. 83; 1914, 2 S.L.T. 320.

(206)

Onus of proof—Injury to knee—Incapacity alleged to be due to similar injury in previous employment.

In December, 1908, a workman in the course of his employment felt a severe pain in his right knee on rising from a kneeling posi-

tion, and on examination it was found that the cartilage was torn. Three years before, while in another employment, he had sustained a "wrench" to the same knee, which had incapacitated him for some weeks, after which he was able to resume his ordinary work. It was not clear on the evidence whether the later injury was connected with the former, or, if so, to what extent it was so connected. In answer to a claim by the workman for compensation against the firm in whose employment he was in December, 1908, they maintained that the incapacity was due to the original injury. **Held** that, as the injury in December, 1908, was apparently sustained in the employment of his then employers, the onus was on them to show that no new injury was sustained and that anything suffered in December, 1908, was due to the former accident; that they had failed to discharge this onus, and were accordingly liable to pay compensation.

Borland v Watson, Gow & Co., 1912 S.C. 15; 49 S.L.R. 10; 1911, 2 S.L.T. 327.

(207)

Supervening incapacity — Question whether incapacity due to accident.

Under a remit by parties to a medical referee to report on the condition of a workman, who had been injured and who was in receipt of compensation, the referee reported that he was fit for his former work. Thereafter the employers presented an application for review of the compensation, which was opposed by the workman on the ground that, since the date of his examination by the medical referee, he had again become incapacitated as a result of the accident. In a stated case, **held** that the onus was on the workman of proving that the supervening incapacity was due to the accident.

M'Ghee v Summerlee Iron Co., 1911 S.C. 870; 48 S.L.R. 807; 1911, 2 S.L.T. 16.

(208)

Recovery from injury—Supervening insanity—Whether insanity due to accident.

On 28th February, 1912, a workman, in the course of his employment, received a severe scalp wound, which incapacitated him for work. His employers paid him compensation down to 5th November, 1913. The workman, at some time not later than September, 1914, became insane, and in the autumn of 1916 an application was presented for an award of compensation in respect of total incapacity. The arbitrator found that the workman had completely recovered from the physical effects of his injury, but that he was totally incapacitated for work owing to his insanity. He further found that there was no proof that the insanity was due to the accident, nor, on the other hand, was there any proof of a new cause intervening to account for the insanity; and awarded compensation. **Held** that the onus of proving that the insanity was due to the accident lay upon the workman, and that, as he had failed to dis-

charge that onus, he was not entitled to compensation.

Brownlee v Coltness Iron Co., 1917 S.C. 409; 54 S.L.R. 311; 1917, 1 S.L.T. 185.

(209)

———**Review—Weekly payments fixed by registered agreement.**

M'Callum v Quinn, 1909 S.C. 227; 46 S.L.R. 141; 16 S.L.T. 501, No. 249, *infra*.

19. COMPENSATION.

(1) **COMPENSATION IN RESPECT OF WORKMAN'S DEATH—First Schedule (1) (a).**

[See also Cases under Act 1897, II. 14 (1), *infra*.]

(a) Generally.

(210)

Claim by dependant's executor.

Held that the right to compensation, conferred by the Workmen's Compensation Act, 1906, on the dependant of a deceased workman, vests in the dependant on the death of the workman, and transmits to the representatives of the dependant, although the dependant may have made no claim for compensation during his lifetime.

Hendry v United Collieries, 1909 S.C. (H.L.) 19; [1909] A.C. 383; 46 S.L.R. 780; 1909, 2 S.L.T. 47.

(211)

Funeral expenses.

Opinion, per curiam, that reasonable funeral expenses are a proper charge on the fund available for compensation.

Murray v Gourlay, 1908 S.C. 769; 45 S.L.R. 577; 15 S.L.T. 1029.

(b) Amount.

Average weekly earnings.

[See (2) (a) (i), *infra*.]

(212)

Partial dependency—Sum "reasonable and proportionate to the injury."

In an application for compensation under the Workmen's Compensation Act, 1906, for the death of a workman, the arbitrator found that an illegitimate pupil child of the deceased, for whose support the deceased had been paying aliment under a decree of affiliation and aliment, was partially dependent on his earnings, and that the sum available for compensation under the Act was £150. No other dependant having applied for compensation, the arbitrator awarded the whole sum of £150, less £5 10s. of funeral expenses, to the illegitimate child. **Held** that in making the award the arbitrator had proceeded on a wrong principle, in respect that the Act does not provide for the maximum sum being awarded in every case, but only for an award of reasonable compensation within that limit; and case remitted to him to ascertain the prospective value of the contributions that would probably have been

made by the deceased, if he had lived, for the support of his illegitimate child.

Murray v Gourlay, 1908 S.C. 769; 45 S.L.R. 577; 15 S.L.T. 1029.

(213)

———**Competency of considering possible future earnings of deceased.**

In assessing, under paragraph (1) (a) (ii) of the first schedule to the Workmen's Compensation Act, 1906, the compensation payable to dependants in part dependent upon the earnings of a deceased workman, an arbitrator is not bound to confine his attention to the workman's past earnings, but may take into consideration the earnings which he might reasonably have been expected to make in the future, and may admit evidence with regard thereto. So **held** where an arbitrator had refused to admit evidence with regard to the possible future earnings of a boy of fourteen, who had been killed by an accident, and who had been in the habit of contributing his earnings towards the support of his family.

Fraser v Fairfield Shipbuilding and Engineering Co., 1919 S.C. 279; 56 S.L.R. 133; 1919, 1 S.L.T. 63.

(2) **COMPENSATION FOR INJURY—First Schedule (1), (3).**

(a) Amount.

(i.) Average Weekly Earnings.

[See also Cases under Act 1897, II. 14

(2) (a) (i.), *infra*.]

(214)

Mode of computation.

A workman who had been incapacitated by accident, and who was entitled to compensation, had been at the date of the accident for thirteen weeks in his employment. During that period he had earned for one week nothing, and for another week very little, on account of illness, and again for one week had earned nothing, and for another week very little, on account of trade holidays. The arbitrator calculated his average weekly earnings by dividing his total earnings by thirteen. In an appeal by stated case, the Court enunciated certain general rules for the computation of a workman's average weekly earnings for the purposes of the Workmen's Compensation Act, 1906, recalled the determination of the arbitrator, and remitted to him to proceed.

Carter v Lang & Sons, 1908 S.C. 1198; 45 S.L.R. 938; 16 S.L.T. 345.

(215)

———**First schedule (2) (a).**

In ascertaining the amount of the average weekly earnings of a workman entitled to compensation under the Workmen's Compensation Act, 1906, the leading canon is, as stated in sec. (2) (a) of the first schedule, that "average weekly earnings shall be computed in such manner as is best calculated to

give the rate per week at which the workman was being remunerated."

Carter v Lang & Sons, 1908 S.C. 1198; 45 S.L.R. 938; 16 S.L.T. 345.

(216)

Coal cutting contract—Contractor working along with his gang—Separation of earnings as workman from profits as contractor.

A workman was employed by a colliery company as an electrical coal cutting machine contractor. In this work he employed a gang of men and worked along with them himself; and while so working he met with an injury by accident. His income for the year preceding the accident was £281, of which £220 represented his personal earnings as a workman, and the balance his profits on the contracts. His employers having admitted liability to pay him compensation, held that, in assessing compensation, the arbitrator was, in the circumstances, entitled to separate the man's earnings as a workman from his profits as a contractor, and to base his award on the former sum only.

Logan v Shotts Iron Co., 1919 S.C. 131; 56 S.L.R. 79; 1918, 2 S.L.T. 298.

(217)

General rule — Regularly recurring trade holidays—First schedule (2) (a).

In an ordinary case the average weekly earnings of a workman entitled to compensation under the Workmen's Compensation Act, 1906, are to be ascertained by dividing the total amount earned during the relevant period of his employment by the number of weeks actually worked within that period, and, if there are regularly recurring trade holidays when no work can be done, by deducting from the result thus obtained a fraction equal to the fraction of the year during which for this reason no wages can be earned.

Carter v Lang & Sons, 1908 S.C. 1198; 45 S.L.R. 938; 16 S.L.T. 345.

(218)

Days on which workman absent from work—First schedule (2) (a).

In ascertaining the average weekly earnings of a workman the question whether those days in any week on which the workman was absent from work are to be disregarded depends on the nature of the employment, and in an employment where it is customary to work for only a limited number of days in the week, the amount earned in these days may be taken as the weekly earnings of the workman.

Carter v Lang & Sons, 1908 S.C. 1198; 45 S.L.R. 938; 16 S.L.T. 345.

(219)

Facts of workman's own employment—First schedule (2) (a).

The question whether, in view of the shortness of the employment or of the other considerations indicated in sec. (2) (a) of the first schedule of the Workmen's Compensation Act, 1906, it is practicable to compute

the rate of remuneration at the date of the accident from the facts of the workman's own employment, is a question of fact for the determination of the arbitrator, and is to be settled in each case by a consideration of the whole circumstances of the employment.

Carter v Lang & Sons, 1908 S.C. 1198; 45 S.L.R. 938; 16 S.L.T. 345.

(220)

Inmate of charitable institution receiving monthly payments in course of industrial training—First schedule (2) (a).

A blind pauper was injured while working in the industrial department of a charitable institution. The department, which supplied industrial training to blind persons, was not self-supporting, but depended partly on charitable aid. On account of the pauper the institution received £14 8s. per annum from his parish, and £20 per annum from a charitable fund, and, on the other hand, supplied him with his board, lodging, and clothing, and paid him 5s. a month. The Court, holding the pauper to be a "workman," held also that as the monthly payments to such blind persons were supposed, in the institution, to represent 20 per cent. of their average earnings, the compensation fell to be calculated on that basis.

MacGillivray v Northern Counties Institute for the Blind, 1911 S.C. 897; 48 S.L.R. 811; 1911, 2 S.L.T. 57.

(221)

Grade of employment—Change of grade—Appointment to work higher class machine dealing with finer material—First schedule (2) (c).

A girl in a rope and sailcloth factory, employed at a weekly wage of 7s. 6d. to work a drawing machine dealing with hemp which was afterwards spun into rope, was promoted to work, at a weekly wage of 8s., a drawing machine dealing with tow, a finer material which was afterwards woven into sailcloth. Five weeks after the change she was accidentally injured. Held that the change was a change in the "grade" of her employment within the meaning of the Workmen's Compensation Act, 1906, first schedule (2) (c), and that compensation fell to be calculated on the basis of her average weekly earnings for these five weeks.

Dalglish v Edinburgh Roperie and Sailcloth Co., 1913 S.C. 1007; 50 S.L.R. 916; 1913, 2 S.L.T. 206.

(222)

Boilermaker—Labourer—First schedule (2) (c).

A workman, a boilermaker by trade, who had been employed for four weeks as a boilermaker at a boilermaker's wage, and for fifteen weeks as a labourer at a labourer's wage, in the service of the same employers, was injured while working as a labourer. Held that in calculating his average weekly earnings for purposes of compensation, the

wages he had earned as a boilermaker did not fall to be included.

Babcock & Wilcox v Young, 1911 S.C. 406; 48 S.L.R. 298; 1911, 1 S.L.T. 21.

(223)

"Absence from work due to illness or other unavoidable cause"—First schedule (2) (c).

In the application of sec. (2) (c) of the first schedule to the Workmen's Compensation Act, 1906, "absence from work due to illness or any other unavoidable cause" means absence from work due to a cause personal to the workman, as distinguished from causes due to the work, such as trade holidays or an accidental stoppage of machinery.

Carter v Lang & Sons, 1908 S.C. 1198; 45 S.L.R. 938; 16 S.L.T. 345.

(224)

Deductions from wages—"Special expenses"—First schedule (2) (d).

A miner was in the habit of purchasing the explosives which he required for his work from his employers, and the price of these was retained by them from his wages. **Held** (1) that it had been authoritatively settled by decisions prior to the Workmen's Compensation Act, 1906, that in estimating a miner's earnings for the purposes of compensation his wages must be taken at their full rate, without deducting the cost of explosives paid for by him; (2) that in the present case the cost of explosives did not represent a sum paid to the miner "to cover any special expenses" in the sense of the Workmen's Compensation Act, 1906, first schedule (2) (d); and therefore (3) that the miner was entitled to compensation on the full rate of wages.

M'Kee v John G. Stein & Co., 1910 S.C. 38; 47 S.L.R. 39; 1909, 2 S.L.T. 293.

(225)

Total of earnings and compensation for one week exceeding wages before injury—Charge for compensation for one week—Suspension.

An injured workman, who was earning a weekly wage of 36s. before his injury, was awarded compensation for partial incapacity at the rate of 15s. a week. He returned to work, and in one week earned 23s. 4d., but in the following week his earnings fell to 14s. The employers having refused to pay the full sum of 15s. for the week in which the workman earned 23s. 4d., on the ground that he would, with his earnings, thereby receive more than his former wage of 36s., the workman charged them to pay the 15s. The employers having brought a suspension of the charge, **held** that the figures of one week could not be taken as establishing an average; and, as it did not appear that the average wages that the workman was able to earn were such as would, with the addition of the full compensation amount to more than his former wage, the employers were not entitled to suspend the charge.

James Nimmo & Co. v Myles, 1917 S.C. 522; 54 S.L.R. 465; 1917, 1 S.L.T. 306.

(ii.) Payments, &c., Received from Employer during Incapacity—First Schedule (3).

(226)

"Benefit" received from employer—Payment of hospital charges.

Held that an arbitrator was entitled to find that the payment by employers of an account rendered to them for the maintenance of an injured man in hospital was a "benefit" received by the workman in the sense of paragraph (3) of the first schedule to the Workmen's Compensation Act, 1906, which fell to be taken into account in fixing the amount of his compensation.

Sorensen v John Gaff & Co., 1912 S.C. 1163; 49 S.L.R. 896; 1912, 2 S.L.T. 137.

(227)

Payment received from employer—Employment by distress committee—Poor relief.

A workman employed by a distress committee under the Unemployed Workmen Act, 1905, was totally incapacitated for work by an accident arising out of his employment, and was found entitled to compensation from the distress committee under the Workmen's Compensation Act, 1906. During incapacity he was paid poor relief at the rate of ten shillings per week. **Held** that the amount of the poor relief did not fall to be taken into account in calculating the amount of the compensation payable by the distress committee.

Gilroy v Mackie, 1909 S.C. 466; 46 S.L.R. 325; 1909, 1 S.L.T. 141.

(iii.) Compensation in Respect of Partial Incapacity—First Schedule (1) (b) and (3).

[See also Cases under Act 1897, II. 14 (2) (a) (ii.), *infra*.]

(a) Generally.

(228)

Workman in receipt of maximum compensation in respect of total incapacity from new employers—Claim for continuation of compensation in respect of partial incapacity from former employers.

A workman, having partially recovered his capacity after an accident, entered the service of new employers, his old employers continuing their former weekly payments of compensation at the maximum rate, in virtue of an agreement which provided that these payments were to be continued during the continuance of partial incapacity. In his new employment, and while still partially incapacitated by his old injury, the workman met with an accident causing total incapacity, in respect of which his new employers paid him compensation at the maximum rate. **Held** that, as the workman was receiving from his new employers the maximum compensation provided by the Act, the weekly payments of compensation by the old employers fell to be suspended.

M'Kinstrey v Auchinlea Coal Co., 1920 S.C. 75; 57 S.L.R. 80; 1919, 2 S.L.T. 263.

(229)

Partial recovery—Review of weekly payments—Arbitrator's discretion.

When a workman, who has been totally incapacitated and has been receiving full compensation in terms of the Workmen's Compensation Act, partially recovers and is earning a wage, a *prima facie* case arises for reducing his compensation; but it is open to him to prove circumstances which will warrant the arbitrator, in the exercise of his discretion, in refusing to diminish the compensation. The circumstance that the compensation he has been receiving together with the wage he is earning does not equal his average weekly earnings before the accident does not by itself justify a refusal to diminish.

Pryde v A. G. Moore & Co., 1913 S.C. 457; 50 S.L.R. 302; 1913, 1 S.L.T. 49.

(230)

Workman fit for light work—Evidence justifying reduction of compensation.

In an application at the instance of the employers of a workman to end or diminish the weekly payments of compensation due under a recorded memorandum of agreement, it was proved that about nine months after the accident (by which the workman, a labourer, had been wholly incapacitated and for which he had been receiving compensation at the rate of 12s. weekly), the employers offered him light work as a labourer, which he refused, though he was able for the work and though it would have aided his recovery. Six months later, at the date of the application for review, the workman was proved to be "able for light work such as that of a messenger or light porter or other occupation, where he would not require to do the heavy work of a labourer," and the employers renewed their previous offer of employment. There was no evidence of how much the workman was capable of earning at such work as he was able to perform. The arbitrator reduced the compensation to 8s. weekly. The Court sustained the award.

Carlin v Stephen & Sons, 1911 S.C. 901; 48 S.L.R. 862; 1911, 2 S.L.T. 19.

(231)

Amount of compensation—General rise in wages since date of accident.

Held that, in reviewing the compensation due to a partially disabled miner under the Workmen's Compensation Act, 1906, an arbitrator was entitled to take into consideration a general rise in miners' wages since the date of the accident.

M'Neill v Woodilee Coal and Coke Co., 1918 S.C. (H.L.) 1; [1918] A.C. 43; 55 S.L.R. 15; 1917, 2 S.L.T. 131.

(232)

Amount of compensation—General fall of wages.

Quilter v Kepplehill Coal Co., 1921 S.C. 905; 58 S.L.R. 588; 1921, 2 S.L.T. 184, No. 237, *infra*.

(β) Wage-earning Capacity.

[See 17, *supra*.]

(γ) Suitable Employment.

(233)

Refusal to accept light work—Sunday labour.

An injured workman, who was in receipt of compensation as for total incapacity but who had so far recovered as to be physically fit for light work, was offered work as a watchman by his employers. That work was suitable to the workman's physical condition, but it involved working on Sundays, and on that ground the workman refused it. The arbitrator having reduced the weekly payments, held that, as the workman had unreasonably refused suitable employment, the arbitrator was justified in reducing the weekly payment.

Smith v William Beardmore & Co., 1922 S.C. 131; 59 S.L.R. 94; 1922 S.L.T. 58.

(234)

Partially incapacitated workman enlisting in army—Suspension of compensation.

A partially incapacitated workman, who was receiving weekly payments of compensation, enlisted in the army. In an application for review at the instance of his employers, the arbitrator suspended compensation, holding that service in the army was not a "suitable employment" within the meaning of par. (3) of the first schedule, and that the workman, by enlisting, had made it impossible to test his wage-earning capacity in a suitable employment. Held (1) that service in the army was not a "suitable employment" within the meaning of the Act; but (2) that it was the duty of the arbitrator to determine from the workman's physical condition what wages he would have been able to earn in a suitable employment, and to assess compensation accordingly.

Thomson v John Watson, Limited, 1916 S.C. 23; 53 S.L.R. 55; 1915, 2 S.L.T. 246.

(235)

Risk of future incapacity—One-eyed miner—First schedule (3).

A miner was struck by a chip of coal while working at the coal face, and thereby lost the sight of one eye. His employers, after paying compensation for a time, ceased payment on the ground that he was able to resume his former occupation and to earn his former wage. The miner having applied to the sheriff to have the compensation continued, the sheriff dismissed the application, finding that the miner was able to resume his former occupation at the face and to earn his former wage, and that the risk, which was incidental to working at the face, of a similar accident again happening was not increased by the fact that he had lost the sight of an eye. On appeal it was contended for the miner that the sheriff had disregarded the relevant consideration that the loss of one eye, although not increasing

the risk of a similar accident occurring, would render the results of such an accident more serious, as total blindness would follow; and accordingly that, the employment of a miner working at the face not being a "suitable employment" for him, he was still entitled to compensation. **Held** that the determination of the sheriff, in dismissing the application, was right. **Observed** that the question whether an employment was "suitable" arose only under the first schedule (3) to the Workmen's Compensation Act, when partial incapacity existed, and therefore did not arise in this case, as the workman's incapacity had ceased. **Opinions** (per Lord President Strathclyde and Lord Guthrie), that the consideration that the results of a future accident might be more serious to a workman who had lost one eye than to a workman who had not could not relevantly be taken into consideration in determining what was "suitable" employment; **opinion contra** (per Lord Johnston).

Law v William Baird & Co., 1914 S.C. 423; 51 S.L.R. 388; 1914, 1 S.L.T. 261.

(236)

A miner lost the use of one eye, and received compensation for a certain period. Thereafter the arbitrator terminated compensation in the meantime. In an application by the miner for review and for an award of partial compensation, he contended that he was entitled to refuse to work at the face. The arbitrator considered himself bound by authority to find that work as a miner at the face was suitable employment for the applicant. **Held** that he was not so bound.

Burt v Fife Coal Co., 1914, 52 S.L.R. 51; 1914, 2 S.L.T. 313.

(b) Review of Weekly Payments—First Schedule (16).

(i.) Competency.

[See also Cases under Act 1897, II. 14
(2) (b) (i.), *infra*.]

(237)

Change of circumstances—General reduction of wages.

A miner, who was in receipt of compensation in respect of partial incapacity at a rate which his employers were willing to continue, claimed an increase of the rate, stating as the sole basis of his claim that there had been a general reduction in wages to the extent of at least 2s. per shift. **Held** that he had failed to aver relevant grounds for a review of the rate of compensation.

Quilter v Kepplehill Coal Co., 1921 S.C. 905; 58 S.L.R. 588; 1921, 2 S.L.T. 184.

(238)

Inability to get work due to the accident—Workman physically capable of doing work.

Held (1) that a workman's inability to obtain work owing to his injured condition is "incapacity for work" within the meaning of the Act, even though he may be

physically capable of doing work; (2) that supervening inability to obtain work is a relevant ground for reviewing a weekly payment, even though there may have been no change in the workman's physical condition.

Duris v Wilsons & Clyde Coal Co., 1912 S.C. (H.L.) 74; [1912] A.C. 513; 49 S.L.R. 708; 1912, 1 S.L.T. 459.

(239)

Unsuccessful applications for employment—No physical change in workman.

A miner, who was awarded compensation as being partially incapacitated owing to an injury to three fingers of his right hand, presented an application ten weeks later for review of the weekly payments. It was proved that the applicant was able for light work only; that there had been no change in his physical condition since the date of the former award; but that he had on seven occasions applied for employment to five companies without success, for the reasons either that these companies had no vacancy in their works, or preferred, in the case of injured men, to engage those who had been injured in their own service, or that the work which they could offer was too heavy for him to undertake with his injured hand. It was not proved that he had completely exhausted his chances of employment, or that it was impossible for men in his physical condition to obtain employment. The arbitrator found that the applicant, "in view of the difficulty of his finding employment, which is attributable to the nature of his personal injury," was entitled to an increase in the rate of compensation, and awarded a higher weekly sum. **Held** that there was evidence upon which the compensation could competently be increased by the arbitrator. **Observations** upon the review of awards of compensation in cases where there has been no alteration in the physical condition of the injured workman.

M'Alinden v James Nimmo & Co., 1919 S.C. (H.L.) 84; [1920] A.C. 39; 56 S.L.R. 522; 1919, 2 S.L.T. 84.

(240)

Payments under unrecorded verbal agreement.

Weekly payments made under an unrecorded verbal agreement were reviewed in an application under paragraph (16) of the first schedule of the Act.

Southhook Fireclay Co. v Laughland, 1908 S.C. 831; 45 S.L.R. 664; 16 S.L.T. 46.

(241)

No compensation being paid—Competency of review of unrecorded agreement.

A workman was injured on 31st July, 1908, and his employers paid him compensation until 1st April, 1909, when they ceased further payments. Thereafter, on 17th May, 1909, they applied to the sheriff, as arbitrator, for a declaration that the workman's right to compensation had ceased on 1st April, or, alternatively, for an award of partial compensation. The workman pleaded

that the application was incompetent. **Held** that the application was competent, although (1) no compensation was actually being paid; (2) no memorandum of agreement had been recorded.

Nelson v Summerlee Iron Co., 1910 S.C. 360; 47 S.L.R. 344; 1910, 1 S.L.T. 137.

(242)

Application to have compensation ended at certain date—No claim for payments in respect of period subsequent to date in question.

A workman claimed £1 15s. 11d. as compensation for two and five-sixths weeks ending on 13th April, 1908. He made no claim for any period subsequent to that date. The employers, while admitting that they were due the amount claimed, averred that the workman's incapacity had ceased on 13th April, 1908, and craved the arbitrator to grant an order ending the compensation as at that date. The arbitrator decreed for the sum claimed; but, on the ground that there was no dispute between the parties as to the period subsequent to 13th April, 1908, submitted to arbitration, he made no further order. **Held** that the arbitrator, besides issuing a finding as to the amount due, should have proceeded to determine whether the compensation should be ended as at 13th April, 1908.

Malcolm v Bowhill Coal Co., 1909 S.C. 426; 46 S.L.R. 354; 1909, 1 S.L.T. 177.

(243)

Partial incapacity—Workmen enlisting in army.

Thomson v John Watson, Limited, 1916 S.C. 23; 53 S.L.R. 55; 1915, 2 S.L.T. 246, No. 234, *supra*.

(244)

Employer offering full wages for light work—Recording memorandum of agreement—Sisting procedure.

Keevans v Mundy, 1914 S.C. 525; 51 S.L.R. 462; 1914, 1 S.L.T. 350, No. 291, *infra*

(ii.) Date from which Payment may be Reviewed.

[See also II. 14 (2) (b) (ii.), *infra*.]

(245)

Date when incapacity ceased.

The employers of an injured workman, in terms of an award of an arbitrator, paid him compensation for total incapacity up to 24th September, at which date they ceased the payments, contending that his incapacity had ceased. On 4th November they presented an application for review of the compensation, asking that the payments should be terminated as at 24th September. The arbitrator found in fact that the workman had completely recovered his capacity at 24th September. **Held** that the compensation fell to be terminated as at the date when the incapacity ceased, and not merely at the date of the application for

review. **Opinion** (per Lord Atkinson) that the same principles would apply to an application to diminish or increase the weekly payments. **Observations** (per Lord Shaw of Dunfermline) on the procedure to be adopted by an employer who maintains that the workman has recovered and ceases the weekly payments, if the workman proceeds to charge for payment.

Wishart v Gibson & Co., 1914 S.C. (H.L.) 53; [1915] A.C. 18; 51 S.L.R. 516; 1914, 1 S.L.T. 416.

(246)

Date of application for review.

Upon an application under the first schedule, par. (16), of the Workmen's Compensation Act, 1906, for review of a weekly payment under the Act, on the ground that the workman's incapacity has ceased, it is competent for the arbitrator, if he finds that the incapacity has ceased at or prior to the date of the application, to terminate the weekly payment as from the date of the application, and he is not bound to treat the payment as enforceable up to the date of his decision; but it is not competent for him to terminate the payment as from any date prior to that of the application.

Donaldson Brothers v Cowan, 1909 S.C. 1292; 46 S.L.R. 920; 1909, 2 S.L.T. 161.

(247)

Payments under unrecorded verbal agreement.

Employers, who were paying compensation to a workman under an unrecorded verbal agreement, presented an application on 21st December, 1907, under the Workmen's Compensation Act, 1906, first schedule (16), to have the payments reviewed, and the compensation ended as at 1st November, 1907, on the ground that incapacity had then ceased. The arbitrator found it proved that the workman's incapacity ceased on 1st November, 1907, and on 29th January, 1908, pronounced an interlocutor ending the payments from the date of the interlocutor. In an appeal on a stated case, **held** that as there was no recorded agreement, the compensation fell to be ended as from the date when incapacity ceased, and not from the date of the application for review, or the date of the arbitrator's decision.

Southhook Fireclay Co. v Laughland, 1908 S.C. 831; 45 S.L.R. 664; 16 S.L.T. 46.

(iii.) Method of Obtaining Review.

[See 27, *infra*.]

[See also Cases under Act 1897, II. 20, *infra*.]

(iv.) Recovery of Injured Workman.

[See also Cases under Act 1897, II. 14 (2) (b) (iv.), *infra*.]

Medical examination—Effect of medical referee's report.

[See 20 (2), *infra*.]

(248)

Finality of arbitrator's decision.

The employers of a workman, whose duties occasionally necessitated his climbing a ladder, and who had suffered injuries and had been in receipt of compensation, stopped the payments, and presented an application to have the compensation ended or reduced, on the ground, which was disputed, that the workman had recovered. After a proof before the sheriff and a medical assessor, the sheriff found that the workman was "fit to resume his former work," or "to undertake any other form of labour which is conducted on the level of the ground," but that, "in the meantime, it would not be entirely safe for him to climb ladders, . . . as from want of use, combined with the effect of the accident, the appellant's left leg is weaker than the right," and ended the compensation. The Court refused to interfere with the decision, **holding** that the question of the workman's recovery was one of fact only upon which the sheriff's finding was final.

M'Naughton & Sinclair v Cunningham, 1910 S.C. 980; 47 S.L.R. 781; 1910, 2 S.L.T. 167.

(249)

Onus of proof—Registered agreement.

In an application under the Workmen's Compensation Act, 1906, for review of a weekly payment fixed by a recorded memorandum of agreement, the arbitrator found it proved that the workman was unable to work in consequence of a cardiac affection, which was not proved to be in any way connected with the injuries in respect of which compensation was payable, and that it was not proved that the workman still suffered from these injuries in such a way as to render him incapable of work. **Held** that upon such findings the employer was not entitled to have the weekly payments ended, the onus being upon him, in the case of a payment fixed by a recorded memorandum of agreement, to prove affirmatively that the workman had recovered from his injuries.

M'Callum v Quinn, 1909 S.C. 227; 46 S.L.R. 141; 16 S.L.T. 501.

(250)

Partial recovery—Arbitrator's discretion.

Observed (per Lord Salvesen)—"The moment it is established as matter of fact that total incapacity has ceased and that only partial incapacity is present, the employer has made out a prima facie case for having the award as for total incapacity diminished."

Carlin v Stephen & Sons, 1911 S.C. 901; 48 S.L.R. 862; 1911, 2 S.L.T. 19.

(251)

—When a workman, who has been totally incapacitated and has been receiving full compensation in terms of the Workmen's Compensation Act, partially recovers and is earning a wage, a prima facie case arises for reducing his compensation; but it is open to him to prove circumstances which will warrant the arbitrator, in the exercise of his

discretion, in refusing to diminish the compensation. The circumstance that the compensation he has been receiving, together with the wage he is earning, does not equal his average weekly earnings before the accident does not by itself justify a refusal to diminish.

Pryde v A. G. Moore & Co., 1913 S.C. 437; 50 S.L.R. 302; 1913, 1 S.L.T. 49.

(252)

Cessation of incapacity—Workman unfit to perform previous work but earning previous wages at work provided by employers.

A workman, who was employed as supervisor at the picking tables at a colliery, lost the use of his right eye in December, 1917, through an accident arising out of the employment, and for a time received from his employers compensation as for total incapacity. In March, 1919, the medical referee certified that he was unfit to resume his previous work, as his left eye was also defective from a cause unconnected with the accident, but that he was fit to work in the employers' woodyard. In April, 1919, he did resume his previous work, at which, however, he could only get part-time employment, and he was paid partial compensation until 24th December, 1919, when he began to receive wages equal to his earnings prior to the accident. He continued to receive these wages until May, 1920, when, owing to the progressive failure of the sight of his left eye, he again became totally unable to work. In an application by the employers for an award ending the right to compensation as from 24th December, 1919, the arbitrator found as facts that, when the workman resumed his previous work, he was not fit to resume it, and could not have obtained employment in that capacity in the open market, although he was fit to perform work in the woodyard until his sight failed; and he found that the workman's condition was one of partial incapacity from which he at no time recovered, and awarded compensation as for partial incapacity from May, 1920, when he had to give up work. **Held** that the fact that the workman had received from his employers as high wages as he had earned prior to the accident did not prove that his incapacity had ceased, and that there was evidence upon which the arbitrator was entitled to make his award.

Kilpatrick v Wemyss Coal Co., 1922 S.C. 71; 59 S.L.R. 89; 1921, 2 S.L.T. 278.

(253)

Loss of one eye—Supervening disease in other eye—Risk of future incapacity.

Hargreave v Houghhead Coal Co., 1912 S.C. (H.L.) 70; [1912] A.C. 319; 49 S.L.R. 474; 1912, 1 S.L.T. 361, No. 259, *infra*.

(254)

Workman receiving same wages as before the accident—Earning capacity.

Opinion (per Lord Kinnear), that the fact that a workman is earning the same wages

as before the accident may not in itself be conclusive as to the termination of his right to compensation. **Opinion** (per Lord Johnston), that in the case of a workman who was not a minor the fact would be conclusive.

Malcolm v Bowhill Coal Co., 1910 S.C. 447; 47 S.L.R. 449; 1910, 1 S.L.T. 322.

(255)

Abnormal state of labour market—Suspensory order.

Mulligan v Glasgow Corporation, 1917 S.C. 450; 54 S.L.R. 352; 1917, 1 S.L.T. 230, No. 262, *infra*.

(v.) Minor Workmen.

(256)

Probable earnings at date of review—General rise in wages—Agreement fixing probable earnings at prior date—Rise in wages between date of agreement and date of review.

The compensation payable to a minor workman was fixed by agreement at a weekly sum representing half the amount which, in the opinion of the parties, he would have been earning at the date of the agreement had he remained uninjured. Some months afterwards, in consequence of a general rise in wages, he applied to the sheriff to have the compensation increased. **Held** that the fact that there had been a general rise in wages between the date of the agreement and the date of the application did not per se entitle the workman to an increase, but that it was merely one of the items to be taken into consideration by the sheriff in determining for himself under par. (16) of the first schedule to the Act the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured.

Malcolm v Thomas Spowart & Co., 1913 S.C. 1024; 50 S.L.R. 823; 1913, 2 S.L.T. 141.

(257)

Minor workman of full earning capacity—General rise in wages—Discretion of arbitrator.

The fact that a minor workman, who had been injured, was earning an adult's full wage at the time of the injury does not debar an arbitrator from giving effect, in the exercise of his discretion, to the proviso in favour of minor workmen contained in par. (16) of the first schedule to the Workmen's Compensation Act; and he is entitled to give effect to an increased wage which the minor, if uninjured, might have been able to earn at the date of review, notwithstanding the fact that the increase is due solely to a general rise in wages. **Opinion** (per Lord Skerrington) that an arbitrator is not properly exercising his discretion if he refuses to give effect to par. (16) of the first schedule merely on the ground that a minor workman was earning an adult's full wage before he was injured and is not entitled to be put in a better

position than if he had been a workman of full age.

Burke v Wilsons & Clyde Coal Co., 1917 S.C. 92; 54 S.L.R. 97; 1916, 2 S.L.T. 285.

(c) Suspensory Orders.

[See also Cases under Act 1897, II. 14

(2) (c), *infra*.]

(258)

Competency—Possibility of supervening incapacity.

Decision in *Rosie v Mackay*, No. 582, *infra*, to the effect that it is incompetent to keep open a claim to compensation by means of a nominal award or similar device, doubted in view of the opinions delivered in the House of Lords in the subsequent English case of *Taylor v London and North-Western Railway*, [1912] A.C. 242.

Weir v North British Railway Co., 1912 S.C. 1073; 49 S.L.R. 772; 1912, 2 S.L.T. 54.

(259)

Review—Loss of eye—Possibility of incapacity supervening in consequence of disease in other eye—Disease not due to accident.

A miner lost his right eye through an accident arising out of his employment, and for a time received from his employers compensation for total incapacity. Subsequently in proceedings for review the arbitrator ended the compensation on the ground that the miner's incapacity had ceased, and that he was fit to resume his former work as a miner. He also found that there was incipient cataract in the remaining eye which would gradually produce incapacity for work, but that the cataract was not due to the accident. The miner maintained that the arbitrator ought to have made a suspensory order or a nominal award of compensation to enable him to obtain compensation if incapacity should supervene. **Held** that the arbitrator was right in ending the compensation.

Hargreave v Haughhead Coal Co., 1912 S.C. (H.L.) 70; [1912] A.C. 319; 49 S.L.R. 474; 1912, 1 S.L.T. 361.

(260)

Possibility of supervening incapacity.

A workman, who had suffered injuries which necessitated the amputation of portions of three fingers of the right hand, after recovering from the operation obtained work at higher wages in the district where he had been employed, and where, owing to the construction of public works, there was a large demand for labour. In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator, while finding that the workman's injuries were permanent, found also that he was no longer incapacitated owing to the accident from earning his former wages, and ended the compensation that was being paid to him. In an appeal at

the instance of the workman the Court *hoc statu* remitted the case to the arbitrator to consider and decide whether the ending of the payment of compensation should be permanent or temporary. **Opinion** (per Lord President Strathclyde, *dub.* Lord Johnson) that a suspensory order was the proper judgment for the arbitrator to pronounce, looking to the possible adverse effect of a change in the condition of the labour market on the future wage-earning capacity of a permanently damaged workman.

Dempsey v Caldwell & Co., 1914 S.C. 28; 51 S.L.R. 16; 1913, 2 S.L.T. 267.

(261)

Possibility of supervening incapacity—Review—Suspensory order.

A workman, who had received injury at his work, was paid compensation by his employers for two weeks, when he resumed his work, and thereafter earned as much as he was earning prior to his injury. In an application by the employers for review the parties agreed to a remit to a medical referee to decide whether there was any chance of the workman's incapacity recurring. The referee reported that there was still some risk of recurrence of the incapacity. **Held** that the arbitrator's duty was to grant a suspensory order.

Dingwall v Fife Coal Co., 1918 S.C. 203; 55 S.L.R. 226; 1918, 1 S.L.T. 121.

(262)

Workman earning same wages as before accident—State of labour market—Possibility of supervening incapacity.

A workman lost the sight of his left eye through an accident arising out of his employment, and for a time his employers paid him compensation; but subsequently they refused to continue payment, and offered to take him back to his former work. In an application by the workman for compensation under the Workmen's Compensation Act, 1906, the arbitrator found that the workman was fit for work, and that it was not proved that his earning capacity in the open market had been affected by the accident, and dismissed the application. At the time of the application the labour market was in an abnormal condition owing to war. The Court, in respect that the stated case did not disclose that the arbitrator had considered the possible effects of his injury upon the appellant's earning capacity in a normal labour market, *hoc statu* remitted the case to the arbitrator to consider and decide whether the ending of the payment of compensation should be permanent or temporary.

Mulligan v Glasgow Corporation, 1917 S.C. 450; 54 S.L.R. 352; 1917, 1 S.L.T. 230.

(263)

Permanent injury—Chance of employment.

A workman met with an accident which necessitated the amputation of the thumb of his left hand. In an arbitration under the Workmen's Compensation Act, 1906, after the workman had recovered from the

effects of the operation, the arbitrator, after a proof, found that he was fit to resume his former work as a brakeman, and also that the loss of his thumb did "not impair his chance of employment in his former line of employment or in any other line of employment which he might reasonably hope to follow," and terminated the compensation. **Held** that, notwithstanding the permanent and patent nature of the injury, the arbitrator, in view of his finding as to the workman's chance of employment, was entitled to end and not merely suspend the compensation.

Watson v William Beardmore & Co., 1914 S.C. 718; 51 S.L.R. 621; 1914, 1 S.L.T. 481.

(264)

Possibility of supervening incapacity—Suspensory order—Omission to apply to arbitrator for suspensory order—Process—Remit—Competency.

An arbitrator terminated the compensation payable to a miner, who had permanently lost the use of one eye, on the ground that he had recovered his capacity to do the full work of a miner. In an appeal by stated case at the instance of the miner the arbitrator stated that no evidence had been led in the arbitration to show that the man's wage-earning capacity in the open market would be prejudicially affected by his condition, and that no request had been made for the pronouncement of a suspensory order. The Court, on condition that the appellant paid the whole expenses of the stated case, remitted to the arbitrator to consider and decide whether the ending of the payment of compensation should be permanent or temporary.

Neilson v Farme Coal Co., 1919 S.C. 410; 56 S.L.R. 286; 1919, 1 S.L.T. 205.

(d) Redemption of Weekly Payments—First Schedule (17).

(265)

Permanent incapacity—Loss of arm.

The employers of a workman, who had lost an arm as the result of an accident while in their employment, and who under agreement had received compensation at the rate of 16s. per week for over six months, presented an application under sec. 17 of the first schedule for redemption of liability. The facts above stated having been admitted by the parties, the arbiter, without further inquiry, fixed the amount payable by the employers at £622 14s. Sixteen shillings per week was admittedly the maximum rate of compensation for total incapacity. In an appeal the employers denied that the workman's incapacity was permanent, and moved for inquiry into his ability to work. **Held** that the incapacity was permanent in the sense of par. (17) of the first schedule, and that the arbiter had rightly proceeded, without further proof, to award a sum determined on that footing.

National Telephone Co. v Smith, 1909 S.C. 1363; 46 S.L.R. 988; 1909, 2 S.L.T. 147.

(e) Personal Bar.

[See 29, *infra*.]

20. MEDICAL EXAMINATIONS OF WORKMAN.

(1) PRELIMINARY EXAMINATION ON BEHALF OF EMPLOYER—First Schedule (4).

(266)

Workman's demand for presence of his own doctor.

Held that a workman has not an absolute right to insist on his own doctor being present when he is being examined, in terms of par. (4) of the first schedule to the Workmen's Compensation Act, 1906, by a medical practitioner on behalf of the employers; the question whether such a demand is reasonable or unreasonable, and, accordingly, whether the workman's insistence on it does or does not amount to a refusal to submit himself to examination, being a question of fact for the decision of the arbitrator in each particular case.

Morgan v William Dixon, Limited, 1912 S.C. (H.L.) 1; [1912] A.C. 74; 49 S.L.R. 45; 1911, 2 S.L.T. 430.

(2) MEDICAL EXAMINATION DURING PAYMENTS—First Schedule (14) and (15).

[See also Cases under Act 1897, II. 15, *infra*.]

(267)

Reference to medical referee—Recovery of injured workman—Finality of arbitrator's decision.

The employers of a miner whose knee had been injured and who had been in receipt of compensation, stopped further payments on 9th April, 1909, on the ground that the workman had completely recovered. The question of his recovery was referred to a medical referee, who reported that the knee should be kept unbandaged, and that after continuing for a month at light labour he should resume his original work. The workman ceased wearing a bandage, but a fortnight thereafter his knee again required to be bandaged by a doctor, and after one day's absence he resumed light work and continued to wear a bandage. In an application by the workman for continued compensation, the sheriff found, on 22nd July, 1909, "that the appellant, if he wears a knee-cap, will be able and ought to resume his original work as a brusher," and awarded him partial compensation up to 13th August, 1909, and ended the compensation as from that date. The Court refused to interfere with the sheriff's finding, **holding** that the question of the workman's recovery was one of fact only, on which the sheriff's decision was final.

Anderson v Darngavil Coal Co., 1910 S.C. 456; 47 S.L.R. 342; 1910, 1 S.L.T. 149.

(268)

Finality of referee's report—Proof as to earning capacity.

In an application for review of compensa-

tion paid to a miner, who had received an injury resulting in the loss of an eye, a reference was made to a medical referee in terms of par. (15) of the first schedule. The referee reported that the miner was "as fit as any other one-eyed man to resume his work underground." The miner having moved for a proof as to his earning capacity, the arbitrator refused the motion and ended the compensation, on the ground that the referee's report was final, and that it meant that the miner's incapacity had ceased. **Held** that the report in question, though final as to the miner's physical condition, was not final as to his earning capacity, and case remitted to the arbitrator to allow a proof on that matter.

Arnott v Fife Coal Co., 1911 S.C. 1029; 48 S.L.R. 828; 1911, 2 S.L.T. 85.

(269)

Finality of medical referee's report—Report of fitness for work—Proof as to wage-earning capacity.

By agreement between a coal miner, who had received an injury to his thumb and was receiving compensation, and his employers the question of the workman's capacity to resume his former employment was referred to a medical referee. The medical referee reported that the workman was "quite fit to resume his ordinary employment as a coal miner, having recovered from" the injury. In an application by the employers to have the compensation ended, the workman averred that having returned to work he had ascertained "that his earning ability has been considerably reduced from the effects of his injury," and maintained that he was still entitled to partial compensation. **Held** that, as the medical referee's report was final, and was from its terms conclusive as to the question raised by the workman's averments, proof of these averments was inadmissible. **Observed** that where a medical referee's report is not from its terms conclusive a proof may be admissible. **Question**, whether a proof might not have been admissible if the workman had averred that, owing to the consequences of the accident, he had been unable to obtain employment.

Gray v Shotts Iron Co., 1912 S.C. 1267; 49 S.L.R. 906; 1912, 2 S.L.T. 146.

(270)

Finality of referee's report—Proof as to wage-earning capacity.

In an application to end the compensation payable to a miner who had received an injury to his eye, the question of his condition and his fitness for employment was referred to a medical referee under par. (15) of the first schedule to the Act. The medical referee reported that "his condition is such that I consider he ought now to be fit to resume his ordinary work as a miner below ground." The miner having lodged answers in which he averred that he had not yet recovered from the effects of the accident and that his earning capacity was not restored, the

Court allowed a proof as to the miner's wage-earning capacity, but excluded all evidence with regard to his physical condition and physical fitness for his ordinary work as a miner below ground, as on those points the medical referee's certificate was final.

Cruden v Wemyss Coal Co., 1913 S.C. 534; 50 S.L.R. 344; 1913, 1 S.L.T. 100.

(271)

—Certificate of recovery—Supervening incapacity.

The employers of a workman paid him compensation for injuries under an unrecorded agreement until 20th October, 1908, when they refused to make further payments, on the ground, disputed by the workman, that the incapacity had ceased. The parties having applied for a reference to a medical referee, the referee reported that incapacity ceased at 20th October, 1908. The workman acquiesced in the non-payment of compensation until 8th May, 1909, at which date he alleged that he again became incapacitated owing to the same injury. No application was ever made by the employers for an order to end the compensation. In an application to the sheriff by the workman for an award to fix the amount of compensation due in respect of the alleged supervening incapacity, **held** that the certificate of the medical referee did not bar the application.

King v United Collieries, 1910 S.C. 42; 47 S.L.R. 41; 1909, 2 S.L.T. 272.

(272)

—Ambiguous report—Competency of sending report back to medical referee for explanation.

The report of a medical referee, to whom a reference has been made under the Workmen's Compensation Act, 1906, first schedule (15), may competently be sent back to him by the arbitrator for explanation, if it is ambiguous or unintelligible.

Kennedy v William Dixon, Limited, 1913 S.C. 659; 50 S.L.R. 453; 1913, 1 S.L.T. 253.

(273)

—Minute craving the Court to end compensation—Necessity for separate application—Act of Sederunt, 26th June, 1907, sec. ix. (C.A.S., L. xiii. 9).

A workman having been injured in the course of his employment, his employers agreed to pay him compensation, but no memorandum of the agreement was recorded. After compensation had been paid for some time, the parties, being at variance as to whether the workman had recovered, lodged a joint minute craving that the question be referred to a medical referee. The sheriff-clerk having made the reference, the referee reported that the workman had recovered, whereupon the employers lodged a minute craving the Court to end the compensation. The sheriff, holding that there was no process before him, and that he could not act until a separate application to end the compensation was presented, dismissed the minute. **Held** that, as the minute contained a crave

to end the compensation, it was competent for the sheriff to act on it, and that he ought to have disposed of the application on its merits.

M'Ghie v United Collieries, 1910 S.C. 927; 47 S.L.R. 751; 1910, 2 S.L.T. 186.

21. ASCERTAINMENT OF DEPENDANTS —First Schedule (8).

(274)

Proof of relationship incidental to arbitration.

In an arbitration under the Workmen's Compensation Act, 1906, a claim was made by a girl who alleged that she was an illegitimate child of the deceased workman. The arbitrator sisted procedure in order that she might establish her allegation in a competent Court. **Held** that it was the duty of the arbitrator, in determining the question whether the claimant was a dependant, to decide incidentally her relationship to the deceased.

Johnstone v Spencer & Co., 1908 S.C. 1015; 45 S.L.R. 802; 16 S.L.T. 182.

(275)

Proof of marriage incidental to arbitration.

In an arbitration under the Act a claim was made by a woman who alleged that she was the wife of the deceased workman, and in proof of the marriage tendered evidence of cohabitation and habit and repute. The arbitrator sustained her claim. **Opinions** reserved on the question whether it was competent for the arbitrator in the arbitration proceedings to determine whether the claimant was the widow of the deceased workman.

Wallace v Fife Coal Co., 1909 S.C. 682; 46 S.L.R. 727; 1909, 1 S.L.T. 509.

SECOND SCHEDULE.

22. MEDICAL ASSESSOR—Second Schedule (5).

(276)

In a stated case under the Workmen's Compensation Act the opinion of a medical assessor ought not to be included as a finding in fact. The arbitrator, however, is entitled to rely upon that opinion in arriving at a conclusion as to the cause of disablement or death.

Connelly v Cross & Sons, 1917 S.C. 164; 54 S.L.R. 142; 1917, 1 S.L.T. 40.

23. RECORDING MEMORANDUM OF AGREEMENT—Second Schedule (9).

(1) COMPETENCY.

[See also Cases under Act 1897, II. 16 (1), *infra*.]

(277)

Agreement containing conditions other than those of the statute.

Opinion (per Lord Kinnear) that an agree-

ment to pay compensation which introduces conditions other than those contained in the statute cannot be recorded under par. (9) of the second schedule.

M'Ewan v William Baird & Co., 1910 S.C. 436; 47 S.L.R. 430; 1910, 1 S.L.T. 215.

(278)

Agreement in settlement of claim for compensation—Liability denied but claim settled as though compensation due.

Held that an agreement between a workman and his employers for the settlement of a claim for compensation by payment of a lump sum may be an "agreement" in the sense of the Workmen's Compensation Act (and so recordable) even though the employers dispute liability to pay compensation, if, in fact, they have agreed to the amount of the payment being fixed as though they were liable under the Act.

M'Guire v Paterson & Co., 1913 S.C. 400; 50 S.L.R. 289; 1913, 1 S.L.T. 32.

(2) PARTY INTERESTED.

(279)

National Insurance Act, 1911—Approved society.

Question, whether an approved society under the National Insurance Act, 1911, is a "party interested" who, in terms of the Workmen's Compensation Act, 1906, second schedule (9), may apply for registration of a memorandum of an agreement regarding the payment of compensation to one of its members.

William Baird & Co. v Ancient Order of Foresters, 1914 S.C. 965; 51 S.L.R. 819; 1914, 2 S.L.T. 206.

(3) GENUINENESS.

[See also Cases under Act 1897, II. 16 (2), *infra*.]

(280)

Written agreement between parties—Terms of memorandum differing from terms of agreement.

Where an agreement in writing has been entered into between an employer and a workman with regard to compensation, it is the duty of the sheriff (if objection is taken) to refuse to record a memorandum which is not in the precise terms of the written agreement. It is not part of his duty to construe the written agreement and then to determine whether the memorandum gives effect to it as so construed.

M'Lean v Allan Line Steamship Co., 1912 S.C. 256; 49 S.L.R. 207; 1912, 1 S.L.T. 61.

(281)

Terms of memorandum differing from terms of agreement.

A workman, who had been totally incapacitated by an accident, received weekly payments of 10s. from his employers, for which he granted receipts bearing that the payments were accepted "as the weekly compensation payable during the period of total incapacity

for work as the result of the accident." He subsequently applied for warrant to record a memorandum which bore that the parties had agreed "that compensation be paid by" the employers to the workman "in terms of the Workmen's Compensation Act, at the rate of 10s. per week from" the date of the accident. Held that the memorandum was not genuine, in respect of the omission of the qualification "during the period of total incapacity."

Pryde v A. G. Moore & Co., 1913 S.C. 457; 50 S.L.R. 302; 1913, 1 S.L.T. 49.

(282)

Terms of memorandum differing from terms of agreement—Agreement to pay compensation in terms of the Act.

An injured workman and his employers verbally agreed that compensation should be paid to the former at the rate of 15s. 1d. per week. The workman thereafter signed a number of receipts, each of which bore to be for "weekly compensation to date under the Workmen's Compensation Act, 1906, under which I claim for personal injury by accident sustained by me." Thereafter the employers objected to the recording of a memorandum which bore that the agreement was to pay compensation at the foresaid rate "until the same is ended, diminished, redeemed, or suspended in terms of" the Act, on the ground that the memorandum was not genuine, because it differed in terms from the agreement which contained no obligation as to future payments. Held that the arbitrator, who had granted warrant to record the memorandum, was right in so doing, in respect that the agreement was an agreement to pay compensation in terms of the Act, and that the memorandum merely set forth those terms.

Pearson v Babcock & Wilcox, 1913 S.C. 959; 50 S.L.R. 790; 1913, 2 S.L.T. 96.

(283)

Terms of memorandum differing from terms of agreement—Agreement embodied in receipts—Whether agreement for total incapacity only.

A workman, who had been incapacitated as the result of an accident, received payments of compensation from his employers for more than a year, and granted receipts for these payments which bore that they were "accepted as the amounts payable under the Workmen's Compensation Act, 1906." The payments were all at the rate to which the workman was entitled as for total incapacity. On the employers ceasing to make further payments the workman sought to record a memorandum which bore that "the liability to pay workmen's compensation during the claimant's incapacity for work at the rate of 10s. per week was admitted by the respondents." The employers objected to the recording of this memorandum, on the ground that the agreement, as evidenced by the receipts, was to pay compensation during total incapacity only, and accordingly that the memorandum was not in terms of the agreement. Held

that the agreement was not limited to the period of total incapacity, and accordingly that the memorandum was in terms of the agreement, and fell to be recorded.

Scott v Sanguhar and Kirkconnel Collieries, 1915 S.C. 520; 52 S.L.R. 391; 1915, 1 S.L.T. 241.

(284)

Memorandum not disclosing agreement as to expenses.

The law-agent of an employer who was paying weekly compensation to a workman offered the law-agent of the latter £15 and £5 5s. of expenses, in final settlement of the claim. The workman's agent communicated the offer of £15 to his client, and urged him to accept it, but did not mention the arrangement about expenses. The workman having authorised his agent to accept the offer of £15, the agent wrote accepting the offer of £15 in settlement of the compensation, "and £5 5s. in full of our expenses as arranged." Thereafter the employer presented an application to record a memorandum of agreement which narrated that the weekly payments were to be redeemed by payment of £15, but contained no reference to the expenses. **Held** that the memorandum of agreement was genuine though it contained no reference to the agreement as to expenses, that being a subsidiary arrangement.

M'Laughlin v Pumpherston Oil Co., 1915 S.C. 65; 52 S.L.R. 48; 1914, 2 S.L.T. 306.

(285)

Agreement to pay weekly sum during total incapacity—Objection on ground that incapacity had ceased.

By an agreement between a workman and his employers the latter bound themselves to pay him a weekly sum as compensation under the Act "during his total incapacity for work." The workman having sought to have a memorandum of agreement recorded at a time when he was no longer incapacitated, his employers, while not disputing that the memorandum correctly represented the contract between themselves and the workman, contended that in view of the fact that he was not incapacitated it was not "genuine" in the sense of the statute, and should not be recorded. **Held** that the memorandum was "genuine" and fell to be recorded.

Coakley v Addie & Sons, 1909 S.C. 545; 46 S.L.R. 408; 1909, 1 S.L.T. 261.

(4) AGREEMENTS NO LONGER SUBSISTING.

[See also Cases under Act 1897, II. 16 (3), *infra*.]

(286)

Agreement superseded by reference to medical referee—Report that incapacity had ceased.

The employers of a workman paid him compensation for injuries under an unrecorded agreement till March, 1909, when the parties, by joint letter, referred to a medical man the question whether the work-

man had then recovered. The referee reported that the workman was fit for his former duties or for any ordinary work, and the employers stopped the payments. In August, 1909, the workman lodged a memorandum of the agreement to be recorded, which was objected to by the employers. The sheriff found that the memorandum was genuine, and granted warrant to record. On appeal by the employers, **held** that no warrant should have been granted, in respect that the agreement sought to be recorded had been superseded and brought to an end by the joint reference, and by the referee's report that incapacity had ceased.

M'Naughton & Sinclair v Cunningham, 1910 S.C. 980; 47 S.L.R. 781; 1910, 2 S.L.T. 167.

(287)

Discharge of claim by workman prior to application for recording—Determination of validity of discharge in application for recording—Act of Sederunt, 26th June, 1907, sec. 12.

A workman presented an application for recording a memorandum of agreement under the Workmen's Compensation Act, 1906, to which the employers lodged objections, on the ground that prior to the memorandum being presented the workman had signed a final discharge of his claim. The workman in answer averred that the alleged discharge, if signed by him, was signed under essential error. Both parties expressly admitted that the question fell to be settled by arbitration in terms of sec. 12 of the Act of Sederunt, 26th June, 1907. **Held** that the arbitrator could competently determine the question as to the validity of the discharge in the application to record the memorandum, and that as the parties had joined issue on the question he was bound to determine it.

Hanley v Niddrie and Benhar Coal Co., 1910 S.C. 875; 47 S.L.R. 726; 1910, 2 S.L.T. 45.

(288)

Incapacity diminished—Finding that workman fit for some work.

Compensation having been paid for six months, applications were brought by the workman to have a memorandum recorded and by the employer to have the compensation ended or diminished. After a proof the sheriff-substitute found the workman "fit for some work," dismissed the employer's application, and granted warrant to record the memorandum. Case remitted to the sheriff-substitute for a definite finding as to workman's capacity.

Petrie v Smith, 1913, 50 S.L.R. 749; 1913, 1 S.L.T. 470.

(5) RECORDING SUBJECT TO CONDITIONS.

(289)

"Earning the same wages"—Workman returning to work, but dismissed prior to application for recording.

In an application by a workman for warrant to record a memorandum of agreement

for the payment of compensation during total incapacity, which was opposed by the employers, it was proved that the workman had returned to work at wages higher than those earned before the accident; that on several occasions he was reprimanded for laziness, and was ultimately dismissed on a reduction of the staff, which took place a few weeks after his resumption of work; that since his dismissal he had earned no wages, and was earning none at the date of the application, although no incapacity had supervened. The sheriff, holding that the employers had discharged the onus of proof imposed on them by sub-sec. (b) of par. (9) of the second schedule, applied that sub-section, and granted only a conditional warrant to record. Held that the decision of the sheriff was justified.

Matthews v William Baird & Co., 1910 S.C. 689; 47 S.L.R. 627; 1910, 1 S.L.T. 356.

(290)

Workman earning the same wages as before the accident.

An injured workman, who had entered into an agreement with his employers with regard to payment of compensation, sought to record a memorandum of that agreement. The employers objected to the recording on the ground (which was admitted) that the workman had returned to work and was earning the same wages as before the accident; and the sheriff refused to record. Held that, the memorandum being a genuine record of the agreement, the sheriff had no discretion to refuse to record it, but should have recorded it, attaching such conditions as he considered just in the circumstances.

Scott v Sanquhar and Kirkconnel Collieries, 1915 S.C. 520; 52 S.L.R. 391; 1915, 1 S.L.T. 241.

(291)

Partially incapacitated workman—Employer's offer of full wages for light work—Refusal of offer by workman—Sisting procedure.

An injured workman, who had been receiving compensation in pursuance of an agreement with his employer, recovered from his injuries sufficiently to be fit for light work. His employer thereupon offered him such work, and offered to pay him therefor the same wage as he had been earning before the accident. The workman refused this offer, and presented for registration a memorandum of the agreement with his employer. The sheriff refused to record the memorandum, and ended the compensation. Held (1) that the workman was barred from receiving compensation by his refusal of work, at full wages, suited to his capacity; (2) that the proper course for the sheriff was to have recorded the memorandum, but, in respect of the employer's offer to pay the workman full wages, to have suspended compensation by sisting procedure *hoc statu*.

Keavans v Mundy, 1914 S.C. 525; 51 S.L.R. 462; 1914, 1 S.L.T. 350.

Cf. McEwan v William Baird & Co., 1910 S.C. 436; 47 S.L.R. 430; 1910, 1 S.L.T. 215, No. 303, *infra*.

(6) **APPEAL FROM ORDER GRANTING OR REFUSING SPECIAL WARRANT TO REGISTER.**

[See also Cases under Act 1897, II. 16 (4), *infra*.]

(292)

Finality of sheriff—Act of Sederunt, 26th June, 1907, sec. 12 (see C.A.S., L. xiii. 12).

In a case where the recording of a memorandum was objected to on the ground that it was not genuine, held that the decision of the sheriff as to whether it should or should not be recorded was a decision *qua arbitrator* and not merely a ministerial act, and was accordingly subject to appeal by stated case.

Coakley v Addie & Sons, 1909 S.C. 545; 46 S.L.R. 408; 1909, 1 S.L.T. 261.

(293)

Method of review—Action of reduction—Competency—Act of Sederunt, 26th June, 1907, sec. 12 (see C.A.S., L. xiii. 12).

An application by a workman for the registration of a memorandum of agreement under the Workmen's Compensation Act, 1906, was objected to by the employers, but the sheriff granted warrant to register. The employers thereupon brought an action for reduction of the registered memorandum. Held that the action of reduction was incompetent, in respect that, as the act of the sheriff in recording the memorandum was a judicial act in arbitration proceedings under the statute, and (in this case) involved a question of law, it fell under the provisions for appeal by way of stated case contained in the statute, and that the common law remedies were consequently excluded.

John Brown & Co. v Orr, 1910 S.C. 526; 47 S.L.R. 437; 1910, 1 S.L.T. 138.

(294)

Competency—Action by workman—No opportunity to workman to use statutory procedure.

A workman's employers obtained a receipt and discharge from the workman by which they were discharged from all claims in respect of personal injury in respect of an accident. An application of the employers for registration of a memorandum of agreement embodying the receipt and discharge was intimated to the workman, and the memorandum was recorded without opposition. The workman brought an action of reduction of the receipt and discharge and of the memorandum. The action was dismissed. On a reclaiming note, the record was allowed to be amended, the pursuer averring that he had had no opportunity of working out his remedy by the procedure provided in the Workmen's Compensation Act. Held that the action was competent and proof allowed.

Mackinnon v Fairfield Shipbuilding and Engineering Co., (O.H.) 1921, 2 S.L.T. 270.

(7) AGREEMENT FOR REDEMPTION OF WEEKLY PAYMENTS.

(295)

Duty of sheriff-clerk to inquire into circumstances of agreement.

The second schedule (9) (d) of the Workmen's Compensation Act, 1906, provides that a sheriff-clerk to whom a memorandum of agreement for the redemption of a claim for compensation by payment of a lump sum is brought, may refuse to record it if, "on any information which he considers sufficient," it appears to him that, by reason of the inadequacy of the sum or the means by which the agreement was obtained, the agreement should not be recorded. **Held** that the sheriff-clerk is not bound in every case *ex proprio motu* to inquire into these matters before proceeding to record. **Observations** on the duties of the sheriff-clerk in such a case.

M'Guire v Paterson & Co., 1913 S.C. 400; 50 S.L.R. 289; 1913, 1 S.L.T. 32.

(296)

Procedure—Minute by workman objecting to adequacy of sum agreed on and to means by which agreement obtained—Reference by sheriff-clerk to sheriff—Act of Sederunt, 26th June, 1912, sec. 12 (C.A.S., L. xiii. 12).

Held that where, upon a minute lodged by a workman objecting to the recording of a memorandum of an agreement as to the redemption of a weekly payment on the grounds mentioned in par. (9) (d) of the second schedule, the matter was referred by the sheriff-clerk to the sheriff, it was the duty of the latter to determine the questions thus raised, notwithstanding that the minute was lodged by the workman and not by the sheriff-clerk.

Burns v William Baird & Co., 1913 S.C. 358; 50 S.L.R. 280; 1912, 2 S.L.T. 491.

(297)

Duty of sheriff-clerk to consider question—National Insurance Act, 1911, sec. 11 (1) (c)—Workman member of approved society—Approved society objecting to recording of memorandum—C.A.S., L. xiii. 12.

An injured workman, who was an insured person with an approved society under the National Insurance Act, 1911, agreed to accept from his employers a lump sum in full of all his claims for compensation under the Workmen's Compensation Act, 1906, and lodged a memorandum of this agreement with the sheriff-clerk for registration. The approved society thereupon lodged with the sheriff-clerk a minute in which they stated that they objected to the recording of the memorandum on the ground that the lump sum was inadequate. The minute contained no averments in support of this objection. The sheriff-clerk put the memorandum and minute before the sheriff, who found that the sheriff-clerk had in effect, though not by formal minute as required by C.A.S. 1913, L. xiii., sec. 12, referred the question in dispute to him, and accordingly that the matter fell to be dealt with by him as

arbitrator. **Held** that the procedure followed had been irregular, and case remitted to the sheriff court in order that the sheriff-clerk might discharge the duty imposed on him by par. (9) (d) of the second schedule to the Act, and by sec. 12 of the Act of Sederunt, of considering any information, including that of the approved society, relating to the objection to recording the memorandum, and of laying before the sheriff, if so advised, a minute setting forth his grounds for refusing to record the memorandum. **Held** further that the sheriff, before disposing of the question raised, would be entitled to hear the approved society.

William Baird & Co. v Ancient Order of Foresters, 1914 S.C. 965; 51 S.L.R. 819; 1914, 2 S.L.T. 206.

(298)

Objection to recording of agreement—Lump sum already paid to workman—Validity of order for consignation of sum by workman before objection disposed of.

An injured workman entered into an agreement with his employers that the weekly compensation due to him should be redeemed for a lump sum of £100, which sum was paid over to him. On the employers presenting a memorandum of this agreement for registration, the sheriff-clerk refused to record it, on the ground of the inadequacy of the sum, and referred the matter to the sheriff-substitute, all in terms of the Act. The sheriff-substitute, holding that further inquiry into the question was necessary, ordained the workman to consign in Court the £100 (less the weekly compensation due to date), as a condition precedent to the inquiry being held. **Held** that the sheriff-substitute was not entitled to make such an order.

M'Vie v Taylor & Co., 1914 S.C. 533; 51 S.L.R. 435; 1914, 1 S.L.T. 342.

(8) SUSPENSION OF CHARGE ON RECORDED MEMORANDUM.

(299)

Suspension of charge on recorded memorandum of agreement—Competency.

Wilsons & Clyde Coal Co. v Cairnduff, 1911 S.C. 647; 48 S.L.R. 500; 1911, 1 S.L.T. 369, No. 339, *infra*.

(300)

Remedy of employer where workman charges for payment.

Wishart v Gibson & Co., 1914 S.C. (H.L.) 53; [1915] A.C. 18; 51 S.L.R. 516; 1914, 1 S.L.T. 416, No. 340, *infra*.

(9) MISCELLANEOUS.

(301)

Memorandum of agreement—Validity—Conditional agreement—Suspensive condition—Impossibility of fulfilment—Condition requiring approval by curator ad litem—Death of workman before curator appointed.

The employers of a minor workman, who

had met with an injury in respect of which he was in receipt of weekly payments of compensation, entered into an agreement with the workman to pay him a sum in full settlement of all claims competent to him, but subject to the condition of the agreement being approved by a curator ad litem to be appointed by the Court. The workman presented an application to have a memorandum of the agreement recorded, but he died before a curator ad litem had been appointed. His executor having been sisted as applicant in his place, the application was refused by the sheriff-substitute. **Held** that the approval of a curator ad litem was a condition suspensive of the validity of the agreement, and that, as the condition could not be purified, the application had been rightly refused.

Donaldson's Executor v Sharp & Sons, 1922 S.C. 566; 59 S.L.R. 440; 1922 S.L.T. 385.

(302)

Arbitration to obtain award of compensation—Simultaneous application for warrant to record memorandum of agreement—Jurisdiction—Competency.

A workman presented an application to the sheriff court for warrant to record a memorandum of agreement for payment of compensation under the Workmen's Compensation Act, 1906, in respect of an accident. The genuineness of the memorandum was disputed by his employers. While the application was pending he initiated arbitration proceedings to obtain an award of compensation under the Act in respect of the same accident. **Held** that the two proceedings could not competently be conjoined, and that the arbitration should be sisted until the application for the warrant had been determined.

King v Arniston Coal Co., 1913 S.C. 892; 50 S.L.R. 685; 1913, 1 S.L.T. 451.

(303)

Counter application for review.

Where an application by a workman for the recording of an agreement fixing compensation and an application by his employer to have the compensation ended or diminished came before a sheriff-substitute at the same time, the sheriff-substitute allowed a proof in the application for review. The workman having moved for a warrant to record the memorandum in respect that its genuineness was not disputed and that no other question of fact arose, the sheriff-substitute refused the motion and allowed a proof to proceed on the same day as the proof in the application for review. In an appeal **held** that the sheriff-substitute was not bound to grant warrant to register the memorandum of agreement without awaiting the result of the proof in the application for review.

Opinion (per Lord President Dunedin and Lord Kinnear) that in such circumstances it was also competent for the sheriff-substitute either to sist the application for recording

or to record the memorandum and supersede extract.

M'Ewan v William Baird & Co., 1910 S.C. 436; 47 S.L.R. 430; 1910, 1 S.L.T. 215.

(304)

—A workman presented to the sheriff a minute for special warrant to record a memorandum of agreement under the Workmen's Compensation Act, 1906, the genuineness of which had been objected to by his employers. The employers did not lodge a minute stating the grounds of their objection, but instituted arbitration proceedings to have the compensation ended or reduced. The workman then moved that the memorandum should be recorded, on the ground that its genuineness was not disputed, and that no other question of fact arose. The sheriff-substitute refused the motion at that stage, and continued the application till the date of the proof in the proceedings for review. **Held** that the arbitrator was not bound by the statute to grant warrant to record the memorandum of agreement without awaiting the result of the proof in the counter application.

M'Vey v William Dixon, Limited, 1910 S.C. 544; 47 S.L.R. 463; 1910, 1 S.L.T. 247.

(305)

Agreement discharging all claims—National Insurance Act, 1911, sec. 11 (1) (c) and (2)—Workman insured with approved society—Failure to give notice of agreement to society—Subsequent claim for compensation at instance of society—Competency.

An injured workman, who was insured with an approved society under the National Insurance Act, 1911, accepted compensation under the Workmen's Compensation Act, 1906, for ten weeks from the date of the accident at the rate of £1 per week. On the day following the last of those weekly payments he received an additional sum of £6, and signed a receipt for £16 in full settlement and discharge of all claims competent to him under the Workmen's Compensation Act, 1906, the Employers' Liability Act, 1880, or at common law, in respect of the injury sustained by him. He returned to work on the same day. A memorandum of this agreement was recorded, but no notice of the agreement was sent by the workman's employers to his approved society in terms of sec. 11 (1) (c) of the National Insurance Act, 1911. Some months later the workman again became incapacitated, and an application for an award of further compensation was made by the approved society in the workman's name. The society contended that the claim was not barred by the recorded memorandum, because of the employers' failure to send them notice of that agreement. **Held** that the application was incompetent.

Gormley v Scottish Iron and Steel Co., 1918 S.C. 742; 55 S.L.R. 667; 1918, 2 S.L.T. 102.

24. REMIT TO MEDICAL REFEREE FOR REPORT—Second Schedule (15).

[See also 20 (2), supra.]

[See also Cases under Act 1897, II. 17, infra.]

(306)

Competency—No proof taken—Regulations, 27th June, 1907, Part V., rule 20.

Held that a remit by an arbitrator to a medical referee for a report cannot competently be made unless the arbitrator has taken a proof regarding the matter remitted for report.

Gray & Sons v Carroll, 1910 S.C. 700; 47 S.L.R. 646; 1910, 1 S.L.T. 373.

(307)

Remit on matter as to which no evidence tendered—Competency of finding by referee outwith the matter remitted to him—Statutory Regulations, 27th June, 1907, Part V., rule 20.

A woman was incapacitated by an accident which caused injuries to her hand, and she refused, on the advice of her own doctor, to undergo a minor operation, involving the use of anæsthetics, which was likely to diminish the incapacity of her hand. After a proof, an arbitrator remitted to a medical referee for a report as to whether the woman would be exposed to any exceptional risk in the use of anæsthetics, as this was a matter which had not been established by the proof. The referee reported that the risk was not more than ordinary; but he added that he considered that the operation would be of little benefit, and that the injury to the hand was permanent. The arbitrator refused to take the latter expression of opinion into consideration, as it went beyond the terms of the remit to the referee. On an appeal it was maintained that a remit to a medical referee on a matter as to which no evidence had been led was incompetent. Held (1) that the remit to the medical referee had been completely made; (2) that the arbitrator was not entitled to disregard any part of the referee's report.

Gracie v Clyde Spinning Co., 1915 S.C. 906; 52 S.L.R. 706; 1915, 2 S.L.T. 46.

(308)

Conflict of medical evidence—Whether referee's report conclusive as to question remitted—Statutory Regulations, 27th June, 1907, Part V., rule 20.

In an arbitration under the Workmen's Compensation Act the arbitrator, in consequence of a conflict of medical evidence, remitted to a medical referee, under paragraph (15) of the second schedule, to examine the evidence and to report whether a deceased workman was injured by rupture of the heart caused by the work, and died therefrom, or whether he died of heart disease. The medical referee reported that the workman "died from disease of the heart." The sheriff thereafter found that the workman had died from a rupture of the heart caused by the strain resulting from the work in

which he was engaged, and awarded compensation. In an appeal against that decision as contrary to the report, held (1) that the arbitrator was not bound to accept the medical referee's report as conclusive of the question which he, as arbitrator, had to decide, and (2) that as there was some evidence to support his decision it could not be interfered with.

Jackson v Scotstoun Estate Co., 1911 S.C. 564; 48 S.L.R. 440; 1911, 1 S.L.T. 215.

25. PROCEDURE IN ARBITRATIONS—Second Schedule (17) (b).

[See also Cases under Act 1897, II. 18, infra.]

(309)

Preliminary defences—Duty of arbitrator to dispose of whole case.

Where an arbitrator had allowed a separate proof on preliminary defences and had issued findings thereon without having heard the case as a whole, opinions that, there being no exceptional circumstances calling for the procedure followed, the arbitrator ought to have heard and disposed of the case as a whole.

Ellis v Fairfield Shipbuilding and Engineering Co., 1913 S.C. 217; 50 S.L.R. 137; 1912, 2 S.L.T. 485.

(310)

Dismissal of claim as irrelevant—Proof—Personal knowledge of arbitrator.

Employers, who had been paying compensation to an injured workman, discontinued the compensation on the ground that the workman's total incapacity had ceased. The question of his capacity was thereupon referred to a medical referee, who reported that the workman was fit to do light work, and specified certain kinds of such work. Thereafter the workman presented an application for an award of compensation as for total incapacity, and in support thereof averred that he had applied in the district for, and had been unable to obtain, such work as was indicated by the medical referee, and he enumerated the various places at which he had applied for that work. The arbitrator, without allowing a proof, dismissed the application as irrelevant, holding upon his knowledge of the district that there was a market for such work as was indicated by the referee, and that the workman's efforts to obtain work had not been sufficient to test the market. Held that the arbitrator was not entitled to dismiss the application as irrelevant, but ought to have allowed the workman a proof of his averments, although he would be entitled to use his own knowledge of the district in considering the evidence led.

Dyer v Wilsons & Clyde Coal Co., 1915 S.C. 199; 52 S.L.R. 114; 1914, 2 S.L.T. 411.

(311)

Amendment of pleadings—Addition of new respondent—Sheriff Courts (Scotland) Act, 1907, secs. 39, 50, and first schedule, rule 79.

In an arbitration under the Workmen's

Compensation Act, 1906, a workman claimed compensation from H, and subsequently, during the course of a proof, craved leave from the sheriff to amend his instance by substituting the name of H & Co. as respondents instead of H. The sheriff refused the motion as incompetent. In an appeal the Court held that it was competent for the sheriff to allow the name of H & Co. to be added as additional respondents, and remitted to him to allow the amendment in that form. **Opinion** (per Lord Johnston) that rule 79 of the first schedule to the Sheriff Courts (Scotland) Act, 1907, does not apply to arbitration proceedings under the Workmen's Compensation Act, 1906. **Opinions reserved** (per Lord Kinnear and Lord Salvesen).

O'Donnell v Wilson, 1910 S.C. 799; 47 S.L.R. 707; 1910, 2 S.L.T. 3.

(312)

Form of arbitrator's interlocutor.

Opinion (per Lord President Dunedin) that, in an interlocutor in an arbitration under the Workmen's Compensation Act, findings are unnecessary.

Walker v Murray, 1911 S.C. 825; 43 S.L.R. 575; 1911, 1 S.L.T. 278.

(313)

Power of arbitrator to decern.

In an arbitration under the Workmen's Compensation Act, 1906, the sheriff, acting as arbitrator, decerned for the sum claimed. **Held** that he should have merely pronounced a finding that that sum was due; and that in granting a decerniture he had exceeded his jurisdiction as arbitrator.

Malcolm v Bowhill Coal Co., 1909 S.C. 426; 46 S.L.R. 354; 1909, 1 S.L.T. 177.

(314)

Date of issue of award.

Hoolachan, 1917 S.C. 195; 54 S.L.R. 174; 1917, 1 S.L.T. 38, No. 315, *infra*.

26. APPEALS—Second Schedule (17) (b).

(1) COMPETENCY.

[See also Cases under Act 1897, II. 19 (1), *infra*.]

(315)

Application for stated case—Application within seven days after issue of award—Date of issue of award—C.A.S., L. xiii. 11 (2) and 17 (a).

In an arbitration under the Workmen's Compensation Act the sheriff-substitute, acting as arbitrator, signed an award on the 11th of November. No written notice of the award was sent to the parties, but on 13th November the sheriff-clerk's assistant handed a copy of it, which was blank as to date, to the workman's agent and informed him that it was of that day's date. Thereupon, in his presence, the workman's agent filled in the date as 13th November. Seven days thereafter the workman lodged a minute craving a stated case for appeal. The sheriff-substitute refused to receive the

minute, on the ground that, as his award was issued on 11th November, the minute had not been lodged within seven days as required by Act of Sederunt. **Held** that the award had not been issued till the 13th of November, and accordingly that the minute had been timeously lodged.

Hoolachan, 1917 S.C. 195; 54 S.L.R. 174; 1917, 1 S.L.T. 38.

(316)

Stage at which appeal competent—Appeal against allowance of proof.

Observations on the circumstances in which the Court will consider an appeal under the Workmen's Compensation Act before proof has been taken.

Colquhoun v Woolfe, 1912 S.C. 1190; 49 S.L.R. 911; 1912, 2 S.L.T. 169.

(317)

Failure to transmit case timeously—Dispensing power of Court—Act of Sederunt, 12th June, 1906, sec. 17 (e) (C.A.S., L. xiii. 17 (e)).

In an appeal under the Workmen's Compensation Act, 1906, the appellant failed to transmit the stated case within the seven days allowed by the Act of Sederunt of 12th June, 1906. The days expired in vacation, and the case was lodged before the first sederunt day. The First Division (after consulting with the judges of the Second Division), **holding** that they had power to dispense with the observance of the provisions of the Act of Sederunt, allowed the appeal to proceed, in respect that the appellant's failure to observe these provisions had not delayed the hearing of the appeal, and that it was the intention of the Court to alter the Act of Sederunt so as to provide for the event of the days expiring in vacation.

Leishman v William Dixon, Limited, 1910 S.C. 498; 47 S.L.R. 410; 1910, 1 S.L.T. 273.

(2) FORM OF STATED CASE.

[See also Cases under Act 1897, II. 19 (2), *infra*.]

(318)

Arbitrator's note—Purpose for which note may be referred to—Act of Sederunt, 6th July, 1915, sec. 1.

Observed (by Lord Justice-Clerk Scott Dickson) that, while it was not legitimate for the Court to use statements in the arbitrator's note for the purpose of supplementing the specific findings in fact which were contained in the stated case, the Court might use the note in order to discover the ratio in law of the arbitrator's judgment.

Espeie v British Basket Co., 1920 S.C. 655; 57 S.L.R. 529; 1920, 2 S.L.T. 89.

(319)

Observed (by Lord Shaw of Dunfermline) —“The provisions of the Act of Sederunt were simply that, when the sheriff-substitute had written a note, it should go into the proceedings as an appendix to the case. But

it is no function of the note to do anything other than to be expiscatory of what went before."

Scrimgeour v Thomson & Co., 1922 S.C. (H.L.) 64; 59 S.L.R. 66; 1922 S.L.T. 47.

(320)

Findings in fact—Findings in law—Duty of arbitrator to distinguish.

Observations (per Lord Atkinson) on the duty of the arbitrator to distinguish clearly between findings in fact and findings in law.

McKinnon v J. & P. Hutchison, 1916 S.C. (H.L.) 111; [1916] 1 A.C. 471; 53 S.L.R. 232; 1916, 1 S.L.T. 158.

(321)

Opinion of medical assessor.

In a stated case under the Workmen's Compensation Act, the opinion of a medical assessor ought not to be included as a finding in fact.

Connolly v Cross & Sons, 1917 S.C. 164; 54 S.L.R. 142; 1917, 1 S.L.T. 40.

(3) REFUSAL OF ARBITRATOR TO STATE CASE.

[See also Cases under Act 1897, II. 19 (3), *infra*.]

(322)

Question of law — Form of arbitrator's award—Workman suffering from two affections—Precise cause of incapacity not disclosed in arbitrator's findings.

In arbitration proceedings under the Workmen's Compensation Act, 1906, a controversy arose as to whether the workman had sustained injuries to his heart as well as to his back. The arbitrator found the workman entitled to compensation in consequence of total incapacity resulting from the accident, but he made no findings as to the nature of the injuries to which the incapacity was due. Thereupon the employers presented a minute craving him to state a case for the opinion of the Court on the questions (1) whether he was entitled to refrain from stating in his award whether the cause of incapacity was due to the condition of the back or of the heart, and (2) whether the award should have contained a finding as to the onus of proof with regard to the heart affection. The arbitrator refused to state a case, on the grounds that the questions proposed were not questions of law, and that, if they were, he had determined neither of them. **Held** that a question of law was raised; and arbitrator ordered to state a case containing specific findings regarding the character of the injuries said to have arisen out of the accident.

Montgomery v Niddrie and Benhar Coal Co., 1918 S.C. 181; 55 S.L.R. 217; 1918, 1 S.L.T. 107.

(323)

Accident arising out of and in the course of the employment—Form of question of law—C.A.S., L. xlii. 17 (h).

In arbitration proceedings under the Workmen's Compensation Act, 1906, the arbitrator

found that a workman's death resulted from injuries sustained by him owing to a fall from a ladder, and awarded compensation. A medical certificate which was produced stated the cause of death to have been appendicitis-peritonitis. The arbitrator refused a minute for the employers craving him to state a case for the opinion of the Court on the question whether the death of the deceased "was the result of an accident arising out of and in the course of his employment," on the ground that the question was one of fact and not of law. **Held** that the proper question was "whether there was evidence upon which it could competently be found that the death of the workman was the result of an accident arising out of and in the course of his employment"; and case remitted to the arbitrator to state a case on this question.

Euman v Dalziel & Co., 1912 S.C. 966; 49 S.L.R. 693; 1912, 1 S.L.T. 450.

(324)

Question of fact or law.

Circumstances in which **held** in an arbitration under the Workmen's Compensation Act, 1906, that the question whether the accident had arisen "out of and in the course of" the workman's employment was a question of law and not of fact, and that the arbitrator was not justified in refusing to state it as a question of law for the Court of Appeal.

Jackson v General Steam Fishing Co., 1909 S.C. (H.L.) 37; [1909] A.C. 523; 46 S.L.R. 901; 1909, 2 S.L.T. 227.

(325)

Question whether arbitrator's findings in fact supported by the evidence led—Law or fact—C.A.S., L. xlii. 17 (h).

A workman, dissatisfied with the arbitrator's statement of a case on appeal under the Workmen's Compensation Act, 1906, presented a note for an order upon the arbitrator to state a case, averring that certain facts, other than those stated by the arbitrator, had been proved, and that certain of the arbitrator's findings were contrary to the evidence, and proposing as one of the questions of law the question "Whether there was evidence led before the sheriff-substitute which could competently support his findings of fact?" He did not aver that there was no evidence before the arbitrator upon which he could proceed to a decision of the case. The Court refused the note, **holding** that it was in effect a request for the allowance of appeal upon a pure question of fact, upon which the arbitrator was final.

Nelson v Allan Brothers & Co., 1913 S.C. 1003; 50 S.L.R. 820; 1913, 2 S.L.T. 147.

(326)

Application for order to show cause why case should not be stated—Duty of applicant to specify in note the findings he desires—Act of Sederunt, 26th June, 1907, sec. 17 (h) (C.A.S., L. xlii. 17 (h)).

Held that a note presented to one of the Divisions of the Court of Session for an order

to show cause why a case under the Workmen's Compensation Act should not be stated by the sheriff, must specify findings to which the applicant says he is entitled; and, unless these findings are such as will found a *prima facie* argument that the sheriff's decision in the arbitration is wrong, the order craved will not be made.

Walker v Murray, 1911 S.C. 825; 48 S.L.R. 575 and 741; 1911, 1 S.L.T. 278 and 448.

(327)

Certificate of refusal—Act of Sederunt, 26th June, 1907, sec. 17 (c) and (h) (C.A.S., L. xiii. 17 (c) and (h)).

A certificate of refusal to state a case for appeal under the Workmen's Compensation Act, 1906, must be written on a separate paper, and not merely on the interlocutor sheet in the arbitration process.

Paterson v William Beardmore & Co., 1910 S.C. 507; 47 S.L.R. 455; 1910, 1 S.L.T. 208.

(4) REMIT TO ARBITRATOR.

[See also Cases under Act 1897, II. 19 (4), *infra*.]

(328)

Remit to arbitrator to reconsider his award—Act of Sederunt, 26th June, 1907, sec. 17 (g) (C.A.S., L. xiii. 17 (g)).

In an appeal by way of stated case in an arbitration under the Workmen's Compensation Act, the Court, without answering the questions put, remitted the case to the arbitrator to reconsider his award in light of the opinions expressed by the House of Lords in a judgment pronounced after the date of his decision.

Weir v North British Railway Co., 1912 S.C. 1073; 49 S.L.R. 772; 1912, 2 S.L.T. 54.

(329)

Remit to arbitrator for further information—C.A.S., L. xiii. 17 (g).

Observations on the principles which should guide the Court in remitting stated cases back to the arbitrator for further information.

Lendrum v Ayr Steam Shipping Co., 1914 S.C. (H.L.) 91; [1915] A.C. 217; 51 S.L.R. 733; 1914, 2 S.L.T. 137.

See also M'Kenna v Niddrie and Benhar Colliery Co., 1916 S.C. 1; 53 S.L.R. 1; 1915, 2 S.L.T. 234.

(330)

Remit to arbitrator for new findings.

Circumstances in which the Court refused a motion for a remit to the arbitrator for certain findings.

Buchan v Scottish Steam Herring Fishing Co., 1917 S.C. 565; 54 S.L.R. 482; 1917, 1 S.L.T. 343.

(331)

Remit to arbitrator for further statement of fact—Power of arbitrator to hear further evidence—Act of Sederunt, 26th June, 1907, sec. 17 (g) (C.A.S., L. xiii. 17 (g)).

In a case stated for appeal against the

decision of a sheriff-substitute acting as arbitrator in proceedings under the Workmen's Compensation Act, 1906, in the course of which proceedings proof had been led, the Court remitted to the sheriff-substitute to find whether the workman had given statutory notice of his accident as soon as practicable thereafter. The sheriff-substitute reported that he had himself re-examined the doctor who attended the workman during his illness, and made a finding in answer to the question put by the Court. This report was objected to on the ground that it proceeded on evidence which had been taken after the proof had been closed. Held that the sheriff-substitute was entitled, under the remit, to take further proof, and objection repelled.

Park v Coltness Iron Co., 1913 S.C. 1163; 50 S.L.R. 926; 1913, 2 S.L.T. 232.

(332)

Remit to arbitrator for additional proof—Act of Sederunt, 26th June, 1907, sec. 17 (g) (C.A.S., L. xiii. 17 (g)).

At the hearing of a stated case under the Workmen's Compensation Act, 1906, the claimants moved the Court, in the event of it being held that they had failed to establish their claim, to remit the case to the arbitrator to take the evidence of the employer's foreman, who had not been examined in the arbitration. Motion refused.

Miller v North British Locomotive Co., 1909 S.C. 698; 46 S.L.R. 755; 1909, 1 S.L.T. 519.

(333)

Failure by arbitrator to state facts on which his finding was based—Use by Court of notes of evidence.

Circumstances in which the Court, on the failure of an arbitrator to state the salient points of the evidence on which his finding was based, used, of consent of parties, a transcript of the notes of evidence taken *ex parte* in the Court below, and reversed his decision.

Per Lord President Dunedin—"I must add that the entry, 'contusion of chest,' in the register of deaths proves, in the absence of the doctor, nothing as to its own correctness."

Dundee Steam Trawling Co. v Robb, 1910, 48 S.L.R. 11; 1910, 2 S.L.T. 211.

(5) TRANSMISSION OF PROCESS FROM SHERIFF COURT.

[See also Cases under Act 1897, II. 19 (5), *infra*.]

(334)

Act of Sederunt, 26th June, 1907, sec. 17 (f) (C.A.S., L. xiii. 17 (f)).

Circumstances in which the Court, in a stated case under the Workmen's Compensation Act, 1906, granted an order for the transmission of the process from the sheriff court, upon conditions as to the expenses connected with the transmission.

M'Ghie v United Collieries, 1910 S.C. 927; 47 S.L.R. 751; 1910, 2 S.L.T. 186.

(335)

In an appeal by stated case the Court remitted to the arbitrator for a statement of the facts on which he had based his judgment. The arbitrator having reported, the appellant stated that the evidence in the arbitration had been recorded in shorthand, and moved the Court, in respect of the unsatisfactory nature of the arbitrator's report, to order the process to be transmitted to the Court of Session. The respondent made no objection, and the Court ordered the process to be transmitted.

Millar v Refuge Assurance Co., 1912 S.C. 37; 49 S.L.R. 67; 1911, 2 S.L.T. 361.

(336)

Circumstances in which the Court refused a motion for transmission of the process in a stated case under the Workmen's Compensation Act, 1906.

Buchan v Scottish Steam Herring Fishing Co., 1917 S.C. 565; 54 S.L.R. 482; 1917, 1 S.L.T. 343.

(337)

Consideration of notes of evidence.

Circumstances in which the Court granted a motion for transmission of the process in a stated case under the Workmen's Compensation Act; and thereafter considered the notes of the evidence taken before the arbitrator, for the purpose of ascertaining whether there was evidence to support the findings made by him in the case.

M'Kenna v Niddrie and Benhar Coal Co., 1916 S.C. 1; 53 S.L.R. 1; 1915, 2 S.L.T. 234.

(6) APPEAL TO HOUSE OF LORDS.

(338)

Accident happening before commencement of Act — "Proceedings consequential" on references to medical referees.

Rosie v Mackay, 1912 S.C. (H.L.) 7; 49 S.L.R. 48; 1911, 2 S.L.T. 401, No. 180, supra.

27. SUSPENSION OF CHARGE TO PAY COMPENSATION.

[See also Cases under Act 1897, II. 20, *infra*.]

(339)

Competency.

Opinion that where a memorandum of agreement has been recorded in terms of the Workmen's Compensation Act, 1906, the only method by which the employer can relieve himself of the liability imposed on him by that memorandum is by an application for review under par. (16) of the first schedule to the Act; but observed that if a workman charges under a recorded memorandum for a sum which has already been paid to him by the employer, a suspension at the instance of the employer would be competent.

Wilsons and Clyde Coal Co. v Cairnduff, 1911 S.C. 647; 48 S.L.R. 500; 1911, 1 S.L.T. 369.

(340)

Employer alleging incapacity has ceased—Remedy of employer.

Observations (per Lord Shaw of Dunfermline) on the procedure to be adopted by an employer who maintains that the workman has recovered, and ceases to make weekly payments, if the workman proceeds to charge for payment.

Wishart v Gibson & Co., 1914 S.C. (H.L.) 53; [1915] A.C. 18; 51 S.L.R. 516; 1914, 1 S.L.T. 416.

(341)

Sist of process pending application for registration of new memorandum.

A workman in receipt of compensation under the Workmen's Compensation Act, 1906, returned to work and granted his employers a final discharge, and the payments were stopped. Two years later the workman recorded a memorandum of agreement. The employers did not oppose the recording of the agreement. Thereafter the workman charged the employers on the recorded memorandum. The employers brought a suspension of the charge, in which they alleged that per incuriam they had omitted to oppose the recording of the memorandum. The employers having presented in the sheriff court a minute craving to have the weekly payments reviewed and a memorandum of agreement embodying the discharge registered, the Court sisted process until the application for registration had been disposed of in the sheriff court, the complainers having consigned the sum charged for, holding that the validity of the discharge could only be decided in the application for registration.

Barr & Co. v M'Girr, 1911, 2 S.L.T. 26.

(342)

Average weekly earnings — Charge for compensation for one week—Total of earnings and compensation for one week exceeding wages before injury.

James Nimmo & Co. v Myles, 1917 S.C. 522; 54 S.L.R. 465; 1917, 1 S.L.T. 306, No. 225, supra.

28. EXPENSES.

[See EXPENSES I. 10 (2).]

29. PERSONAL BAR.

[See also Cases under Act 1897, II. 22, *infra*.]

(343)

Refusal of employment—Partial incapacity—Employer's offer of full wages for light work.

An injured workman who had been receiving compensation in pursuance of an agreement with his employer recovered from his injuries sufficiently to be fit for light work. His employer thereupon offered him such work, and offered to pay him therefor the same wage as he had been earning before the accident. The workman refused this offer. Held that the workman was barred from

claiming compensation by his refusal of work, at full wages, suited to his capacity.

Keevans v Munday, 1914 S.C. 525; 51 S.L.R. 462; 1914, 1 S.L.T. 350.

(344)

Acquiescence by workman in discontinuance of compensation.

A workman who, in April, 1910, sustained injuries to his back through an accident, received compensation, under agreement with his employers, at the full rate till February, 1911, when he was certified to be fit for light work. Thereafter compensation at a reduced rate was paid till August, 1912, when the employers ceased to make further payments. No memorandum was ever recorded. In October, 1912, the workman threatened proceedings for the recovery of compensation, and the employers then denied liability. No further steps were taken by the workman until February, 1914, when, having become totally incapacitated through spinal sclerosis resulting from his injury, he intimated that fact to his employers, and subsequently applied for an award of partial compensation from August, 1912, till February, 1914, and for full compensation thereafter. It was proved that he had never fully recovered from the results of the accident and had never returned to work, but that the sclerosis was not diagnosed till December, 1913. There was no evidence that the employers had been prejudiced by his delay in taking proceedings. **Held** that, in the circumstances, the arbitrator was entitled to award compensation as claimed, rejecting a contention that the workman's claim for compensation for the period from August, 1912, to February, 1914, was excluded by his acquiescence in the non-payment of it throughout that period. **Observations** on the circumstances in which silence on the part of a workman in the face of his employer's refusal to continue payment of compensation will bar his claim.

Rankine v Fife Coal Co., 1915 S.C. 476; 52 S.L.R. 361; 1915, 1 S.L.T. 213.

(345)

A miner was totally incapacitated by an accident for fourteen months, during which period he was paid compensation under the Workmen's Compensation Act, 1897, at the maximum rate, by agreement with his employers. Having partially recovered he was employed by his former employers at lighter work for seven years, his average weekly earnings being less than prior to the accident, but greater than the weekly compensation he had received. During this period he repeatedly requested his employers to make up to him the deficiency in his earnings, but these requests were not complied with. At the end of the seven years he again became totally incapacitated. **Held** that he had barred himself personally exceptio*ne* from claiming any compensation in respect of his partial incapacity during the seven years.

Dempster v Baird & Co., 1909 S.C. 127; 46 S.L.R. 119; 16 S.L.T. 470.

(346)

Suspension of charge on memorandum.

A workman in receipt of compensation under the Workmen's Compensation Act, 1906, returned to work and granted his employers a final discharge, and the payments were stopped. Two years later the workman recorded a memorandum of agreement. The employers did not oppose the recording of the agreement. Thereafter the workman charged the employers on the recorded memorandum. In a suspension of the charge the employers pleaded, *inter alia*, that the workman, having acquiesced in the discontinuance of compensation, was barred from charging for any sum therefor prior to the date of the memorandum of agreement, but they made no averments of facts and circumstances in support of the plea apart from an averment that they had omitted to oppose the recording of the memorandum *per incuriam*. The Lord Ordinary dismissed the plea for want of relevant averments. The respondents having reclaimed, the Court of consent recalled *in hoc statu* the interlocutor of the Lord Ordinary in so far as it repelled the plea.

Barr & Co. v McGirr, 1911, 2 S.L.T. 26.

(347)

Agreement—Recording—Period prior to recording—Act 1897, first schedule (12)—Second schedule (8).

Lochgelly Iron and Coal Co. v Sinclair, 1909 S.C. 922; 46 S.L.R. 665; 1909, 1 S.L.T. 367, No. 631, *infra*.

(348)

Action by employers to reduce memorandum.

A memorandum of agreement having reference to compensation payable to a workman in respect of accidents which happened on two consecutive days was recorded at the instance of the workman. As provided by the Act, a copy of the memorandum was sent to the workman's employers, who stated no objection to recording. Subsequently the employers made an application for review of the weekly payments which were being made under the memorandum. After the decision in this application, they brought an action of reduction of the memorandum on the ground that there had never been any agreement to pay compensation in respect of the second accident, and that they had permitted the memorandum to be recorded in the belief that it had reference to the first accident only, an error which they averred was induced by the workman's failure to give notice of the second accident. **Held** that they were barred from insisting in the action of reduction.

Robert Forrester & Co. v Fleming, (O.H.) 1908, 16 S.L.T. 139.

(349)

Action by workman to reduce memorandum.

dum—Memorandum recorded without opposition.

A workman signed a receipt and discharge, discharging his employers of all claims in respect of personal injury resulting from an accident. The employers made application for registration of a memorandum of agreement embodying the receipt and discharge. This application was intimated in accordance with C.A.S., L. xiii. 11, and was recorded without opposition. In an action of reduction **held** that the workman had acquiesced in the recording of the memorandum, and action dismissed.

Mackinnon v Fairfield Shipbuilding and Engineering Co., (O.H.) 1920, 2 S.L.T. 118; 1921, 2 S.L.T. 270.

II. WORKMEN'S COMPENSATION ACT, 1897.

(60 & 61 Vict. cap. 37.)

1. SEC. 1 (1).

(1) "EMPLOYMENT TO WHICH THIS ACT APPLIES."

(350)

Liability of employer as such.

Held that an employer who is not also an "undertaker" within the meaning of the Workmen's Compensation Act, 1897, is not liable in compensation under the Act.

Malcolm v M'Millan, 1900, 2 F. 525; 37 S.L.R. 383; 7 S.L.T. 364.

(2) INJURY BY ACCIDENT.

(a) What is an Accident.

[See also Cases under Act 1906, I. 1 (1) (a), supra.]

(351)

Strain.

A workman while engaged in the course of his employment in replacing a derailed coal hutch on the rails severely strained his back. **Held** that the injury suffered by the workman was an injury by accident entitling him to compensation, in terms of the Workmen's Compensation Act, 1897.

Stewart v Wilsons & Clyde Coal Co., 1902, 5 F. 120; 40 S.L.R. 80; 10 S.L.T. 366.

(352)

Voluntary attempt to rescue fellow servant—Suffocation by noxious gas.

London and Edinburgh Shipping Co. v Brown, 1905, 7 F. 488; 42 S.L.R. 357; 12 S.L.T. 694, No. 361, infra.

(b) Whether Death Attributable to Accident.

[See 11, *infra*.]

(c) Whether Incapacity for Work Attributable to Accident.

[See 13, *infra*.]

(3) ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

[See also Cases under Act 1906, I. 1 (2), supra.]

(a) Proof.

(353)

Unexplained death—Workman found dead in place where he might legitimately be in the course of his duties.

A station policeman in the employment of a railway company was run down by an engine on a siding at the station and died shortly afterwards of his injuries. There was no evidence to show how or why he came to be at the spot where he was injured, but he might legitimately have been there in the course of his duties as station policeman. **Held** that the deceased being a station policeman, the presumption was that he had been injured by accident arising out of and in course of his employment, and that in the absence of evidence to the contrary this must be taken to be the fact.

Grant v Glasgow and South-Western Railway Co., 1908 S.C. 187; 45 S.L.R. 128; 15 S.L.T. 585.

(b) Workman going to or from Work.

(354)

Climbing over railing in order to get to work.

A workman employed in the renovation of the interior of a church found the church door locked on his arrival in the morning, and was unable to unlock the door. To gain access to his work he climbed the iron railing of a neighbouring schoolyard, which enabled him to scale the churchyard wall and enter the church by a window. The railing was topped by spikes, one of which pierced his foot, from the effects of which injury he died. **Held** that the accident did not arise "out of and in the course of the employment" of the workman in the sense of sec. 1 (1) of the Workmen's Compensation Act, 1897.

Gibson v Wilson, 1901, 3 F. 661; 38 S.L.R. 450; 8 S.L.T. 497.

(355)

Miner on way to mine—Accident on railway belonging to employers.

A miner, while proceeding above ground to his work, slipped and broke his leg upon rails belonging to the mine leading to the doorway of a horizontal passage by which the mine was entered, at a spot distant between 9 and 13 feet from the doorway. **Held** that the accident arose out of and in the course of his employment.

Mackenzie v Coltness Iron Co., 1903, 6 F. 8; 41 S.L.R. 6; 11 S.L.T. 350.

(356)

Workman at coal mine on railway line belonging to employers.

A workman employed at a coal mine had finished his day's work, and was proceeding

home along a private line of railway occupied by the colliery, when he was run over and killed at a point 230 yards distant from the place where he worked. **Held** that the accident did not arise "out of and in the course of the employment" of the workman in the sense of sec. 1, sub-sec. (1), of the Workmen's Compensation Act, 1897.

Caton v Summerlee and Mossend Iron and Steel Co., 1902, 4 F. 989; 39 S.L.R. 762; 10 S.L.T. 204.

(357)

Miner leaving work by unauthorised route.

A workman employed at a coal mine proposing to go home by crossing a railway siding on the premises of the mineowners, and by trespassing along a railway, was injured while crossing the siding. There were two exits provided for leaving the mine, neither of which crossed the siding. The workman was aware that the short cut was not the proper exit, but there was no express prohibition against workmen leaving the mine at this spot. **Held** that the accident did not arise "out of and in the course of the employment" of the workman.

Haley v United Collieries, 1907 S.C. 214; 44 S.L.R. 193; 14 S.L.T. 546.

(358)

Engine-driver going to report himself off duty.

An engine-driver was relieved from active duty when his engine was in a siding. It was then his duty to report himself off duty at the neighbouring station. He was entitled to wages or an allowance for overtime until he reached home. In making his way to the station, it was necessary for him to go down the main line for some distance. He was warned that a down train had been signalled. He was run over by this train. When last seen alive he was walking on the down line, but was apparently making for the left side, where there was room to stand clear of the train. He had passed a footpath which afforded an egress from the line on to the public road, but there was a gate on this footpath which was not always unlocked. There was no rule or bye-law of the railway company against their servants walking on the line. **Held** that the accident arose out of and in the course of the engine-driver's employment.

Tod v Caledonian Railway Co., 1899, 1 F. 1047; 36 S.L.R. 784; 7 S.L.T. 85.

(c) Scope of Employment.

(359)

Assisting fellow-workman—Furtherance of employer's interests.

A labourer, employed in a steam joinery shop, whose duties were not connected with the management of the machinery, met with a fatal accident while assisting a machine-man to replace some loose belting upon the machinery while in motion. It was found in fact that the foreman might have ordered

the deceased to assist in replacing the belting, but no such order had been given. **Held** that the accident arose out of and in the course of the labourer's employment in the sense of sec. 1 (1) of the Workmen's Compensation Act, 1897.

Menzies v McQuibban, 1900, 2 F. 732; 37 S.L.R. 526; 7 S.L.T. 432.

(360)

—Clerk helping to carry heavy weight.

A clerk, employed at engineering works, whose duty it was to weigh and record all articles sent out from the works, met with an accident which resulted in his death while helping workmen to carry a heavy article to the weighing machine. It was found in fact that his duty in relation to articles sent out was "confined to weighing the articles, which it was the duty of other employees to carry to the weighing machine." **Held** that the accident arose out of and in the course of the clerk's employment.

Goslan v James Gillies & Co., 1907 S.C. 63; 44 S.L.R. 71; 14 S.L.T. 466.

(361)

Voluntary attempt to rescue fellow-workman.

A steamship was moored to a quay in a dock discharging her cargo under a stevedore, who had contracted with her owners to unload her. The labourers in the employment of the stevedore were each appointed to work in connection with a particular hold of the vessel, either on board her or on the quay. A, who was employed on the quay to discharge cargo from the afterhold, and who did not require in the performance of his duty to go on board the vessel, on being informed that one of his fellow-workmen employed in the forehold was lying there in an unconscious condition owing to inhaling noxious gas, offered to attempt a rescue, and after a handkerchief had been tied round his mouth, was lowered into the forehold, where both he and the man he had attempted to rescue were suffocated by carbonic acid gas. A acted without instructions from his employer—the stevedore—who had gone for rescue appliances. **Held** that A met his death by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897.

London and Edinburgh Shipping Co. v Brown, 1905, 7 F. 488; 42 S.L.R. 357; 12 S.L.T. 694.

(362)

Doing work of fellow-workman under private arrangement.

A roadman in the employment of a county road authority was injured when stepping down from a steam road roller belonging to the employers. The accident occurred before 7 a.m., the roadman's hour for beginning work. He had gone on to the roller for the purpose of breaking up the boiler fire so as to get up steam by 7 a.m. It was not

part of his duty to do so, his employment being solely to sweep and put "blinding" on the road. He had privately arranged with the engineman to break up the fire so as to save the engineman and fireman, who had gone to their homes for the night, from returning before 7 a.m. **Held** that the accident did not arise "out of and in the course of" the workman's employment within the meaning of sec. 1 (1) of the Workmen's Compensation Act, 1897.

M'Allan v Western District Committee of Perthshire County Council, 1906, 8 F. 783; 43 S.L.R. 592; 14 S.L.T. 36.

(363)

Brusher in coal mine interfering with charge in shot-hole.

General rule 12 (e) of the Coal Mines Regulation Act, 1887, provides: "No explosive shall be pressed into a hole of insufficient size, and when a hole has been charged the explosive shall not be unrammed." In the course of blasting operations in a mine, a brushing squad, whose work it was, drilled a hole and filled it with a charge of an explosive called saxonite, placing at the bottom of the charge a detonator which was to be electrically exploded by means of two wires passing downwards through the charge and attached to the detonator; the foreman brusher thereafter, contrary to fact and apparently for fun, informed the fireman whose duty it was to explode the charge, that it was not ready, and the fireman went away. Subsequently the fireman was sent for, but could not be found, and the foreman brusher then proceeded alone to the charge, which exploded and killed him, and it was found in fact that the accident was caused by friction set up by the deceased having attempted to pull out the wires communicating with the detonator. **Held** that the accident arose out of and in the course of the deceased's employment.

Lynch v Baird & Co., 1904, 6 F. 271; 41 S.L.R. 214; 11 S.L.T. 597.

(364)

Railway carter trying to stop his horse.

A, a carter in the employment of a railway company, was waiting with his horse and cart at one of the company's goods stations, when the horse, from some unexplained cause, started off, and A in endeavouring to stop it, received injuries from which he died. **Held** that the accident arose out of and in the course of the employment of the deceased on or in or about a railway.

Devine v Caledonian Railway Co., 1899, 1 F. 1105; 36 S.L.R. 877; 7 S.L.T. 99.

(365)

Fish porter killed on railway.

A fish porter, in the employment of a fish stevedore who had a contract with a railway company for the portage of fish delivered at one of their stations, left the siding where the trucks were customarily discharged, and going along the line of railway was run down and killed by a railway engine near a

shunter's bothy to which the fish porters were in the habit of going in order to find out the number of fish boxes that were in transit. The fish porters had no right to walk along the railway, they were never instructed by any one to go to the bothy to find out the number of fish boxes that were in transit, and the information was not of any use to them, or to their employer in their work. **Held** that the deceased had not been killed through an accident arising out of and in the course of his employment.

Hendry v Caledonian Railway Co., 1907 S.C. 732; 44 S.L.R. 584; 14 S.L.T. 863.

(366)

Leaving work to get a drink.

Held that a miner, who had left the pit-head where he was working to get a drink of water, and was killed by a runaway hutch when he was returning, was killed "in the course of his employment," within the meaning of the Workmen's Compensation Act, 1897, sec. 1, sub-sec. (1).

Keenan v Flemington Coal Co., 1902, 5 F. 164; 40 S.L.R. 144; 10 S.L.T. 409.

(367)

Conversation with fellow-workman—Workman killed while returning to his work.

A, an engine-driver in the employment of a railway company, having brought a train into a station belonging to the company about 10 p.m., was ordered to take his engine into a particular lye in the station, there to await his next duty, which was to take a train out of the station at 11 p.m. Having taken his engine into the lye, he left the engine and crossed over four or five sets of rails to ask a traffic regulator why he had been ordered to take his engine to that particular lye. He then crossed two more sets of rails to a point about twelve or thirteen yards further from his engine, where he spoke for a moment or two to another of the company's employees. This conversation had nothing to do with A's duties as an engine-driver. Immediately afterwards, while recrossing the last-mentioned lines of rails on his way back to his engine, A was knocked down and killed by a train that was being shunted. **Held** that A was killed by an accident arising out of and in the course of his employment.

Goodlet v Caledonian Railway Co., 1902, 4 F. 986; 39 S.L.R. 759; 10 S.L.T. 203.

(d) Risks Incidental to Employment.

(368)

Negligence of fellow-servant.

M'Intyre, a workman in the employment of shipbuilders, was oiling with a brush a machine at which he was working. The brush was not the brush belonging to the machine, and M'Intyre knew this. While M'Intyre was so engaged, Clark, another workman in the same employment, to whose machine the brush belonged, and who required it for his work, came up angrily, said the brush was his, and took hold of it. M'Intyre asked Clark to wait a moment, but

Clark pulled the brush out of M'Intyre's hand, and in doing so unintentionally injured M'Intyre's hand by drawing it across a sharp piece of iron. **Held** that the injury to M'Intyre was caused by accident arising out of and in the course of the employment.

M'Intyre v Rodger & Co., 1903, 6 F. 176; 41 S.L.R. 107; 11 S.L.T. 467.

(369)

Horseplay of fellow-servant.

A workman in the course of his employment in a "factory," within the meaning of the Workmen's Compensation Act, 1897, met with an accident caused by his fellow-workmen, who, at the time, were not engaged at their work, but were indulging in horseplay. **Held** that the accident was not one arising "out of" the employment in the sense of the Workmen's Compensation Act, 1897, sec. 1 (1), and that the injured workman was not entitled to compensation under the Act.

Falconer v London and Glasgow Engineering and Iron Shipbuilding Co., 1901, 3 F. 564; 38 S.L.R. 381; 8 S.L.T. 430.

(370)

Wrongful act of fellow-servant—Miner injured in trying to avoid rubbish thrown at him by fellow-servant.

Smith and Paton, two drawers in a coalpit, were sitting in a hutch, Smith driving the horse. In passing near the working place of another drawer, Burley, Paton took hold of a hutch Burley had been using and pulled it after him. Burley followed, and in endeavouring to recapture his hutch, pushed Paton with a prop. Paton then threw some rubbish at Burley; in avoiding the rubbish Burley struck his head against a projection on the wall and was injured. **Held** that although the accident arose in the course of Burley's employment, it did not arise out of it within the meaning of the Workmen's Compensation Act, 1897, sec. 1 (1).

Burley v Baird & Co., 1908 S.C. 545; 45 S.L.R. 416; 15 S.L.T. 867.

(371)

Dangerous method of doing work that might be done safely.

An accident to a workman may be attributable to his adopting a wrong and dangerous method of doing work which could be done safely, and at the same time may be an "accident arising out of and in the course of the employment," in the sense of sec. 1 of the Workmen's Compensation Act, 1897.

Durham v Brown Brothers & Co., 1898, 1 F. 279; 36 S.L.R. 190; 6 S.L.T. 239.

(e) Breach of Rules and Orders.

(372)

Going on wagons contrary to orders.

Some boys employed in steel works were allowed an interval of half an hour for rest between two jobs. During this interval they got into one of a number of wagons that were standing on a steeply inclined line of rails in the yard of the works. After the boys had got into the wagon, the wagons

began to move down the incline, and one of the boys jumped off the wagon in order to sprag the wheels. While thus engaged he was caught by the sprag, and, being thrown underneath the wheels, sustained injuries from which he died. The boys had no occasion to be near the wagons, and had repeatedly been warned not to go near them, and knew that they were doing wrong when they went there. **Held** that the accident did not "arise out of" the boy's employment.

Powell v Lanarkshire Steel Co., 1904, 6 F. 1039; 42 S.L.R. 231; 12 S.L.T. 656.

(373)

Leaving working place contrary to order—Girl employed as a farm servant.

A girl was engaged on the platform of a steam threshing machine, her duty being to pass the sheaves to the millman. She was specially directed to remain at her place, and was warned of the danger of moving about. Notwithstanding, in the temporary absence of the millman, she attempted to step across the opening through which the mill was fed with sheaves, in order to speak to another girl who was engaged on the same machine. In attempting to cross her foot slipped and she was caught in the machinery and received injuries. For the performance of her work the pursuer did not require to speak to the other girl or to leave her place. **Held** that the accident was not an accident "arising out of and in the course of" the pursuer's employment.

Callaghan v Maxwell, 1900, 2 F. 420; 37 S.L.R. 313; 7 S.L.T. 339.

(374)

Ignorance of rule—Miner examining shot-hole contrary to rule.

A miner having lighted the train to fire a shot retired to a place of safety, but six minutes having elapsed without the shot exploding, he returned to examine the shot-hole. While he was so engaged the shot exploded, with the result that he was injured. One of the special rules adopted for the mine in terms of the Coal Mines Regulation Act, 1887, provided that, if a shot had been lighted and did not explode, no person should enter the place where it was lighted until thirty minutes should have elapsed. This rule was not known to the miner, and was not generally observed in the pit. A printed copy of the special rules was exposed to the view of the miners at the pit-head in a shallow case with a hinged door which could be closed but not locked. **Held** that the accident arose out of and in the course of the miner's employment.

M'Nicol v Speirs, Gibb & Co., 1899, 1 F. 604; 36 S.L.R. 428; 6 S.L.T. 353.

(375)

Procuring articles necessary for work—Ascending dangerous hoist—Use of hoist forbidden.

A workman who was engaged in the process of filling scrap-iron into barrows, was killed owing to the defective condition of

a hoist in which he was ascending to a furnace platform, in order to procure hand-leathers, which were necessary to his work. The furnace platform could be reached either by a fixed iron ladder or by the hoist in question. Workmen were forbidden to ascend by the hoist, a notice to that effect being posted on a wall close by, and at the time of the accident the hoist had been rendered especially dangerous by recent alterations. There was no finding that the deceased knew of the notice, and there was no proof that his attention was directed to the changed condition of the hoist. Some of the workmen knew of the notice and some did not, but all of them used the hoist. **Held** that the deceased had been killed in the course of his employment.

Logue v Fullerton, Hodgart & Barclay, 1901, 3 F. 1006; 38 S.L.R. 738; 9 S.L.T. 152.

2. SEC. 1 (2) (b)—OPTION OF WORKMAN TO CLAIM COMPENSATION OR TO TAKE PROCEEDINGS AGAINST EMPLOYER INDEPENDENTLY OF ACT.

(376)

Election to take under Act—Bar to action of damages—Jury trial.

In an action of damages for personal injury laid at common law and under the Employers' Liability Act, 1880, the defenders averred that the pursuer had claimed and received compensation under the Workmen's Compensation Act, 1897. Averments to this effect **held** relevant to support a plea of bar.

The Court sent the whole cause to trial by jury, allowing the defender a counter issue on the question of bar.

Campbell v Caledonian Railway Co., 1899, 1 F. 887; 36 S.L.R. 699; 7 S.L.T. 35.

(377)

Payment of compensation—Separate proof as to preliminary defence.

In an action raised by a workman against his employers at common law for damages for injuries alleged to have been received through their fault, the defenders, besides denying fault, averred that the pursuer had given written notice that he claimed compensation under the Workmen's Compensation Act, and that subsequently they had paid him compensation, and pleaded that in respect thereof the pursuer was barred from suing the action. In answer, the pursuer averred that he was induced to sign the notice shortly after the accident by false representations on the part of the defenders, at a time when, through illness, he could not, and did not, understand its import. **Held** that this question should be determined by proof *primo loco*.

Hunter v Darnagavil Coal Co., 1900, 3 F. 10; 38 S.L.R. 6.

(378)

Receipt for compensation.

A workman brought an action against his employer, at common law and under the

Employers' Liability Act, 1880, for damages on account of the loss of an eye sustained by him when in the defender's employment. The defender pleaded that the action was incompetent, in respect that the pursuer had elected to take compensation under the Workmen's Compensation Act, 1897. The defender founded on a receipt for 12s. 6d. signed by the pursuer when in hospital shortly after the accident, and bearing that the money had been "received under the Workmen's Compensation Act, 1897." The pursuer averred that he had signed the receipt without being made aware of its terms. After a proof, the Court repelled the defender's plea to the competency of the action, **holding** that it had not been proved that the pursuer had elected to take compensation under the Workmen's Compensation Act, 1897.

Fowler v Hughes, 1903, 5 F. 394; 40 S.L.R. 321; 10 S.L.T. 583.

(379)

Election inferred from acceptance of weekly payments.

In defence to an action of damages at common law for personal injuries, brought by a workman against his master, the master pleaded that the action was barred by the pursuer having elected to take compensation under the Workmen's Compensation Act. On a proof it appeared that at the end of the week in which he was injured the workman was paid a sum in lieu of wages, and was told that for the next two weeks he would get nothing, but after that he would be paid half-wages. He subsequently, for a period of about six months, received each week a sum amounting to slightly more than half his average weekly wage. These payments were at first made at his house, but afterwards, when he had partially recovered, he called for them regularly at his employer's office. No receipts were taken for these payments. **Held** that the pursuer had elected to accept, and had accepted, compensation under the Workmen's Compensation Act, and was thereby barred from raising the action.

Mackay v Rosie, 1908 S.C. 174; 45 S.L.R. 178; 15 S.L.T. 654.

(380)

Receipts.

In an action against the pursuer's employers for damages, **held** (1) that receipts, granted by the pursuer to the defenders, according to their terms imported an election to take under the provisions of the Workmen's Compensation Act, 1897; (2) that the pursuer had not stated a relevant ground for setting aside the receipts; and therefore (3) that the pursuer was barred from proceeding with the action.

Little v P. & W. MacLellan, 1900, 2 F. 387; 37 S.L.R. 287; 7 S.L.T. 313.

(381)

Foreign workman.

In defence to an action for personal injuries, the defenders pleaded that the action

was barred by the pursuer having claimed and accepted compensation under the Workmen's Compensation Act. On a proof, it appeared that the workman was an Italian imperfectly acquainted with English, and wholly unable to read or write it; that he had applied for money for his injuries; that he had accepted two sums from the defenders, consisting of the amount due to him under the Act of 1897 for three weekly payments, and had with his mark authenticated two receipts therefor which bore to be for payments under the Act of 1897; that he knew of his right to half-wages during incapacity, but did not know of the Act by name, or of his rights apart from the Act; and that the receipts were not read over or explained to him. **Held** that it had not been proved that the pursuer had elected to take compensation under the Act of 1897, and that consequently he was not barred from raising the action.

Valenti v William Dixon, Limited, 1907 S.C. 695; 44 S.L.R. 532; 14 S.L.T. 882.

(382)

Claim for compensation under Act refused on ground of serious and wilful misconduct—Subsequent common law action.

Held that a workman who had claimed compensation under the Act, and whose claim had been disallowed by the arbitrator on the ground of his serious and wilful misconduct, must be held to have exercised his option of claiming either under or independently of the Act, and that he was not entitled thereafter to bring an action of damages at common law.

Opinions that when a claim for compensation has been dismissed on the ground of want of title, the effect will be otherwise.

Burton v Chapel Coal Co., 1909 S.C. 430; 46 S.L.R. 375; 1909, 1 S.L.T. 111.

(383)

Claim by person not a dependant—Subsequent action of damages.

Held that a claimant who had been refused compensation under the Workmen's Compensation Act, 1897, on the ground that she was not a dependant of the deceased workman, was not thereby barred under sec. 1, sub-sec. (2) (b), of the Act from raising an action of reparation at common law, or under the Employers' Liability Act, 1880, against the deceased's employer.

M'Donald v James Dunlop & Co., 1905, 7 F. 533; 42 S.L.R. 394; 12 S.L.T. 765.

(384)

Claim by partial dependant—Subsequent action of damages.

Held that a son who had claimed compensation under the Workmen's Compensation Act, 1897, on account of the death of his father, but was found to have no title to insist in his claim, in respect that he had been only partially dependent on his father, and that there were others who had been wholly dependent on the father, was not by reason of his unsuccessful claim barred from insisting in

an action of damages on account of his father's death.

Blain v Greenock Foundry Co., 1903, 5 F. 893; 40 S.L.R. 639; 11 S.L.T. 92.

3. SEC. 1 (2) (c)—SERIOUS AND WILFUL MISCONDUCT.

(1) WHAT CONSTITUTES.

(a) Breach of Rules and Orders.

[See also Cases under Act 1906, I. 3 (1) (a), supra.]

(385)

Rashness—No wilful violation of known rule—No disobedience to order—Fact or law.
Condron v Gavin Paul & Sons, 1903, 6 F. 29; 41 S.L.R. 33; 11 S.L.T. 383, No. 403, infra.

(386)

Ignorance of rule—Coal mine.

Opinions (per Lord President Dunedin and Lord Kyllachy) that where a workman in a coal mine, except for some dominant reason, is in breach of a duly published statutory rule, and an injury results therefrom, his de facto ignorance of the rule can in no circumstances prevent the injury from being attributable to his serious and wilful misconduct. **Opinion** (per Lord McLaren) that there may be exceptions where the workman is excusably ignorant. **Opinion** (per Lord Kinnear and Lord Stormonth-Darling) reserved.

Dobson v United Collieries, 1905, 8 F. 241; 43 S.L.R. 260; 13 S.L.T. 644.

(387)

—A workman who was engaged in the process of filling scrap iron into barrows was killed owing to the defective condition of a hoist in which he was ascending to a furnace platform, in order to procure hand-leathers, which were necessary for his work. The furnace platform could be reached either by a fixed iron ladder or by the hoist. Workmen were forbidden to ascend by the hoist, a notice to that effect being posted on a wall close by, and at the time of the accident the hoist was specially dangerous owing to recent alterations. There was no finding that the deceased knew of the notice, and there was no proof that his attention was directed to the changed condition of the hoist. Some of the workmen knew of the notice and some did not, but all used the hoist. **Held** that the deceased had not been guilty of serious and wilful misconduct.

Logue v Fullerton, Hodgart & Barclay, 1901, 3 F. 1006; 38 S.L.R. 738; 9 S.L.T. 152.

(388)

—**Rule not generally observed—Mine.**

One of the special rules adopted for a mine under the Coal Mines Regulation Act, 1887, provided that, if a shot had been lighted and did not explode, no person should enter the place where it was lighted until thirty minutes had elapsed. A miner disobeyed the rule and was injured in consequence. The

rule was not known to the miner, and was not generally observed in the pit. A printed copy of the special rules was exposed to the view of the miners at the pithead in a shallow case with a hinged door, which could be closed but not locked. **Held** that the miner's failure to inform himself of the rule was not serious and wilful misconduct.

M'Nicol v Speirs, Gibb & Co., 1899, 1 F. 604; 36 S.L.R. 428; 6 S.L.T. 353.

(389)

Coal mine—Coal Mines Regulation Act, 1887—Unramming explosive.

General rule No. 12 (e) of the Coal Mines Regulation Act, 1887, provides—"No explosive shall be forcibly pressed into a hole of insufficient size, and when a hole has been charged the explosive shall not be unrammed." In the course of blasting operations in a mine, a brushing squad, whose work it was, drilled a hole and filled it with a charge of an explosive called saxonite, placing at the bottom of the charge a detonator which was to be electrically exploded by means of two wires passing downwards through the charge and attached to the detonator; the foreman brusher thereafter, contrary to fact, and apparently for fun, informed the fireman, whose duty it was to explode the charge, that it was not ready, and the fireman went away. Subsequently the fireman was sent for, but could not be found, and the foreman brusher then proceeded alone to the charge, which exploded and killed him, and it was found in fact that the accident was caused by friction set up by the deceased having attempted to pull out the wires communicating with the detonator. Rule 12 (e) was well known to the deceased and carefully enforced, but it was not proved that he knew the mechanism of the detonator or the danger of pulling the wires. **Held** on the facts as stated by the arbitrator that the accident was not caused by an attempt to unram the charge in the sense of rule 12 (e), and did not result from the "serious and wilful misconduct" of the deceased in the sense of the Workmen's Compensation Act, 1897.

Lynch v Baird & Co., 1904, 6 F. 271; 41 S.L.R. 214; 11 S.L.T. 597.

(390)

Accident due to absent-mindedness—Bottomer opening door of shaft before cage stopped.

By the special rules in force in a coal mine, under the provisions of the Coal Mines Regulation Act, 1887, it was provided (rule 3) —"The bottomer at a mid-working in a vertical shaft not provided with an appliance which constantly fences the shaft, being a mid-working in use for the regular passage of workers or the drawing of minerals from the mine, shall not open the gate fencing the shaft until the cage is stopped at such mid-working." In a case stated for appeal under the Workmen's Compensation Act, 1897, it was stated that a bottomer with a loaded hutch opened the gate fencing the shaft when

the cage was not opposite the gate; that the bottomer, "presumably through absent-mindedness, failed to notice (although there was sufficient light to enable him to do so) that the cage was not at the gate, and proceeded to push the hutch from behind till it fell down the shaft; that the "bottomer "was drawn after it, and was fatally injured by the fall." **Held** that the bottomer's conduct amounted to serious and wilful misconduct within the meaning of sec. 1 (2) (c) of the Workmen's Compensation Act, 1897.

United Collieries v M'Ghie, 1904, 6 F. 808; 41 S.L.R. 705; 12 S.L.T. 650.

(391)

Failure to set sprags.

A case for appeal under the Workmen's Compensation Act set forth rule 9 of the additional special rules framed in pursuance of the Coal Mines Regulation Act, 1887, which provided—"Where holing is being done, sprags or holing props shall be set as soon as there is room, and the distance between such sprags or holing props shall not exceed six feet, or such less distance as shall be ordered by the owner, agent, or manager." A, a workman in a mine in which this rule was in force was killed by a fall of coal while holing coal with four other workmen. Three of the men had holed a distance of nearly seventeen feet before A and the remaining man began, and these two had holed a further distance of three feet when the accident happened. No sprag had been erected by any one in the space thus holed, though there was ample room for the erection of sprags. **Held** that A was in breach of rule 9, and that his death was attributable to serious and wilful misconduct in the sense of the Workmen's Compensation Act, 1897, sec. 1 (2) (c).

O'Hara v Cadzow Coal Co., 1903, 5 F. 439; 40 S.L.R. 355; 10 S.L.T. 617.

(392)

Miner carrying explosives without removing naked light.

A special rule for a mine provided as follows:—"While charging shot-holes or handling any explosive not contained in a securely closed case or canister, a workman should not smoke or permit a naked light to remain on his cap, or in such a position that it could ignite the explosive." A, a workman in the mine, committed a breach of this rule by wearing a lighted naked lamp in his cap while carrying cartridges which were not enclosed in a case or canister. A spark from the lamp ignited the cartridges, which exploded, causing injuries which resulted in A's death. The employers provided a special canister to carry cartridges, but it was a common practice among the miners (not known to the employers) not to use this canister when carrying cartridges. A was not directly told not to carry cartridges in the way he did when he met his death, but the sheriff found "that it must be assumed he knew the special rules." **Held** that the death of A was attributable to his serious

and wilful misconduct within the meaning of sec. 1, sub-sec. (2), of the Act.

Daily v John Watson, Limited, 1900, 2 F. 1044; 37 S.L.R. 782; 8 S.L.T. 73.

(393)

——By the additional special rules in force in a mine, under the provisions of the Coal Mines Regulation Act, 1887, it was provided, rule 1—"While charging shot-holes or handling any explosive not contained in a securely closed case or canister a workman shall not smoke or permit a naked light to remain in his cap, or in such a position that it could ignite the explosive." These rules were duly exhibited at the mine in such a manner as to satisfy the requirements as to publication of sec. 57, sub-sec. (1), of that Act. A workman in the mine, while carrying a cartridge not contained in a close case or canister, failed to remove a naked light from his cap, and in crawling through a narrow road, 2 feet in height, the light came in contact with the cartridge, which exploded and injured him. The workman did not know of the special rule, nor that there was any rule against having a lamp in his cap while carrying a cartridge. In acting as he did he followed his usual practice, a practice that was also followed by other miners in the pit. **Held** that the injury was attributable to the serious and wilful misconduct of the workman in the sense of sec. 1, sub-sec. (2) (c), of the Workmen's Compensation Act, 1897.

Dobson v United Collieries, 1905, 8 F. 241; 43 S.L.R. 260; 13 S.L.T. 644.

(394)

Cleaning machinery in motion.

A woman employed in a spinning mill was injured through attempting to clean a teaser card-machine, at which she was working, while it was in motion. It was the rule and practice of the factory, known to the woman, that no cleaning of machinery was to be done unless the machinery was stopped. **Held** that the injuries to the woman were attributable to her serious and wilful misconduct within the meaning of sec. 1, sub-sec. (2) (c), of the Workmen's Compensation Act, 1897, and consequently that her employers were not liable to her in compensation under the Act.

Guthrie v Boase Spinning Co., 1901, 3 F. 769; 38 S.L.R. 483.

(395)

Boys going on wagons contrary to orders.

Some boys employed in steel works were allowed an interval of half an hour for rest between jobs. During this interval they got into one of a number of wagons that were standing on a steeply inclined line of rails in the yard of the works. After the boys had got into the wagon the wagons began to move down the incline, and one of the boys jumped off the wagon in order to sprag the wheels. While thus engaged he was caught by the sprag, and, being thrown underneath the wheels, sustained injuries

from which he died. The boys had no occasion to be near the wagons and had been repeatedly warned not to go near them, and knew that they were doing wrong when they went there. **Held** that the accident was attributable to the boy's serious and wilful misconduct.

Powell v Lanarkshire Steel Co., 1904, 6 F. 1039; 42 S.L.R. 231; 12 S.L.T. 656.

(396)

Farm servant on steam threshing machine.

A girl employed as a farm servant was engaged on the platform of a steam threshing machine, her duty being to pass the sheaves to the millman. She was specially directed to remain at her place, and was warned of the danger of moving about. In the temporary absence of the millman she attempted to step across the opening through which the mill was fed with sheaves in order to speak to another girl who was engaged on the same machine. In attempting to cross her foot slipped and she was caught in the machine and injured. **Held** that the accident was attributable to her serious and wilful misconduct.

Callaghan v Maxwell, 1900, 2 F. 420; 37 S.L.R. 313; 7 S.L.T. 339.

(b) Other Cases.

[See also Cases under Act 1906, I. 3 (1) (b), supra.]

(397)

Drunk and unfit to work.

Held that being drunk and unfit to work is serious and wilful misconduct on the part of a workman within the meaning of sec. 1 (2) (c) of the Workmen's Compensation Act, 1897.

M'Groarty v John Brown & Co., 1906, 8 F. 809; 43 S.L.R. 598; 14 S.L.T. 66.

(398)

Railway servant walking on line.

An engine-driver was relieved from active duty when his engine was in a siding. It was then his duty to report himself off duty at the neighbouring station. He was entitled to wages or an allowance for overtime until he reached home. In making his way to the station it was necessary for him to go down the main line for some distance. He was warned that a down train had been signalled. He was run over by this train. When last seen alive he was walking on the down line, but was apparently making for the left side, where there was room to stand clear of the train. He had passed a footpath which afforded an egress from the line to the public road, but there was a gate on the footpath which was not always unlocked. There was no rule or bye-law of the company against their servants walking on the line. **Held** that the engine-driver had not been guilty of serious and wilful misconduct.

Tod v Caledonian Railway Co., 1899, 1 F. 1047; 36 S.L.R. 784; 7 S.L.T. 85.

(2) WHETHER INJURY ATTRIBUTABLE TO MISCONDUCT.

[See also Cases under Act 1906, I. 3 (2), supra.]

(399)

Held that, though a deceased miner had in fact broken a statutory rule in force at the mine, his injury was directly attributable not to his breach of the rule, but to an act done by him after the operation to which the rule applied had been completed, and that, on the facts, his injury was not attributable to his serious and wilful misconduct in the sense of sec. 1 (2) (c) of the Act.

Praties v Broxburn Oil Co., 1907 S.C. 581; 44 S.L.R. 408; 14 S.L.T. 866.

(400)

A miner while riding on the top of a loaded hutch in the mine, in breach of one of the rules in force in the mine, was killed by the fall of a stone from the roof of the tunnel in which the hutch was running.

Held that although the miner was guilty of serious and wilful misconduct, his death was not "attributable" thereto in the sense of sec. 1, sub-sec. (2), of the Workmen's Compensation Act, 1897, and that his widow was not barred from claiming compensation.

Glasgow Coal Co. v Sneddon, 1905, 7 F. 485; 42 S.L.R. 365; 12 S.L.T. 717.

(3) QUESTION OF FACT OR LAW.

(401)

Facts stated in a case for appeal under the Workmen's Compensation Act, 1897, on a consideration of which **held** that the question whether the workman had been guilty of serious and wilful misconduct within the meaning of sec. 1, sub-sec. (2), of the Act, was a question of law.

Dailly v John Watson, Limited, 1900, 2 F. 1044; 37 S.L.R. 782; 8 S.L.T. 73.

(402)

A farm servant, who had been driving a lorry, was found lying injured by the roadside with the lorry upset. No other person saw the accident happen, but it appeared that the cause of the accident was that the injured man had tied the reins to a small wheel which worked a brake on the front of the lorry instead of keeping them in his hand, and that the horse's head had thereby been pulled round so as to make it run back and upset the lorry. The arbitrator found, "in fact and in law," that the workman's action amounted to serious and wilful misconduct.

Held that the arbitrator's finding was a finding in fact, and was not subject to review.

Vaughan v Nicoll, 1906, 8 F. 464; 43 S.L.R. 351; 13 S.L.T. 804.

(403)

Rashness—No wilful violation of rule.

A miner employed in a coal mine at a place adjoining a wheel brae on which there were two sets of rails, one for ascending and the

other for descending hutches, was injured in crossing the wheel brae while the hutches were running. He was well aware that it was most dangerous to do so. Had he waited until the hutches had ceased running he could by shouting to the man in charge at the top of the wheel brae have been able to cross in safety. The sheriff-substitute dismissed an application by the miner for compensation on the ground that the applicant's injuries were due to his own serious and wilful misconduct. In an appeal the miner contended that to establish serious and wilful misconduct in the sense of the statute, it was necessary to show either wilful violation of a known rule or disobedience to the order of a superior, and that in the present case the accident was due to rashness, and not to wilfulness. The Court dismissed the appeal, Lord President Kinross and Lord Adam holding that the sheriff's judgment determined a question which, in the absence of anything to show that the sheriff had proceeded on an erroneous construction of the statute, was one of fact only, and was not subject to review, Lord M'Laren and Lord Kinnear holding that the judgment involved a question of the construction of the statute, and that the construction of the statute on which the sheriff had proceeded was right.

Condron v Gavin Paul & Sons, 1903, 6 F. 29; 41 S.L.R. 33; 11 S.L.T. 383.

(404)

Breach of rule—Injury "attributable" to serious and wilful misconduct.

In defence to a claim under the Workmen's Compensation Act, 1897, for the death of an oversman in a mine, the employers pleaded that the death was attributable to the serious and wilful misconduct of the deceased, in respect that he had acted in breach of the statutory rules in force at the pit. The arbitrator repelled this defence and awarded compensation. Circumstances in which the Court refused to interfere with his award.

Wallace v Glenboig Union Fireclay Co., 1907 S.C. 967; 44 S.L.R. 726; 15 S.L.T. 82.

(405)

Breach of statutory regulation — Driving cart without holding reins—General Turnpike Act, 1831, sec. 97.

A farm servant who was in charge of a horse and cart received fatal injuries through the horse bolting and the cart being upset. At the time of the accident he was not holding the reins, but had fastened them on to the bridle, contrary to the General Turnpike Act, 1831, sec. 97. The sheriff-substitute "found in fact" that his death was not attributable to any serious and wilful misconduct on his part, and awarded compensation. **Held** that the question was one of fact and not of law, and therefore not subject to review. **Opinion** that the case disclosed nothing amounting to serious and wilful misconduct.

Mitchell v Whitton, 1907 S.C. 1267; 44 S.L.R. 955; 15 S.L.T. 318.

(406)

Note for order on arbitrator to state a case.

A sheriff-substitute having held that on the facts proved, in proceedings before him as arbitrator under the Workmen's Compensation Act, 1897, the injury received by a workman was not attributable to the serious and wilful misconduct of the workman, refused to state a case. The defender having presented a note to the Court for an order on the sheriff-substitute to state a case, on the ground that what constituted serious and wilful misconduct within the meaning of the Act was a question of law, the Court refused the note, in respect that, according to the facts as found by the sheriff-substitute, no question of law on the construction of the statute was raised.

Glasgow and South-Western Railway Co. v Laidlaw, 1900, 2 F. 708; 37 S.L.R. 503; 7 S.L.T. 420.

4. SEC. 1 (3)—SETTLEMENT OF DISPUTES.

[See also Cases under Act 1906, I. 4, supra.]

(1) AGREEMENTS.

(407)

Enforcement—Ordinary action to enforce agreement to pay compensation.

Action to enforce an alleged agreement to pay compensation under the Workmen's Compensation Act, 1897, not averred to be in writing, dismissed, Lord Justice-Clerk Macdonald and Lord Trayner holding that it was an action to enforce payment of compensation under the Workmen's Compensation Act, 1897, and, as such, incompetent; and Lord Young holding that the action was an action for specific implement of an agreement made independently of the Act; that therefore it was not an incompetent action, but that it was irrelevant, in respect that the agreement founded on could be proved only by writ, and no sufficient writ was averred.

Cochrane v Traill & Sons, 1900, 2 F. 794; 37 S.L.R. 662; 7 S.L.T. 459.

(408)

Power of sheriff to decern for arrears.

An arbitrator under the Workmen's Compensation Act, 1897, has no power to enforce an agreement to pay compensation under the Act by decerning for arrears of compensation due under it.

Colville & Sons v Tigue, 1905, 8 F. 179; 43 S.L.R. 129; 13 S.L.T. 571.

(409)

Reduction—Essential error—Mutual error.

An employer tendered £2 7s. 4d. to D, a workman, who had been injured in his employment, as in full satisfaction of any claim he might have against him, stating, as was the fact, that he had obtained a report from a surgeon that D would be fit to return to

his work in six weeks from the date of the accident. D accepted the money and granted a discharge in full. The medical opinion on which both parties relied proved to be mistaken, for D was not able for work for more than six months from the date of the accident. **Held** that the above facts were not sufficient to shew that the parties, in entering into the agreement for settlement of the workman's claim, were under essential error to the effect of rendering the discharge null and void.

Dornan v Allan & Son, 1900, 3 F. 112; 38 S.L.R. 70; 8 S.L.T. 265.

(410)

Minority and lesion.

Held that an agreement between an employer and a workman fixing the amount of compensation to which the latter was entitled under the Workmen's Compensation Act, 1897, was reducible by the workman on the ground of minority and lesion.

Robertson v S. Henderson & Sons, 1904, 6 F. 770; 41 S.L.R. 597; 12 S.L.T. 113.

(411)

Recorded memorandum of agreement—Action of damages for breach of recorded agreement—Competency.

Lawrie v Brown & Co., 1908 S.C. 705; 45 S.L.R. 477; 15 S.L.T. 981, No. 602, *infra*.

(412)

Action of declarator that no agreement had been concluded, and for reduction of recorded memorandum—Competency.

Hughes v Thistle Chemical Co., 1907 S.C. 607; 44 S.L.R. 476; 14 S.L.T. 916, No. 605, *infra*.

(2) ARBITRATION.

(413)

Exclusion of arbitration by agreement—Agreement to pay compensation during incapacity.

A workman, who had been injured in the course of his employment, on 15th March, received from his employers a letter in these terms—"We admit liability under the Workmen's Compensation Act, 1897, and are prepared to pay compensation at the rate of 12s. 8d. during incapacity in terms thereof." The employers, after paying compensation at the specified rate for some months, discontinued the payments on the ground that the workman had recovered. The workman then applied to the sheriff for arbitration under the Workmen's Compensation Act, 1897. **Held** that the letter of 15th March was an agreement of which a memorandum might have been recorded, and might still be recorded, under sec. (8) of the second schedule of the Workmen's Compensation Act, 1897; and that the parties having come to an agreement, procedure by arbitration was excluded.

Dunlop v Rankine & Blackmore, 1901, 4 F. 203; 39 S.L.R. 146.

(414)

—No subsisting agreement—Unrecorded agreement not acted on for seven years.

In March, 1899, a miner sustained injuries, by which he was totally incapacitated for his work, and by agreement with his employers he was paid compensation under the Workmen's Compensation Act, 1897, till May, 1900, at the rate of 14s. 4d. per week (the statutory maximum). No memorandum of the agreement was ever recorded, and it was never formally varied or ended under the Act. In May, 1900, the employers ceased the weekly payments, and the workman returned to their service, in which he remained working and earning wages, when he was able, till April, 1907, when, as the result of his injuries in 1899, he became totally incapacitated for work. No compensation was paid to the workman between May, 1900, and April, 1907. In 1907 the workman claimed compensation as from May, 1900, and he instituted arbitration proceedings under the Act. **Held** that there was no subsisting agreement between the parties, and that consequently arbitration proceedings were competent.

Dempster v Baird & Co., 1903 S.C. 722; 45 S.L.R. 432; 15 S.L.T. 881.

(415)

—Recorded memorandum of agreement.

A workman, who had been injured on 12th October, 1904, received weekly compensation from his employers, under an agreement, until 26th January, 1905, when the employers stopped the payments. Thereafter a memorandum of the agreement was recorded. The employers presented an application, in which they prayed the sheriff to find that their liability to compensate the workman came to an end on 25th January, 1905, and to grant an order declaring his right to compensation to have ended on that date, or alternatively, to ascertain and fix such weekly payments as might be due to the workman under the Workmen's Compensation Act, 1897, and to grant an award finding him entitled to such weekly payments, beginning the first payment on 1st February, 1905, for the preceding week. **Held** that as framed the employers' application was an original application for arbitration and not an application for review of weekly payments under first schedule to the Act, par. (12), and that it was excluded by the agreement of which a memorandum had been recorded.

Lochgelly Iron and Coal Co. v Sinclair, 1907 S.C. 1071; 44 S.L.R. 750; 15 S.L.T. 151.

(416)

Whether question had arisen—Payments being regularly made—No recordable agreement in existence.

An injured workman was regularly paid by his employers the maximum weekly compensation on the footing of total incapacity, until 23rd January, 1906. The employers having on several occasions intimated to

the workman that in their opinion he had recovered, and that the weekly payments would in a short time be stopped, the workman on 30th January, 1906, prior to the payment of the weekly sum due on that date presented a petition in the sheriff court for arbitration under the Workmen's Compensation Act. There was no agreement between the parties as to compensation which could have been recorded. **Held** that the petition was incompetent in respect (a) that at the date when the petition was presented no question had arisen between the parties as to the duration of the compensation; and (b) that the mere fact that there was no agreement between the parties capable of registration did not show that a question had arisen between them so as to entitle the workman to present a petition for arbitration.

Gourlay Brothers & Co. v Sweeney, 1906, 8 F. 965; 43 S.L.R. 690; 14 S.L.T. 131.

(417)

—Premature application.

A workman who had been injured in the course of his employment presented a petition for arbitration in the sheriff court under the Workmen's Compensation Act two days prior to the date at which he could become entitled to compensation under the Act. **Held** that as at the date when the petition was presented no dispute had arisen between the parties as to compensation, and as the compensation was not in arrears, the petition for arbitration was incompetent.

Caledon Shipbuilding and Engineering Co. v Kennedy, 1906, 8 F. 960; 43 S.L.R. 687; 14 S.L.T. 133.

(418)

Medical examination of workman—Certificate of recovery by medical practitioner provided by employers—Workman not submitting himself for examination by medical practitioner appointed under the Act—First schedule (11).

A workman who had been receiving compensation under an unrecorded agreement, submitted himself, at his employers' request, for examination by a medical man provided by his employers, in terms of sec. (11) of the first schedule to the Act. The medical man reported that the workman had so far recovered as to be able to do his former work. The workman was dissatisfied with this report but did not apply to be examined by one of the medical practitioners appointed under the Act. The employers discontinued payment and the workman instituted arbitration proceedings to have the amount of compensation fixed. **Held** that so long as the workman did not submit himself for examination by one of the medical practitioners appointed under the Act, his right to compensation was suspended, and arbitration proceedings were excluded.

Davidson v Summerlee and Mossend Iron and Steel Co., 1903, 5 F. 991; 40 S.L.R. 764; 11 S.L.T. 269.

(419)

The employers of a workman, who had sustained injuries, orally agreed to pay him 13s. 3d. weekly as compensation under the Workmen's Compensation Act, 1897, but no memorandum of the agreement was recorded. The workman, after being in receipt of these weekly payments for nearly a year, on the requisition of the employers submitted himself to examination by a medical practitioner, provided and paid by them. A certificate having been granted by that medical practitioner, the workman was dissatisfied therewith, but did not submit himself for examination to one of the medical practitioners appointed under the Act, whereupon the employers discontinued the weekly payments. The workman then instituted an arbitration under sec. 1 (3) of the Act. Held that he was not precluded from having his claim for compensation dealt with in an arbitration under sec. 1 (3) in respect of his failure to submit himself to one of the medical practitioners appointed under the Act.

Strannigan v Baird & Co., 1904, 6 F. 784; 41 S.L.R. 609; 12 S.L.T. 152.

(420)

Payments ended by arbitrator on ground of recovery—Supervening incapacity—New application for compensation.

Cadenhead v Ailsa Shipbuilding Co., 1910 S.C. 1129; 47 S.L.R. 784; 1910, 2 S.L.T. 65, No. 575, *infra*.

5. SEC. 1 (4)—ASSESSMENT OF COMPENSATION ON FAILURE OF ACTION OF DAMAGES.

[See also Cases under Act 1906, I. 5, *supra*.]

(421)

Procedure.

In an action at common law, and under the Employers' Liability Act, 1880, the sheriff found the averments of the pursuer to be irrelevant. Held that sec. 1, sub-sec. (4), of the Workmen's Compensation Act applied, and that the sheriff was entitled to proceed as arbitrator to inquire into the facts necessary to establish liability under the Act as well as to assess the compensation should any be found due.

Held, further, that the proper procedure in such circumstances was to dismiss the action, so far as founded on common law and under the Employers' Liability Act, 1880, reserving it as an arbitration under the Workmen's Compensation Act.

Henderson v Corporation of Glasgow, 1900, 2 F. 1127; 37 S.L.R. 857; 8 S.L.T. 118.

(422)

An action of damages for personal injuries at common law and under the Employers' Liability Act, 1880, having failed in respect that the pursuer was barred from insisting in it by having accepted payments under the Workmen's Compensation Act, 1897, the Court dismissed it, but, having in view the

provisions of sec. 1, sub-sec. (4), of the Workmen's Compensation Act, 1897, remitted to the sheriff to determine the amount of compensation due under that Act.

Little v P. & W. MacLellan, 1900, 2 F. 387; 37 S.L.R. 287; 7 S.L.T. 313.

(423)

"Court in which the action is tried"—Court of Session or sheriff.

In an action of damages for personal injuries raised by a workman at common law or under the Employers' Liability Act against his employers, the sheriff-substitute, after a proof, assailed the defenders. The pursuer appealed to the Second Division. The Division having decided against the pursuer, and being about to dismiss the action, the pursuer, under sec. 1 (4) of the Workmen's Compensation Act, 1897, moved the Court to assess compensation under that Act. The Court dismissed the action, and remitted to the sheriff to assess compensation.

Quinn v John Brown & Co., 1906, 8 F. 855; 43 S.L.R. 643; 14 S.L.T. 83.

(424)

Time for making application to assess compensation.

When an action of damages has once been dismissed as irrelevant by the Court of Session, it is too late for the pursuer to move the Court to assess compensation under the Workmen's Compensation Act.

Baird v Higginbotham & Co., 1901, 3 F. 673; 38 S.L.R. 479; 8 S.L.T. 497.

McGowan v Smith, 1907 S.C. 548; 44 S.L.R. 384; 14 S.L.T. 766.

(425)

Expenses—Deduction of expenses of unsuccessful action of damages.

Circumstances in which the Court ordered that the expenses of an unsuccessful action of damages (amounting to £187 12s. 11d.), to which the defenders (employers) had been found entitled, should be deducted from compensation of 12s. a week awarded to the pursuer.

McKenna v United Collieries, 1906, 8 F. 969; 43 S.L.R. 713; 14 S.L.T. 150.

(426)

A jury having returned a verdict for the defenders in an action in which a workman sued for damages in respect of personal injuries at common law and under the Employers' Liability Act, the pursuer moved the Court to assess compensation under sec. 1 (4) of the Workmen's Compensation Act, 1897, and the parties by minute agreed to a weekly payment of 15s. 10d. Held that the defenders were entitled to have the taxed amount of their expenses, for which the pursuer had been found liable, deducted from the compensation to be paid. Quoad ultra, neither party was found entitled to expenses since the date of the application of the verdict.

McGovern v Glasgow Coal Co., (O.H.) 1906, 14 S.L.T. 359.

6. SEC. 2—TIME FOR TAKING PROCEEDINGS.

[See also Cases under Act 1906, I. 6, *supra*.]

(1) GENERALLY.

(427)

Judicial proceedings for the recovery of compensation need not be instituted within six months of the accident, provided a claim for compensation is made within that time.

Kilpatrick v Wemyss Coal Co., 1907 S.C. 320; 44 S.L.R. 255; 14 S.L.T. 695.

(2) NOTICE OF ACCIDENT.

(428)

Failure to give notice of accident—"Mistake or other reasonable cause"—Ignorance of serious nature of injuries.

A workman who had sustained injury in the course of his employment failed to give notice of the accident until five months thereafter, when he made a claim under the Workmen's Compensation Act. The reasons for his failure to give earlier notice were that at first he did not regard his injury as so serious as his doctor's advice should have led him to suppose, and that he did not intend to make any claim under the Act if his recovery had been as satisfactory as he expected. **Held** that even if the employers were prejudiced by the workman's failure to give notice timeously, the want of notice was occasioned by mistake for which there was reasonable cause, and that the workman was not barred by the provisions of sec. 2, subsec. (1), of the Workmen's Compensation Act, 1897, from obtaining compensation under the Act.

Rankine v Alloa Coal Co., 1904, 6 F. 375; 41 S.L.R. 306; 11 S.L.T. 670.

(429)

On 20th November, 1905, a workman in the course of his employment fell and racked the muscles on his left side and over his lower ribs. Notwithstanding medical advice to rest, he continued working till February, 1906, when he had to go to a hospital. He designedly did not give notice of his accident at the time, believing that his injuries would not keep him from work. After going to the hospital he realised that his injuries were more serious than he had thought, and on 14th February, 1906, he gave written notice of the accident to his employers. **Held** that the workman's delay in giving notice was due to mistake or other reasonable cause within the meaning of sec. 2 (1) of the Workmen's Compensation Act, 1897, and that consequently the delay in giving notice was not a bar to proceedings under the Act.

Brown v Lochgelly Iron and Coal Co., 1907 S.C. 198; 44 S.L.R. 180; 14 S.L.T. 545.

(430)

—Prejudice to employer—Proof—Onus.

Held that the onus lies on a workman of showing that his employer has not been pre-

judiced by the workman's failure to give due notice of the accident, but **observed** that the question does not necessarily fall to be disposed of by a preliminary inquiry.

Shearer v Miller & Sons, 1899, 2 F. 114; 37 S.L.R. 80; 7 S.L.T. 231.

(431)

—A workman who had been injured in the course of his employment did not give notice of the accident to his employer until after he had left his employment, and after three weeks had elapsed from the date of the accident. A claim for compensation subsequently made by the workman was dismissed by the sheriff, on the ground that the statutory notice had not been given, and that the defence was necessarily prejudiced by the delay in giving notice. The Court recalled the sheriff's interlocutor, on the ground that it was open to the claimant to prove that his employer was not in fact prejudiced in his defence by the want of notice.

M'Lean v Carse & Holmes, 1899, 1 F. 878; 36 S.L.R. 678; 7 S.L.T. 26.

(3) CLAIM FOR COMPENSATION.

(432)

Requisites of claim.

A "claim for compensation" under sec. 2 (1) of the Act must be a claim for a specific sum, and not merely an intimation of a demand for compensation.

Kilpatrick v Wemyss Coal Co., 1907 S.C. 320; 44 S.L.R. 255; 14 S.L.T. 695.

Bennett v Wordie & Co., 1899, 1 F. 855; 36 S.L.R. 643; 7 S.L.T. 10.

Maver v Park, 1905, 8 F. 250; 43 S.L.R. 191; 13 S.L.T. 618.

(433)

Application to arbitrator without previous claim.

Held that an application to the sheriff as arbitrator under the Act to fix the compensation is itself "a claim for compensation" within the meaning of the above section, and if brought within six months of the accident does not require to be preceded by any other form of claim. **Opinion** reserved, whether a letter received by the employers within the six months intimating that a claim was to be made under the Act, but not stating the amount claimed, was a sufficient "claim for compensation" under the section.

Fraser v Great North of Scotland Railway Co., 1901, 3 F. 908; 38 S.L.R. 653; 9 S.L.T. 96.

(434)

Failure to make claim within six months—Personal bar—Payment by employers.

A woman, who had been totally incapacitated through an injury received in the course of her employment, received from her employer for a period of about six months thereafter the sum of 10s. a week, which was 9d. a week in excess of the maximum under the Workmen's Compensation Act, 1897.

The payments were made without anything being said as to the Act. The employer having proposed to reduce the payments to 5s. a week, the woman, without having made any claim to compensation under the Act within six months of the date of the accident, presented an application for arbitration under the Act, contending that her employer was barred from pleading the omission to make a claim within the six months, in respect that the payment by him of 10s. a week amounted to a representation that he admitted her right to compensation under the Act. **Held** that there was nothing in the circumstances to take the case out of the strict rule of the statute, and consequently that the application for arbitration was incompetent.

O'Neil v Motherwell, 1907 S.C. 1076; 44 S.L.R. 764; 15 S.L.T. 155.

7. SEC. 4—SUB-CONTRACTING.

[See also Cases under Act 1906, I. 8, supra.]

(1) RELATION OF UNDERTAKER AND CONTRACTOR.

(435)

Who is undertaker — Factory — Carting goods from factory to sale premises—Railway carter injured while carrying goods from factory to lorry.

The firm of C & Co. had a sausage factory in Glasgow and sale premises in London and Leeds. Under a contract with a railway company, the servants of the company called daily with carts at the factory to collect the manufactured goods for transmission by rail to the sale premises, charging for so doing an inclusive rate for collecting, railway carriage, and delivery. A railway carter was accidentally injured while engaged in taking goods from the factory to the railway lorry on the opposite side of the street from the factory, at a point about thirty-two feet distant. **Held** that C & Co. were the undertakers of the work on which the carter was employed when he was injured.

M'Govern v Cooper & Co., 1901, 4 F. 249; 39 S.L.R. 102; 9 S.L.T. 245.

(436)

Claim against undertakers and employers jointly and severally—Competency.

A workman, while engaged in the employment of a glass merchant in repairing the glass on the roof of a factory occupied by a firm of wool manufacturers, fell from a scaffold on the roof and was killed. In an arbitration under the Workmen's Compensation Act, 1897, his widow and children claimed compensation from the glass merchant and the firm of wool manufacturers, "jointly and severally, or severally, or in such proportions between them as to the Court should seem just." **Held** that as the Act imposed no joint liability, the application, as directed against the two defenders

jointly and severally, was incompetent, and application dismissed.

Herd v Summers, 1905, 7 F. 870; 42 S.L.R. 665; 13 S.L.T. 239.

(2) PART OF OR PROCESS IN UNDERTAKER'S BUSINESS.

(437)

Window cleaning of tailor's shop.

A window cleaner, while engaged, in the employment of a window cleaning company, in cleaning the windows of a workshop belonging to a firm of tailors, fell from one of the windows, and was injured. He claimed compensation from the tailors as being the undertakers within the meaning of the Workmen's Compensation Act, 1897. **Held** that the work of window cleaning was not a part of or process in the trade or business carried on by the respondents, and consequently, under sec. 4 of the Act, that they were not liable in compensation.

Dempster v Hunter & Sons, 1902, 4 F. 580; 39 S.L.R. 395; 9 S.L.T. 450.

(3) ANCILLARY OR INCIDENTAL TO UNDERTAKER'S BUSINESS.

(438)

Carting work.

A firm of carting contractors were under contract to do all the carting work in connection with a factory. One of the carters in the employment of the carting contractors was injured within the factory when engaged in carting work under this contract. He claimed compensation under the Workmen's Compensation Act, 1897, against the occupiers of the factory as the undertakers in the sense of the Act. **Held** that the carting work in which the pursuer was engaged at the time of the accident was not (within the meaning of sec. 4 of the Act) "merely ancillary or incidental to," but "was part of the trade or business carried on" by the defenders in the factory, and that they were liable to him in compensation under sec. 4 of the Act.

Bee v Ovens & Sons, 1900, 2 F. 439; 37 S.L.R. 328; 7 S.L.T. 362.

(439)

—Carter carrying goods from factory to lorry.

The firm of C & Co. had a sausage factory in Glasgow, and sale premises in London and Leeds. Under a contract with a railway company, the servants of the company called daily with carts at the factory to collect the manufactured goods for transmission by rail to the sale premises, charging for so doing an inclusive rate for collecting, transmission by rail, and delivery. A railway carter was accidentally injured while engaged in taking goods from the factory to the railway lorry on the opposite side of the street from the factory, at a point about 32 feet distant. **Held** that the carting was a part of C & Co.'s

business, and not merely ancillary or incidental thereto.

M'Govern v Cooper & Co., 1901, 4 F. 249; 39 S.L.R. 102; 9 S.L.T. 245.

(440)

———**Railway—Carting contract for collection and delivery of goods.**

A railway company charged a through rate, inclusive of all charges for collection and delivery, for the conveyance of goods by their railway. A firm of carting contractors contracted with the railway company for the collection and delivery from and to the public of goods sent or to be sent by rail, receiving from the railway company, in payment of such collection and delivery, a proportion of the through rates paid by the public. A servant of the contractors, acting in pursuance of the contract between his employees and the railway company, was injured while he was engaged in transferring goods from a lorry to a goods train for transmission by rail, and died from the effects of the injury. **Held** that the work in which the deceased was engaged at the time of the accident in question was part of the work undertaken by the railway company, and not merely ancillary or incidental thereto, within the meaning of the Workmen's Compensation Act, sec. 4, and that the company were liable in compensation.

Greenhill v Caledonian Railway Co., 1900, 2 F. 736; 37 S.L.R. 524; 7 S.L.T. 458.

(441)

Railway—Erection of wall in railway cutting.

A workman when engaged in the employment of a builder in the erection of a stone and lime wall in a railway cutting, was run down and killed by a passing train. The wall, which the builder had contracted to build for the railway company, was intended to prevent earth on the bank of the cutting from falling down and obstructing the access to a signal-cabin belonging to the railway company. The workman's widow claimed compensation under the Workmen's Compensation Act, 1897, from the railway company, as the undertakers within the meaning of the Act. **Held** that the work on which the deceased was engaged was not part of the business of the railway company, but was merely ancillary or incidental thereto, and that the railway company was not liable.

Dundee and Arbroath Joint Railway Co. v Carlin, 1901, 3 F. 843; 38 S.L.R. 635; 9 S.L.T. 55.

(442)

———**Fitting up signals for new siding.**

A railway company employed a firm of signal makers to fit up the necessary signals for new sidings which they were constructing in connection with their existing line. While fitting the signal wires, a workman employed by the signal makers was knocked down by a passenger train on the main line and killed. **Held** that the work on which the deceased was engaged at the time of the accident was

part of the business of the railway company, and was not merely ancillary or incidental thereto, and that the company were, in terms of sec. 4 of the Workmen's Compensation Act, 1897, liable as undertakers to pay compensation.

Burns v North British Railway Co., 1900, 2 F. 629; 37 S.L.R. 448; 7 S.L.T. 408.

(443)

Shipowner—Supplying coal for bunkering vessels.

Held that the supplying of coal for bunkering the vessels of a steamship company was not part of, but was ancillary to, the business of the company, in the sense of sec. 4 of the Workmen's Compensation Act, 1897.

Stewart v Dublin and Glasgow Steam Packet Co., 1902, 5 F. 57; 40 S.L.R. 41; 10 S.L.T. 343.

8. SEC. 6—REMEDIES AGAINST EMPLOYER AND THIRD PARTIES.

[See also Cases under Act 1906, I. 10, *supra*.]

(444)

Election to proceed against person other than employer — "Employer" — Workman barred from claiming compensation from the undertaker under the Act.

A workman in the employment of carting contractors was injured while employed under a contract between the contractors and a railway company, who were undertakers in the sense of the Act. The workman, under reservation of all claims he might have for compensation against other parties, asked for and accepted from the contractors a payment in full of all claims against them under any statute or at common law in respect of the injury; and he thereafter presented a petition for compensation under the Act directed against the railway company as undertakers. **Held** that the word "employer" in the sense of sec. 6 of the Workmen's Compensation Act, 1897, meant "undertaker" in the sense of the Act, and consequently that the workman, in respect of the payment by the contractors, was barred by the terms of sec. 6 from thereafter claiming compensation under the Act from the undertakers.

Murray v North British Railway Co., 1904, 6 F. 540; 41 S.L.R. 383; 11 S.L.T. 746.

(445)

Option to workman to proceed against third party—Exercise of option—"Proceed at law."

An injured workman made a claim for damages at common law against a person other than his employers, and, without having taken legal proceedings, received a payment in settlement of his claim. **Held**, in a claim for compensation under the Workmen's Compensation Act, 1897, by the workman against his employers, that he had "proceeded" against a third party in the sense of sec. 6 of the Act, and that, there-

fore, he had exercised his option and was barred from claiming compensation against his employers; and further, that a clause in the receipt granted by him reserving a right to claim compensation from his employer did not prevent this result.

Mulligan v Dick & Son, 1903, 6 F. 126; 41 S.L.R. 77; 11 S.L.T. 433.

9. SEC. 7 (1)—APPLICATION OF ACT.

(1) UNDERTAKERS.

[See 10 (6), *infra*.]

(2) ON, IN, OR ABOUT A RAILWAY.

(446)

Carter at goods station.

A, a carter in the employment of a railway company, was waiting with his horse and cart in one of the company's goods stations, when the horse from some unexplained cause started off, and A in endeavouring to stop it received injuries from which he died. **Held** that the accident arose out of and in the course of the employment of the deceased on, in, or about a railway.

Devine v Caledonian Railway Co., 1899, 1 F. 1105; 36 S.L.R. 877; 7 S.L.T. 99.

(447)

Carter leaving station.

A carter in the employment of contractors, who had a contract with a railway company for the cartage of goods to and from a station of the company, had delivered certain goods at the station. This finished his day's work, and as he was leaving the station with his horse and lorry, on the way to the contractors' stables, the horse took fright and bolted just outside the gate of the station, and, in consequence, the carter was injured by the horse and lorry dashing into a shop 315 yards distant. **Held** that the carter did not sustain his injuries "on, or in, or about" a railway, within the meaning of sec. 7 (1) of the Workmen's Compensation Act, 1897.

Bathgate v Caledonian Railway Co., 1901, 4 F. 313; 39 S.L.R. 246; 9 S.L.T. 334.

(448)

Siding belonging to trading company—Point three-quarters of a mile distant from junction with railway.

A trading company's premises were connected, by a siding, which was its own property, with a line of railway belonging to a railway company. The siding, which was not constructed or carried on under any Act of Parliament, was used solely for the traffic of the trading company, and for that purpose was used by the railway company by means of its own rolling-stock and servants. A servant of the railway company, while so employed, was accidentally injured at a point on the siding three-quarters of a mile from its junction with the line of railway. **Held** that the accident had not occurred "on, in, or about" a

railway within the meaning of the Workmen's Compensation Act, 1897.

Brodie v North British Railway Co., 1900, 3 F. 75; 38 S.L.R. 38; 8 S.L.T. 248.

(449)

Smithy in station—Public traffic—Regulation of Railways Act, 1873, sec. 3.

A smith in the employment of a railway company was injured while shoeing horses belonging to the company. The smithy where the accident occurred, and the stables in which the horses were kept, were both situated in a yard within the area occupied by the railway company as a general station. The yard was separated from the station proper by a fence of sleepers and partly by the stable wall. The horses were used for collecting and delivering goods and for hauling trucks. **Held** that the smithy was "used for the purposes of public traffic," and formed part of the railway within the meaning of the definition in the Regulation of Railways Act, 1873, sec. 3, and that the company were liable in compensation to the injured workman.

Caledonian Railway Co. v Breslin, 1900, 2 F. 1158; 37 S.L.R. 873; 8 S.L.T. 125.

(3) ON, IN, OR ABOUT A FACTORY.

(450)

Railway carter injured while carrying goods from factory to lorry on opposite side of street.

The firm of C & Co. had a sausage factory in Glasgow and sale premises in London and Leeds. Under a contract with a railway company the servants of the company called daily with carts at the factory to collect the manufactured goods for transmission by rail to the sale premises, charging for so doing an inclusive rate for collecting, railway carriage, and delivery. A railway carter was injured while engaged in taking goods from the factory to the railway lorry on the opposite side of the street from the factory, at a point about 32 feet distant. **Held** that the accident occurred while the carter was employed in or about the factory.

M'Govern v Cooper & Co., 1901, 4 F. 249; 39 S.L.R. 102; 9 S.L.T. 245.

(451)

Carter injured through horse bolting 800 yards from factory.

A carter, in the employment of a grain merchant whose premises were a factory within the meaning of the Workmen's Compensation Act, 1897, was driving a horse and cart belonging to his employer, when at a distance of 800 yards from the employer's premises the horse bolted, with the result that the carter was injured.

Held that the accident did not occur in the course of employment "about" a factory within the meaning of the Workmen's Compensation Act, 1897, and that the employer was not liable in compensation.

Kent v Porter, 1901, 38 S.L.R. 482.

(452)

Place 550 yards distant from factory.

A riveter was injured in the employment of a firm of ship-repairers, while repairing a ship in a public dock at a distance from his employers' factory of 550 yards in a direct line and about a mile by road. The employers' factory was not a shipbuilding yard. **Held** that the riveter was not, when he received the injuries, employed "about" a factory in the sense of the Act.

Barclay, Curle & Co. v M'Kinnon, 1901, 3 F. 436; 38 S.L.R. 321; 8 S.L.T. 404.
Appeal held incompetent, 1901, 3 F. (H.L.) 1; [1901] A.C. 269; 38 S.L.R. 611; 9 S.L.T. 84.

(453)

Shed leased by employers half a mile from factory—Factory and Workshops Act, 1878, sec. 93 (3).

A workman received injuries when he was engaged in the employment of a firm of engineers—whose works were a factory within the meaning of the Act—as one of a squad of men "working at a locomotive engine," the property of the defenders, in a shed belonging to and used by a railway company, of which shed the defenders were tenants under an agreement with the railway company. The shed was situated about half a mile from the defenders' works, and had no direct connection therewith by rail. The shed had previously been used on many occasions by the defenders for "similar purposes." No steam, water, or other mechanical power was used in the shed. **Held** that the claimant had not been employed "on, or in, or about" the defenders' factory, and was not entitled to compensation.

Ferguson v Barclay, Sons & Co., 1902, 5 F. 105; 40 S.L.R. 58; 10 S.L.T. 350.

(454)

Place 2 miles distant from factory.

A carter in the employment of the owners of a timber-finishing factory was driving a load of timber from the factory to a house in the course of being built, when, at a spot on the public road 2 miles distant from the factory, the cart was upset, and, falling upon the carter, caused his death. **Held** that the accident did not occur in the course of employment "about" the factory, and that the employers were not liable under the Act.

Bell & Sime v Whittton, 1899, 1 F. 942; 36 S.L.R. 754; 7 S.L.T. 59.

(455)

Wharf—Accident on public street outside wharf.

A labourer employed by a firm of ship-owners as a quay labourer at a wharf occupied by them was assisting in removing girders from the street immediately outside the wharf shed to the side of a steamship belonging to the employers, which was being loaded. The girders were lifted by a hand crane on a hand truck, by which they were conveyed to the ship's side. While removing the hand crane from one pile of girders to

another pile, both of which lay in the street immediately outside the wharf shed, the labourer got jammed between the platform of the crane and one of the girders, and sustained injuries. The wharf was a factory within the meaning of the Act of 1897. **Held** that the fact that the accident happened on a public street immediately outside the wharf shed did not, per se, exclude a claim for compensation.

Strain v Sloan & Co., 1901, 3 F. 663; 38 S.L.R. 475; 8 S.L.T. 498.

(456)

Dock—Ship in dock.

Held (1) that a steamship lying in a dock is not a factory, and (2) that an apprentice boilermaker employed on a ship lying in a dock is not employed on, in, or about a factory even when the dock itself is a factory in the sense of sec. 7 of the Workmen's Compensation Act.

Low v Abernethy & Co., 1900, 2 F. 722; 37 S.L.R. 506; 7 S.L.T. 423.

Cf. Reid v Anchor Line, 1903, 5 F. 435; 40 S.L.R. 352; 10 S.L.T. 591, No. 478, infra.

(457)

Ship berthed in dock—Fireman cleaning and repairing boiler tubes—Factory and Workshops Act, 1901, sec. 104.

Coyne v Glasgow Steam Coasters Co., 1907 S.C. 112; 44 S.L.R. 118; 14 S.L.T. 482, No. 476, infra.

(4) ON, IN, OR ABOUT A MINE.

(458)

Private line of railway occupied by colliery.

A workman employed at a coal mine had finished his day's work and was proceeding home along a private line of railway occupied by the colliery when he was run over and killed at a point 230 yards distant from the place where he worked. **Opinion** (per Lord Justice-Clerk Macdonald) that the accident did not happen "on, in, or about" a mine in the sense of the Act. **Opinion contra** (per Lord Young).

Caton v Summerlee and Mossend Iron and Steel Co., 1902, 4 F. 989; 39 S.L.R. 762; 10 S.L.T. 204.

(459)

Siding adjacent to and belonging to mine—Work extraneous to proper business of employer—Coal Mines Regulation Act, 1887, sec. 75.

A colliery company, owners of a coal mine and siding connecting the mine with a main line of railway, entered into a contract with the owner of a sand-pit situated on the main line to carry sand from the sand-pit in railway wagons to the colliery siding, preparatory to removal by the railway company. The haulage was to be done by an engine belonging to the colliery company, and used in connection with their mine and siding. The siding was about 80 yards in length, and served only the one

mine. The sand-pit was 300 or 400 yards from the siding. In the course of executing this contract the brakeman of the engine, who was in the employment of the colliery company, was killed while uncoupling wagons on the main line at or near the extremity of the siding. **Held** (1) that the employment of the deceased was locally "about" a mine in the sense of sec. 7, sub-sec. (1), of the Workmen's Compensation Act, 1897; and (2) that a claim for compensation arose although the work upon which the deceased was employed at the time of the accident was not part of the proper business of the colliery.

Monaghan v United Collieries, 1900, 3 F. 149; 38 S.L.R. 92; 8 S.L.T. 261.

(460)

Siding—Private railway from mine to main line—Coal Mines Regulation Act, 1887, sec. 75.

A mine was connected with a main line of railway by a private line, about a mile and a quarter in length. At a point in this private line, about 800 yards from the mine, there was a drum-house and sidings connected therewith. At this point an engine-driver in the employment of the mine-owners was accidentally killed in the course of his employment. In an application by his mother for compensation under the Workmen's Compensation Act, 1897, **held** that the place where the accident occurred was on, or in, or about a "mine," within the meaning of the Workmen's Compensation Act, 1897.

Anderson v Lochgelly Iron and Coal Co., 1904, 7 F. 187; 42 S.L.R. 147; 12 S.L.T. 479.

(461)

Private road to mine—"About" mine—Coal Mines Regulation Act, 1887, sec. 75.

A workman employed as a carter at a coal mine sustained fatal injuries while transferring timber to a colliery cart from a railway wagon at a railway siding belonging to and in the occupation of a railway company. The place where the accident occurred was about 400 yards from the pit, the distance being made up of (1) railway siding (123 yards), (2) the breadth of a public road, and (3) a private cart road leading to the pit (259 yards). **Held** that the workman was not injured in the course of employment, "on, or in, or about" "a mine" within the meaning of the Workmen's Compensation Act, 1897, sec. 7.

Coylton Coal Co. v Davidson, 1905, 7 F. 727; 42 S.L.R. 596; 13 S.L.T. 99.

(5) ON, IN, OR ABOUT AN ENGINEERING WORK.

(462)

Repair of road—Steam-roller and water-cart employed in repairing road—Accident to driver of water-cart.

A section of the roads under the control of a district committee was being repaired by means of a steam-roller and water-cart,

the water-cart being used to sprinkle the newly-laid surface before it was rolled. The work was stopped for dinner at a place where two roads joined. After the dinner interval the men in charge of the steam-roller proceeded to roll a portion of the road north of the junction for which water was not required, and the driver of the water-cart was directed to water a piece of road about a quarter of a mile south of the junction in order to prepare it for the roller. As the driver was yoking his horse it bolted, with the result that he was run over and killed. **Held** (1) that as a steam-roller was used for the purpose of repairing the road, the operation was an engineering work in the sense of sub-sec. (2) of sec. 7 of the Workmen's Compensation Act; and (2) that the driver of a water-cart was employed on that work at the time of the accident.

Middlemiss v Middle District Committee of the County Council of Berwickshire, 1900, 2 F. 392; 37 S.L.R. 297; 7 S.L.T. 330.

10. SEC. 7 (2)—DEFINITIONS.

(1) RAILWAY.

[See 9 (2), *supra*.]

(2) FACTORY.

STATUTES.

Act 1878—Factory and Workshop Act, 1878

—41 & 42 Vict. c. 16.

Act 1895—Factory and Workshop Act, 1895

—58 & 59 Vict. c. 37.

Act 1901—Factory and Workshop Act, 1901

—1 Edw. VII. c. 22.

(a) Generally.

(463)

Bottle-washing works—Act 1901, sec. 149 (1).

A storeman employed in the wine cellars of a hotel was injured by the breaking of a bottle which he was corking with his hand. In the cellars there were two small revolving brushes (worked, when desired, by water power from a tap), for washing the interior of bottles. The cellars were primarily used for storage, and the processes of corking and bottle-washing were ancillary to that object. **Held** that the cellars were not a "bottle-washing work," and therefore not a factory within the meaning of the Factory and Workshop Act, 1901, or of the Workmen's Compensation Act, 1897.

Kavanagh v Caledonian Railway Co., 1903, 5 F. 1128; 40 S.L.R. 812; 11 S.L.T. 281.

(464)

A claim for compensation under the Workmen's Compensation Act, 1897, by a spirit salesman against a spirit merchant set forth that the claimant received the injuries on account of which he claimed while engaged, in the respondent's service, washing bottles

in a store which "is used for the purpose of bottling beer and washing beer bottles, and is a factory within the meaning of the Workmen's Compensation Act, 1897." **Held** that under the Workmen's Compensation Act, 1897, sec. 7, and the Factory and Workshop Act, 1901, sec. 149, the claim was irrelevant, in respect that it did not set forth that steam, water, or other mechanical power was used in the respondent's store.

Campbell v M'Nee, 1903, 5 F. 1151; 40 S.L.R. 824; 11 S.L.T. 277.

(465)

Mechanical power used "in aid of" manufacturing process—Grindstone driven by gas engine—Act 1878, sec. 93, sub-sec. (3).

A workman employed in a stone-dressing yard claimed compensation from his employer under the Workmen's Compensation Act, 1897. The premises occupied by the employer consisted of a yard in which the stones were dressed by manual labour, and included an engine-house where the workmen's tools were sharpened on a grindstone driven by a gas engine. No other mechanical power was used in the premises. The claimant, while dressing stones, was struck in the eye by a piece of metal from a chisel, and thereby sustained the injuries for which he claimed compensation. **Held** that the premises were premises in which mechanical power was "used in aid of the manufacturing process carried on therein," within the meaning of the Factory and Workshop Act, 1878, sec. 93, sub-sec. (3), and were therefore a factory within the meaning of the Workmen's Compensation Act, 1897, sec. 7, and that the claimant was entitled to compensation.

Petrie v Weir, 1900, 2 F. 1041; 37 S.L.R. 795; 8 S.L.T. 75.

(466)

Refuse dispatch works—Act 1878, sec. 93 (3).

In the "refuse dispatch works" of the Glasgow Corporation certain saleable parts of the city refuse were separated from the unsaleable part by processes in which steam power was used. The sums realised by the sales were applied in reducing the cost of the disposal of the refuse, which fell on the rates. **Held** that these works fell within the definition of "non-textile factory" in sec. 93 of the Factory and Workshop Act, 1878, in respect that the material in question was there adapted for sale, and afterwards sold, and that accordingly a workman in the employment of the Corporation was entitled to compensation under the Workmen's Compensation Act of 1897 for injuries caused by an accident in the works.

Henderson v Corporation of Glasgow, 1900, 2 F. 1127; 37 S.L.R. 857; 8 S.L.T. 118.

(467)

Threshing machine in transit—Act 1878, sec. 93.

Held that a threshing machine and traction engine in transit to a place where they were

to be used for threshing, the engine being connected with the machine for no purpose but that of haulage, did not constitute a "factory" within the meaning of the Factory and Workshops Act, 1878, or the Workmen's Compensation Act, 1897.

George v Macdonald, 1901, 4 F. 190; 39 S.L.R. 136; 9 S.L.T. 267.

(468)

Workshop for repairs merely incidental to non-factory business—Act 1878, sec. 93.

A cable tramway company had a covered shed for their cars 550 feet long and 160 feet wide, and adjoining it a machine-room or workshop 75 feet long and 50 feet wide, which contained lathes, turning-machines, and boring machines, driven by two electric motors. This workshop was used solely for the repair of the grippers and other parts of the cars. The cars were always brought to the shed for repairs, and were repaired in it. No mechanical power was used in the shed except the power employed to move a travelling platform for moving the cars, which was derived from a steam-engine adjoining the shed. A car-driver was injured when employed in oiling his car in the shed at a point 374 feet distant from the machine-room. **Held** that the machine-room was a factory in the sense of the Act, and that the accident occurred on, in, or about a factory within the meaning of sec. 93, sub-sec. (3) (b), of the Factory and Workshop Act, 1878.

Mooney v Edinburgh and District Tramways Co., 1901, 4 F. 390; 39 S.L.R. 260; 9 S.L.T. 366.

(b) Docks, Wharves, Quays, Warehouses, and Shipbuilding Yards.

(469)

Dock—Dock in which no accident has taken place—Act 1895, secs. 18 and 23.

Question, whether the provisions of sec. 18 of the Factory and Workshop Act, 1895, applied to a dock, in which no accident had yet occurred, so as to make it a factory in the sense of sec. 7 of the Workmen's Compensation Act.

Bruce v Henry & Co., 1900, 2 F. 717; 37 S.L.R. 511; 7 S.L.T. 421.

(470)

Ship in dock.

Held that a steamship lying in a dock is not a factory in the sense of sec. 7 of the Workmen's Compensation Act.

Low v Abernethy & Co., 1900, 2 F. 722; 37 S.L.R. 506; 7 S.L.T. 423.

(471)

Ship in dock—Act 1878, sec. 93—Act 1895.

A, a dock labourer in the employment of a firm of stevedores, was injured while engaged in stowing cargo on board a ship in a public dock. On the occasion in question steam winches on board the ship were used for the purpose of loading her, but steam

cranes which were attached to the quays of the dock were not so used. A claimed compensation under the Workmen's Compensation Act, 1897, from the stevedores as being the occupiers of a dock, which was a factory within the meaning of the Act. **Held** that the dock was not a factory in the sense of the Workmen's Compensation Act, 1897.

Healy v Macgregor & Ferguson, 1900, 2 F. 634; 37 S.L.R. 454; 7 S.L.T. 402.

(472)

Machinery on board ship—Act 1895, sec. 23.

Held that sec. 23 of the Factory and Workshop Act of 1895 did not apply to machinery forming part of the apparatus of a ship lying at a quay, and employed in the process of unloading the ship, and therefore that such machinery so employed was not a "factory" in the sense of the Workmen's Compensation Act, 1897.

Aberdeen Steam Trawling and Fishing Co. v Peters, 1899, 1 F. 786; 36 S.L.R. 573; 6 S.L.T. 378.

(473)

Machinery on board lighter—Act 1895, sec. 23.

A lighter and machinery thereon, the property of and worked by stevedores, was employed in raising goods from the hold to the deck of a vessel moored between the lighter and a quay, the goods being thereafter transferred to the quay, not by the stevedores, but by dock workmen. **Held** that sec. 23 of the Factory and Workshop Act, 1895, did not apply either to the lighter or to the machinery thereon, and that therefore they did not constitute a "factory" in the sense of the Workmen's Compensation Act, 1897; and further, that the process which was being performed by the lighter and its machinery was not one of unloading to a quay in the sense of the Act of 1895.

Laing v Young & Leslie, 1900, 3 F. 31; 38 S.L.R. 29; 8 S.L.T. 230.

(474)

Shipbuilding yard—Dock—Act 1897, sec. 7—Act 1878, sec. 93—Act 1895, sec. 23.

A case for appeal under the Workmen's Compensation Act, 1897, set forth the following facts:—*Rodger & Co.*, shipbuilders, contracted to build a steamship, including her engines. After she had been launched at *Rodger & Co.*'s shipbuilding yard she was taken to a public dock to have her engines erected and fitted by *Hall & Co.*, with whom *Rodger & Co.* had contracted for the engines. While she was lying in the dock having her engines erected and fitted, the claimant, *John Jackson*, a workman in the employment of *Hall & Co.*, was injured while working in the steamship. It was not stated in the case that the dock in question was one to which any provision of the Factory Acts had been applied, or that any steam, water, or other mechanical power was used within the dock in aid of the work that was being carried out on the

steamship. **Held** that, on the facts stated in the case, the dock in question was not a factory in the sense of the Workmen's Compensation Act, 1897. **Held** also that on the facts stated the dock was not a shipbuilding yard in the sense of the Factory and Workshop Act, 1878.

Jackson v Rodger & Co., 1900, 2 F. 533; 37 S.L.R. 390; 7 S.L.T. 363.

Cf. Reid v Anchor Line, 1903, 5 F. 435; 40 S.L.R. 352; 10 S.L.T. 591, No. 478, *infra*.

(475)

Ship in dry dock undergoing repair—Act 1895, sec. 23.

Shipowners took a ship into a dry dock, which they had hired for the purpose of repairing the ship. A workman, who had served as ship's carpenter on board the ship during one voyage, and was engaged for her next voyage, in the interval between the voyages was employed by the shipowners in the work of repairing the ship. While engaged in unshackling the ship's cable, in order to turn it end for end, he fell into the dock, and sustained injuries from which he died. **Held** that when the accident happened he was employed as a workman in the repair of a ship in or about a "factory," in the sense of the Workmen's Compensation Act, 1897, and that the shipowners were liable to pay compensation.

Cayzer, Irvine & Co. v Dickson, 1905, 7 F. 723; 42 S.L.R. 591; 13 S.L.T. 155.

(476)

Ship berthed in dock—Fireman cleaning and repairing boiler tubes—Act 1901, sec. 104.

A fireman, employed in a steamship, was injured on board the ship while she was berthed in a dock where she had come for the purpose of loading. In a claim against his employers under the Workmen's Compensation Act, 1897, he averred that at the time of the accident he "was engaged in repairing and cleaning the boilers, tubes, engines, and fittings" of the ship, and that while he "was engaged sponging the tubes" he fell and was injured. He further averred that at the time of the accident his employers had the occupation of the dock as a "factory" within the meaning of the Act, and that the work at which he was engaged was an "undertaking" within the meaning of the Act. **Held** that the claimant had not relevantly averred that the dock had, in the sense of the Act, become a factory, nor that he had been injured while engaged in factory work, the work alleged not being such repairs as required the docking of the ship, but merely the ordinary work of the ship.

Coyne v Glasgow Steam Coasters Co., 1907 S.C. 112; 44 S.L.R. 118; 14 S.L.T. 482.

(477)

Wharf—Act 1895, sec. 23.

A labourer employed by a firm of shipowners as a quay labourer at a wharf occu-

pied by them was injured while assisting in removing girders from the street immediately outside the wharf shed to the side of a steamship belonging to the employers which was being loaded. **Held** that as one or more of the provisions in sec. 23 of the Factory and Workshop Act, 1895, applied to the wharf, it was a factory within the meaning of the Act of 1897.

Strain v Sloan & Co., 1901, 3 F. 663; 38 S.L.R. 475; 8 S.L.T. 498.

(478)

Quay—Machinery on board ship—Act 1895, sec. 23.

A shipowner was unloading a vessel at a quay, by raising the cargo by means of a steam winch derrick on board the vessel, from the hold to the deck, whence it was wheeled over gangways to the quay. In the course of unloading a workman employed by the shipowner fell from a ladder in the ship and was killed. **Held** that when the accident happened the workman was employed on, or in, or about a "factory," in the sense of the Workmen's Compensation Act, 1897.

Reid v Anchor Line, 1903, 5 F. 435; 40 S.L.R. 352; 10 S.L.T. 591.

(479)

Shipbuilding yard—Dock—Act 1878, sec. 93—Act 1895, sec. 23.

A case for appeal under the Workmen's Compensation Act set forth that the claimant made the following averments:—Rodger & Co., shipbuilders, contracted to build a steamship, including her engines. After she had been launched at Rodger & Co.'s shipbuilding yard, she was taken to a public dock to have her engines erected and fitted by Hall & Co., with whom Rodger & Co. had contracted for the engines. While she was lying in the dock having her engines erected and fitted, the claimant, who was a workman in the employment of Hall & Co., was injured while working on the ship. It was admitted that no machinery driven by steam, water, or other mechanical power was used in the work on which the workman was engaged at the time of the accident. The question of law was whether, on the assumption that the claimant's averments were true, Rodger & Co. "were, within the meaning of sec. 7 of the Workmen's Compensation Act, the occupiers of the dock as a factory, which is a shipbuilding yard, on the occasion" of the accident. The Court answered the question in the affirmative.

Jackson v Rodger & Co., 1899, 1 F. 1053; 36 S.L.R. 851; 7 S.L.T. 76.

(480)

Act 1878, sec. 93.

Question, whether the definition of shipbuilding yard given in the Factory and Workshop Act, 1878, sec. 93, includes places where ships are repaired but not built.

Low v Abernethy & Co., 1900, 2 F. 722; 37 S.L.R. 506; 7 S.L.T. 423.

(481)

Dock near shipbuilding yard.

Opinions that a public dock, fifteen miles distant from a shipbuilding yard, on the same river, was not near the shipbuilding yard within the meaning of the Workmen's Compensation Act, 1897, sec. 7, sub-sec. (3).

Jackson v Rodger & Co., 1899, 1 F. 1053; 36 S.L.R. 851; 7 S.L.T. 76.

(482)

Fact or law.

Held that the question whether a dock two miles distant from a shipbuilding yard was near the yard was a question of circumstances, and not a question of law, and was therefore not a question which the Court had jurisdiction to decide on a case stated for appeal under par. 14 (c) of the second schedule of the Act.

M'Millan v Barclay, Curle & Co., 1899, 2 F. 91; 37 S.L.R. 61; 7 S.L.T. 214.

(483)

Warehouse.

A trader carried on the business of a dry-salter in premises consisting of two rooms on the ground floor and two cellars on the basement. The business, to the extent of between 85 and 90 per cent., consisted in retail sales; and in one of the rooms there was a counter over which the goods were sold. In order to meet this trade, goods were stored on the premises, including casks of oil, all of which were open and ready for the delivery of small quantities; casks of white lead, of which there were generally ten or twelve on the premises, four, one of each quality, being open for retail sales; small parcels of saltpetre, soda, and varnish paints, none of which were sold in large quantities, and starch, which was sold in 56-lb. cases. A lorryman was injured while carrying a cask of white lead, weighing 2 cwts., from the premises to his lorry. **Held** that the premises were not a warehouse within the meaning of sec. 7 (2) of the Workmen's Compensation Act, 1897, and that the workman was not entitled to compensation.

Colvine v Anderson & Gibb, 1902, 5 F. 255; 40 S.L.R. 231; 10 S.L.T. 482.

(484)

Uncovered yard used for storage of material—Act 1901, sec. 104 (1).

A workman was injured while breaking stones in the employment of the Corporation of Perth by an accident which occurred in a yard in Perth belonging to the Corporation. The yard was uncovered, but at the side of it was a large shed in which implements were kept and work was done in wet weather. The yard was principally used to store materials for the repair of roads and drains and for other works executed by the Corporation either on its own account or to a small extent for private individuals, and it contained bings of stone which the workman was employed in breaking at the time of the accident. No mechanical power was used in the yard. **Held** that the yard was not a warehouse in the ordinary sense of the

word, and therefore not a factory within the meaning of the Workmen's Compensation Act, 1897.

Opinions that the reference to warehouses in sec. 104 (1) of the Factory and Workshop Act, 1901, was not to warehouses in general, but merely to warehouses used in connection with docks.

M'Ewan v Magistrates of Perth, 1905, 7 F. 714; 42 S.L.R. 456; 12 S.L.T. 846.

(3) MINE.

[See 9 (4), *supra*.]

(4) ENGINEERING WORK.

(485)

Air compressor lifted on to lorry.

An air compressor, which had been used in connection with a new bridge, was sold. The purchaser employed A to lift the compressor, which was lying on a quay at Glasgow, and put it on a lorry. This work was done by means of a hydraulic jack. **Held** that the lifting of the compressor not being a work of construction, alteration, or repair, was not an engineering work in the sense of the Act.

Rae v Fraser, 1899, 1 F. 1017; 36 S.L.R. 782; 7 S.L.T. 73.

(486)

Haycutter fitted up in customer's premises—Haycutter connected to electrically driven shaft to test working.

A firm of engineers sold a hay-cutting machine to a customer and undertook to fit it up in the customer's premises and test the working. In the process of fitting up the haycutter one of the engineers' workmen, for the purpose of testing its working, connected it with a revolving shaft driven by electricity, forming part of the customer's plant already in the premises, and while doing so was injured. **Held** that the haycutter was an engineering work in the sense of the Act.

Reid v P. R. Fleming & Co., 1901, 3 F. 1000; 38 S.L.R. 720; 9 S.L.T. 113.

(487)

Repairing boiler in spinning mill—No mechanical power used.

A workman in the employment of a firm of boilermakers was injured in course of repairing a boiler in a spinning mill belonging to a third person. The work in which he was engaged was all done by hand, and no mechanical power was being used, although there was steam power on the premises available for use. **Held** that the work was not an engineering work in the sense of the Act.

Cooper & Greig v Adam, 1905, 7 F. 681; 42 S.L.R. 562; 13 S.L.T. 86.

(488)

Repair of road—Steam roller employed in repairing road.

Middlemiss v Middle District Committee of the County Council of Berwickshire, 1900, 2 F. 392; 37 S.L.R. 297; 7 S.L.T. 330, No. 462, *supra*.

v 49

(5) BUILDINGS—CONSTRUCTION, &C., OF.

(489)

Building exceeding thirty feet in height—Part of building below ground—Foundations—Question of fact or law.

A wash-house, built to the order of the police commissioners of a burgh, was 30 feet 5½ inches in height above its foundation. Immediately above the foundation was a basement floor 6 feet below the level of the surrounding ground which contained pipes in connection with the wash-house. The floor of the wash-house was 6 feet 4 inches above the basement floor. **Held** that the question whether a building exceeded 30 feet in height was, in proceedings under the Workmen's Compensation Act, 1897, one of fact for the determination of the arbitrator. **Opinions** that the building exceeded 30 feet in height in the sense of sec. 7 (1) of the Workmen's Compensation Act, 1897. **Question**, whether in estimating the height of a building for the purposes of the Act, the foundations are to be taken into account.

Halstead v Alex. Thomson & Sons, 1901, 3 F. 668; 38 S.L.R. 473.

(490)

Building constructed by a scaffolding—Scaffolding not in use nor erected at time of accident—Question of fact or law.

In the construction of a building, scaffolding consisting of trestles and planks was used from time to time from the beginning to the end of the job. During the construction an accident happened to a workman, at a time when the scaffolding, although its component parts were there, was neither in use nor erected. **Held** that at the time of the accident the building was being constructed by means of a scaffolding in terms of sec. 7 (1) of the Workmen's Compensation Act, 1897.

Opinions that, in proceedings under the Act, the question whether or not at the time of the accident the building was being constructed by means of a scaffolding, was one of fact to be determined by the arbitrator.

Halstead v Alex. Thomson & Sons, 1901, 3 F. 668; 38 S.L.R. 473.

(491)

Demolition of building—Use of machinery driven by steam.

Held that the Act applies to employment about a building on which machinery driven by mechanical power is being used for the purpose of the demolition thereof, although the building does not exceed 30 feet in height.

Murnin v Calderwood, 1899, 1 F. 862; 36 S.L.R. 648; 7 S.L.T. 16.

(492)

Removal of plant from building—Hole made in main wall of building—Scaffolding used in removing plant.

Bell v Adam & Co., 1906, 44 S.L.R. 155; 14 S.L.T. 494, No. 496, *infra*.

(493)

"Scaffolding"—Painter's ladder.

Held that a ladder used in the ordinary way by a painter in painting beams in a building over 30 feet in height was not a "scaffolding" within the meaning of the Workmen's Compensation Act, 1897, sec. 7. *McDonald v Hobbs & Samuel*, 1899, 2 F. 3; 37 S.L.R. 4; 7 S.L.T. 157.

(494)

Ladder.

A workman was killed by falling from a ladder while he was engaged in silicating the wall of a house over 30 feet in height. This work was generally done by slaters by means of a scaffold suspended by a rope from the roof of the house, but where the work was limited (as it was in the case in question) to particular portions of the house it was frequently done by painters by means of ladders, which were in that case much more convenient. Three painters, including the deceased, were engaged in the work in question, and they used three ladders from 16 to 60 feet in length. It did not appear that the ladders were fastened to the wall or to each other, or that they were otherwise than placed against the wall in the usual way. Held that the ladder from which the deceased fell was not a scaffolding within the meaning of the Act.

Campbell v Sellars, 1903, 5 F. 900; 40 S.L.R. 643; 11 S.L.T. 89.

(6) UNDERTAKERS.

(495)

Factory—Occupier—Trial of machinery under control of makers—Act 1878, sec. 93—Act 1895, secs. 4 and 23.

A firm of engineers had erected and practically completed certain ice-making and refrigerating machinery in a building belonging to a cold storage and ice company. While the engineers were making a "preliminary run" for the purpose of testing the machinery, one of their employees engaged in the work was killed. Held that even if the ice company's building, or the refrigerating machinery, was a factory, the engineers were not the occupiers of it, and therefore were not undertakers within the meaning of the Workmen's Compensation Act, 1897.

Purves v Sterne & Co., 1900, 2 F. 887; 37 S.L.R. 696.

(496)

Occupier—Contractor removing plant from factory.

A firm of coppersmiths were dismantling and removing a vacuum pan from a building over 30 feet in height which was used as a sugar refinery. In order to facilitate operations a scaffolding had been erected, portions of the floors removed, and an opening made in the main wall of the building. A workman employed by the firm of coppersmiths was injured while lowering a portion of the pan. Held (1) that, assuming the building to be a factory the workman's employers were not occupiers, and, as such,

"undertakers" in the sense of sec. 7 (2); and (2) that the building was not being constructed, or repaired, or demolished with the aid of a scaffolding in the sense of sec. 7 (1).

Bell v Adam & Co., 1906, 44 S.L.R. 155; 14 S.L.T. 494.

(497)

Warehouse—Occupier—Purchaser of goods stored in warehouse.

The owner of 600 bolls of peas lying in bulk in a grain store belonging to a warehouseman sold 200 bolls thereof to a firm, who received a delivery order therefore. The grain store was a "warehouse" within the meaning of the Factory and Workshop Act, 1901. Held that the purchasers were not "occupiers" of the store in the sense of the Factory and Workshop Act, 1901, sec. 104, and that the dependants of a carter in their employment, who was killed by the fall of a bag while taking delivery of part of the peas at the store, were not entitled to compensation from his employers under the Workmen's Compensation Act, 1897.

Ramsay v Mackie, 1904, 7 F. 106; 42 S.L.R. 114; 12 S.L.T. 468.

(498)

Occupier—Workman sent to repair boiler in spinning mill.

A workman in the employment of a firm of boilermakers was injured in the course of repairing a boiler in the spinning mill belonging to a third person. Held that, as the spinning mill was not a factory occupied by the workman's employers, it was not a factory of which they were the undertakers in the sense of the Workmen's Compensation Act.

Cooper & Greig v Adam, 1905, 7 F. 681; 42 S.L.R. 562; 13 S.L.T. 86.

(499)

Occupier—Workman sent to do work in repair of soap work.

A workman in the employment of the occupier of an ironfoundry was sent, in the course of his employment, to do some work in the repair of a soap work, and while so engaged he fell from a scaffolding and was killed. Held that the ironfounder was not, with respect to the accident in question, an undertaker within the meaning of the Workmen's Compensation Act.

Malcolm v M'Millan, 1900, 2 F. 525; 37 S.L.R. 383; 7 S.L.T. 364.

(500)

Dock—Occupier—Owners of ship lying in dock.

Held that the mere fact of a steamship lying in a dock, while a workman employed by a firm of engineers was engaged in executing repairs on the boiler, did not make the firm occupiers of the dock in such a sense as to make them undertakers within the meaning of sec. 7, sub-sec. (1), of the Workmen's Compensation Act, 1897.

Low v Abernethy & Co., 1900, 2 F. 722; 37 S.L.R. 506; 7 S.L.T. 423.

(501)

Dock—Occupier—Ship unloading in dock—Shipping agents in charge of unloading.

A workman in the employment of shipping agents, who had contracted with the owners of a vessel lying in a dock to load her, while engaged in removing goods from the quay to the vessel, fell into the hold and was killed. In a claim by the widow of the workman against his employers for compensation, **held** that the shipping agents were not the occupiers of the dock, and were therefore not undertakers in the sense of sec. 7 of the Workmen's Compensation Act, and that they were not liable for compensation under the Act.

Bruce v Henry & Co., 1900, 2 F. 717; 37 S.L.R. 511; 7 S.L.T. 421.

(502)

Quay—Occupier.

A coal company contracted with a steam packet company to supply the steamers of the packet company with bunker coal free on board at Glasgow harbour. The coal company contracted with a coal porter to put such bunker coal on board at a particular berth of the harbour, and the coal porter employed labourers, for whose wages he alone was responsible, to do the work of loading. One of the labourers so employed by the coal porter, after having been engaged in bringing coal from the coal company's carts and laying it upon the breast of the quay ready to be shipped, was awaiting the arrival of one of the packet company's steamers when he fell into the river and was drowned. **Held** that assuming the quay to be a factory, the coal company were not (on the occasion in question) the occupiers of the quay, or of any part of it, within the meaning of sec. 23 of the Factory and Workshop Act, 1895; and therefore that they were not the undertakers of the employment at which the labourer met his death.

Stewart v Darnagavil Coal Co., 1902, 4 F. 425; 39 S.L.R. 302; 9 S.L.T. 378.

(503)

Quay — Occupier — Exclusive use of berth.

The D Steamship Co. had a particular berth in a harbour allotted to them for loading and unloading their vessels, and had an office there and a staff of servants and clerks constantly employed in the receipt and discharge of cargo. The same berth was also used by the M Steamship Co., who also had an office there, and when not required by either of these companies the harbour-master allowed occasional vessels to load or discharge at the berth. A firm of coalowners who had the contract for coaling the vessels of the D Co. employed a sub-contractor to trim the coal on the quay opposite the berth, and to put it on board the vessels. While so trimming the coal with a view to putting it on board one of the D Co.'s vessels, which had not yet arrived at the berth, a servant of the sub-

contractor fell off the quay and was drowned. The vessel arrived at the berth an hour after the accident. **Held** that the D Steamship Co. were not the "occupiers" of the quay in the sense of sec. 7 (2) of the Workmen's Compensation Act, 1897, and consequently were not liable in compensation to the dependants of the deceased as "undertakers" in the sense of the section.

Stewart v Dublin and Glasgow Steam Packet Co., 1902, 5 F. 57; 40 S.L.R. 41; 10 S.L.T. 343.

(504)

Quarry—Landed proprietor working quarry on his own estate for estate purposes.

Question (per Lord M'Laren), whether a landed proprietor who worked a quarry on his estate for estate purposes was an undertaker in the sense of the Workmen's Compensation Act, 1897.

Paterson v Lockhart, 1905, 7 F. 954; 42 S.L.R. 755; 13 S.L.T. 298.

(505)

Engineering work—Haycutter—Fitting up haycutter in customer's premises—Employers of workman sent to fit up haycutter.

A firm of engineers sold a hay-cutting machine to a customer, and undertook to fit it up in the customer's premises, and test its working before delivery. In the process of fitting up the haycutter one of the engineers' workmen, for the purpose of testing its working, connected it with a revolving shaft driven by electricity forming part of the customer's plant already in the premises, and while doing so was injured. **Held** that the haycutter was an engineering work in the sense of the Act, that the workman's employers were the undertakers for its construction.

Reid v P. R. Fleming & Co., 1901, 3 F. 1000; 38 S.L.R. 720; 9 S.L.T. 113.

(506)

Building—Construction—Owner of building not taking part in work.

Opinions as to whether the owner of a building who contracts with some one to execute repairs on the building, and does not engage in the work himself, is an "undertaker" in the sense of the Act.

McGregor v Dansken, 1899, 1 F. 536; 36 S.L.R. 393; 6 S.L.T. 308.

(507)

Construction—Construction partly by owner—Act 1897, secs. 4 and 7.

Held that a building contractor who was erecting a tenement for himself, doing the work partly by his own workmen and partly by trading firms, with whom he had contracts for particular branches of the work, was the undertaker of the whole building within the meaning of the Workmen's Compensation Act, 1897, and was therefore liable in compensation in respect of injuries to a work-

man employed in the construction of the building by one of the trading firms.

Stalker v Wallace, 1900, 2 F. 1162; 37 S.L.R. 898; 8 S.L.T. 134.

(508)

Construction — Sub-contractor — Ornamental carving work—Right of principal contractor to indemnity against sub-contractor—Accident due to fault of principal undertaker—Secs. 1, 4, and 7.

Held that a sub-contractor for ornamental carving work, part of the design of a building in course of construction, was an "undertaker" within the meaning of the Workmen's Compensation Act, 1897, sec. 7, and liable to a workman employed by him, and therefore liable under sec. 4 to indemnify the principal contractor for compensation paid by him to the workman. **Question**, whether the fact that an accident was due to the fault of a principal contractor would be a good defence to a claim by him for indemnity against a sub-contractor under sec. 4.

Topping v Rhind, 1904, 6 F. 666; 41 S.L.R. 573; 12 S.L.T. 88.

(509)

Construction—Wash-house built to order of police commissioners of burgh—Whether commissioners or tradesmen were undertakers.

A wash-house was built to the order of the police commissioners. **Opinion** that the undertakers of the building were the police commissioners, not the tradesmen employed by them.

Halstead v Alex. Thomson & Sons, 1901, 3 F. 668; 38 S.L.R. 473.

(7) WORKMAN.

(510)

Contractor.

Held that a "contractor" has no claim to compensation under the Act.

M'Gregor v Dansken, 1899, 1 F. 536; 36 S.L.R. 393; 6 S.L.T. 308.

(511)

Workman or contractor — Piecework—Member of squad.

A firm of shipbuilders entered into an arrangement with a squad of skilled workmen called "platers," under which the latter did certain work in connection with "frames," for which they were paid weekly by the hands of their leader a fixed sum per frame. This sum the squad, after paying the wages of certain helpers or unskilled workmen employed by them, divided among themselves. The squad were bound to work continuously all the working hours recognised in the yard, and when these were exceeded they were paid a certain sum per hour extra. Their work was done in the yard, and was supervised generally by the foreman of the shipbuilders. The necessary plant and materials were supplied by the shipbuilders. The squad were subject to

printed rules and regulations "to be observed by the workmen in the employment of" the shipbuilders. **Held** that a member of the squad was a workman in the employment of the shipbuilders as employers in the sense of the Act.

M'Cready v Dunlop & Co., 1900, 2 F. 1027; 37 S.L.R. 779; 8 S.L.T. 91.

(512)

Piecework.

Hayden and Penman, two labourers, by written offer and acceptance agreed with a quarry master to excavate the "tirr" or surface earth from a new part of the quarry, at the rate of 7½d. per cubic yard. Penman was then working at the quarry, but Hayden had not previously worked there. They were joined by a third man on the footing that he should get an equal share of what they received for the work. The three did the work by their own manual labour, with the assistance of a man whom they engaged at fixed wages. The quarry master supplied the tools and plant, but exercised no control over the method of working, and the men were not tied down to hours. Payments to account were made by the quarry master to Hayden and Penman (the receipts being signed by Hayden) practically weekly, the amount of the payment being calculated on a rough estimate of the work done. **Held** that Hayden was not a "workman" within the meaning of the Act, but was an independent contractor.

Hayden v Dick, 1902, 5 F. 150; 40 S.L.R. 95; 10 S.L.T. 380.

(513)

An estate owner, through his factor, engaged a man to quarry from a quarry on the estate stone blocks for wire fences and farm buildings to meet estate requirements, in such quantities as the factor should direct. He was to be paid 5s. a day, though in fact he was not paid daily, and might employ assistants to be paid through him at the same rate. The estate forester visited the quarry, and kept a note of the days on which the quarryman worked. The tools were supplied partly by the quarryman and partly by the estate. He was told where he was to work, but was free to choose the part of the quarry where the excavation was to be made. **Held** that the claimant was a servant or workman in the sense of the Act.

Opinions reserved (per Lord President Dunedin and Lord M'Laren) whether a workman could at the same time be a contractor and a workman in the sense of the Act.

Paterson v Lockhart, 1905, 7 F. 954; 42 S.L.R. 755; 13 S.L.T. 298.

(8) DEPENDANTS.

(a) Persons Entitled to Sue for Solatium.

(514)

Grandchildren.

Held that grandchildren whose father was dead and who were dependent upon the earnings of their paternal grandfather were

tion Act, 1897, sec. 7, and compensation refused.

Robert Addie & Sons' Collieries v Trainer, 1904, 7 F. 115; 42 S.L.R. 85; 12 S.L.T. 460.

(523)

Wife—Wife living apart from husband, and not supported by him.

Held that a woman who had been for over thirteen years living apart from her husband, and was supported by an illegitimate son, was not wholly or in part dependent on the earnings of her husband, and was not entitled to compensation under the Workmen's Compensation Act, 1897.

Turners, Limited v Whitefield, 1904, 6 F. 822; 41 S.L.R. 631; 12 S.L.T. 131.

(524)

Wife living apart from husband and not supported by him—Pupil child living with wife and supported by her.

In 1895 a wife voluntarily left her husband, and a month afterwards gave birth to a child. By means of her earnings as a weaver, and the assistance of the relatives with whom she lived, she supported herself and child, never asking for and never receiving alimony from her husband. In 1907 her husband was killed by accident in the course of his employment as a workman. Held that neither the wife nor the child were either wholly or in part dependent upon the earnings of the workman at the time of his death.

Lindsay v Stewart M'Glashen & Son, 1903 S.C. 762; 45 S.L.R. 559; 15 S.L.T. 1011.

(525)

Wife deserted by husband, and unable to support herself.

In July, 1901, a husband deserted his wife, and thereafter did not contribute anything to her support. She suffered from chronic bronchitis and varicose veins to an extent which incapacitated her from work requiring ordinary exertion, and she became unable to do anything for her own support. Her husband having in 1904, in the course of his employment, sustained injuries from which he died, she claimed compensation under the Workmen's Compensation Act, 1897, from his employers. Held that the claimant was dependent on the earnings of her husband at the time of his death, and was entitled to compensation under the Act.

Sneddon v Addie & Sons' Collieries, 1904, 6 F. 992; 41 S.L.R. 826; 12 S.L.T. 229.

(526)

Whether wife wholly or in part dependent.

A workman had for the three years immediately preceding his death lived separate from his wife. His contribution to her support did not exceed £5 per annum. The wife had no regular means of livelihood. In addition to what she received from her husband she was supported by her earnings from occasional employment, and by contributions from her relatives. Held that the wife was

wholly dependent on her husband at the time of his death.

Cunningham v M'Gregor & Co., 1901, 3 F. 775; 38 S.L.R. 574; 9 S.L.T. 36.

(527)

Whether wife wholly or in part dependent—Foreigner.

In December, 1903, a Pole came to Scotland, where he found employment as a miner, and, in the course of that employment, was killed on 15th August, 1904. During that period he remitted £1 to his wife, who remained in Poland, and whose means of livelihood during her husband's absence consisted—in addition to the £1 sent by her husband—of her earnings as an outdoor labourer at a wage of 9d. a day, and of contributions from her father. The sheriff found that the wife was wholly dependent upon her husband. Held (1) that the wife was a "dependant" within the meaning of sec. 7 (2) (b) of the Act; but (2) that she was not wholly dependent upon her husband's earnings at the time of his death, and case remitted to the sheriff.

Baird & Co. v Birsztan, 1906, 8 F. 438; 43 S.L.R. 300; 13 S.L.T. 812.

FIRST SCHEDULE.

11. "WHERE DEATH RESULTS FROM THE INJURY"—First Schedule (1) (a).

[See also Cases under Act 1906, I. 16, supra.]

(528)

Death from disease—Action of disease accelerated by accident.

On 28th February, 1902, a workman who was affected with nephritis, a disease which was likely to prove fatal to him, though probably not for a few years, received an injury from an accident in the course of his employment which so lowered his system that the disease from which he was suffering was accelerated in its operation, and that in consequence he died on 8th May, 1902. Held that the workman's death resulted from the injury.

Golder v Caledonian Railway Co., 1902, 5 F. 123; 40 S.L.R. 89; 10 S.L.T. 373.

(529)

Suicide—Workman who had become insane in consequence of accident.

The widow of a workman, John Malone, who had committed suicide, brought a claim against his employers for compensation for his death. She averred—The deceased, who had already lost the sight of his left eye in the course of his employment, received an injury to his right eye by a splinter of iron penetrating it. As a result of the injury the sight of that eye began to fail, and eventually he became almost blind. "Owing to the gradual loss of sight in his right eye and consequent blindness, the said John Malone's mind became affected and he became insane,

and on 20th August, 1907, he committed suicide in his house at 401 Rutherglen Road. The death of the said John Malone was due to the foresaid accident." Proof allowed.

Malone v Cayzer, Irvine & Co., 1908 S.C. 479; 45 S.L.R. 351; 15 S.L.T. 837.

12. INCAPACITY FOR WORK—First Schedule (1) (b) and (2).

[See also Cases under Act 1906, I. 17, *supra*.]

(530)

Wage-earning capacity—Workman earning same wages as before accident.

Held that the test of a workman's right to compensation was the diminution of his earning capacity in the future by reason of the injury received, and that the mere fact that at the date of his claim he earned the same wages as he did before the accident did not necessarily exclude the claim under the Act.

Freeland v Macfarlane, Lang & Co., 1900, 2 F. 832; 37 S.L.R. 599; 7 S.L.T. 456.

(531)

Workman earning same wages as before accident—Partial incapacity.

Opinion that while the Workmen's Compensation Act, 1897, first schedule (2), requires an arbitrator in fixing the amount of a weekly payment to have regard to the amount of the average weekly earnings of the workman before the accident, and to the average amount he is earning after the accident, the latter is not conclusive as to the workman's wage-earning capacity.

Clelland v Singer Manufacturing Co., 1905, 7 F. 975; 42 S.L.R. 757; 13 S.L.T. 319.

(532)

Amount of compensation.

Held (1) that under sched. 1, sub-sec. (2), of the Workmen's Compensation Act, 1897, an injured workman is not entitled as a matter of right to a weekly payment representing the whole of the difference between his average wage before and his average wage after the accident, such difference being merely one of the elements which the arbitrator is to take into account in fixing the amount of compensation; but (2) that such difference is not subject to the limitation of 50 per cent. imposed by sched. 1, sub-sec. (1) (b), and may therefore be competently awarded in toto by the arbitrator as compensation.

Geary v William Dixon, Limited, 1899, 4 F. 1143; 36 S.L.R. 640; 7 S.L.T. 12.

13. "WHERE . . . INCAPACITY FOR WORK RESULTS FROM THE INJURY"—First Schedule (1) (b).

[See also Cases under Act 1906, I. 18, *supra*.]

(533)

Disease contributing to incapacity.

A miner, whose right eye was sound, but whose left eye was affected by disease, was able to work underground. In the course

of his employment he met with an accident to his sound eye which so injured it as to render it of little use. Owing to the condition of the diseased eye he was thereafter unable to resume his work underground. It was proved that the condition of the diseased eye was neither caused nor aggravated by the accident. Held that the workman was suffering from incapacity resulting from the accident.

Lee v William Baird & Co., 1908 S.C. 905; 45 S.L.R. 717; 16 S.L.T. 135.

(534)

Deficient natural vigour—Age.

Where it appeared from the certificate of a medical practitioner appointed under the Act that a workman had recovered from injuries, in respect of which weekly payments were being made to him, and that partial disability for work from which he was suffering was not connected with the injuries but was the result of deficient natural vigour of constitution together with advancing years, held that the workman was not entitled to make any further claim for compensation.

M'Avan v Boase Spinning Co., 1901, 3 F. 1048; 38 S.L.R. 772; 9 S.L.T. 152.

(535)

Age—Decrease of wages in trade.

The employers of a miner who had been totally incapacitated for work by an accident voluntarily paid him compensation for nearly two years, at a weekly rate fixed on the footing that he was entitled to half his average weekly earnings before the accident. The employers having refused to continue these payments at the same rate, the workman presented an application to have the weekly payments fixed by arbitration. Held that in fixing the weekly payments it was incompetent for the arbitrator to take into account the facts (1) that the miner had reached an age (sixty-four) when full wages as a miner could not be earned, and (2) that there had been a general fall in the rate of miners' wages subsequent to the accident.

Jamieson v Fife Coal Co., 1903, 5 F. 958; 40 S.L.R. 704; 11 S.L.T. 201.

(536)

General fall of wages—Partial incapacity.

A workman who had lost a hand by an accident received compensation from his employers until he was again taken into their employment at his former wage of 18s. 6d. a week. Subsequently, owing to a general fall in wages and not to any supervening incapacity on the workman's part, his wages were reduced to 16s. 7d. Held that he was not entitled to compensation in respect of the diminution in his earnings.

Black v Merry & Cuninghame, 1909 S.C. 1150; 46 S.L.R. 812; 1909, 2 S.L.T. 16.

(537)

Refusal to submit to treatment.

In a case stated under the Workmen's Compensation Act, 1897, held that an employer was not bound to continue weekly

payments to an injured workman when the continuance of his incapacity was due to his neglect to comply with certain simple medical directions which had been given to him.

Dowds v Bennie & Son, 1902, 5 F. 268; 40 S.L.R. 239; 10 S.L.T. 439.

(538)

Refusal to undergo surgical operation.

A workman was totally incapacitated in consequence of an injury to his left hand. In an application for review of weekly payments the arbitrator found in fact that three doctors, who had examined the workman, recommended certain operations which were simple or minor operations, not attended with appreciable risk or serious pain, and were likely to restore to the workman in large measure, or altogether, the use of his hand for the purpose of his former work; that the workman refused to undergo the operations; and that his continued incapacity to use his left hand and any continued pain in his left palm were fairly attributable to the want of such operations. **Held** (by a majority of seven judges) that the workman by refusing to undergo the operations had precluded himself from any right to receive further compensation.

Donnelly v Baird & Co., 1908 S.C. 536; 45 S.L.R. 394; 15 S.L.T. 799.

(539)

—A workman became entitled to compensation under the Workmen's Compensation Act, 1897, in consequence of an injury to one of his thumbs on 18th April, 1901, and his employers began to pay him such compensation voluntarily. Shortly after the accident part of the thumb was amputated, and in June, 1901, a further operation was performed. The workman having continued to be incapacitated for his ordinary work, was advised to undergo a third operation, but refused. His employers stopped paying compensation. A stated case set forth that the third operation "would in all probability remove the sensitiveness of the injured part and enable" the workman "to earn wages as before, or at least to earn more than he is able to do now"; and "that the operation so advised is a simple operation, not attended with serious risk or pain, and is such as a reasonable man not claiming compensation or damages would for his own advantage and comfort elect to undergo." The Court **held** that the workman's refusal to undergo the operation was, in the circumstances, such as to disentitle him to a continuance of substantial compensation, and of consent of the employers, remitted to the sheriff to allow the workman a sum of one penny weekly until further orders of the Court.

Anderson v Baird & Co., 1903, 5 F. 373; 40 S.L.R. 263; 10 S.L.T. 525.

(540)

—A workman who had been paid compensation by his employers was examined by two surgeons on their behalf, who advised

that he should undergo an operation. The workman refused. In a stated case the sheriff found it proved "that the operation (1) is an important minor operation; (2) is not in the nature of an experiment, but is established in surgical practice; (3) has been attended with complete success in all similar cases (five in number) regarding which evidence was led before me; (4) is not attended by any appreciable risk; (5) will in all probability within two months, or a little longer, restore to the appellant the use of his right arm, and enable him to earn wages as before; and (6) is such as a reasonable man not claiming compensation or damages would, for his own advantage and comfort, elect to undergo." It was stated at the bar, and not disputed, that an eminent surgeon, who had not been a witness before the arbitrator had examined the appellant after (as well as before) the arbitration, and was of opinion that the appellant should not undergo the operation proposed. **Held** (1) that on the facts stated in the case the appellant was not bound to submit to the operation, (2) that the Court was entitled to take into consideration the facts admitted at the bar, which showed that the appellant's refusal was reasonable, and (3) that his refusal did not disentitle him to compensation.

Sweeney v Pumpherston Oil Co., 1903, 5 F. 972; 40 S.L.R. 721; 11 S.L.T. 279.

14. COMPENSATION.

(1) COMPENSATION IN RESPECT OF WORKMAN'S DEATH—First Schedule (1) (a).

[See also Cases under Act 1906, I. 19 (1), supra.]

(a) Generally.

(541)

Claim by person in part dependent—Person wholly dependent in existence.

Held on a construction of sched. I. (1) (a) of the Act that there can be no claim under the Act by a person only in part dependent on a workman at the time of his death if there is in existence a person who is wholly dependent.

Fagan v Murdoch, 1899, 1 F. 1179; 36 S.L.R. 921; 7 S.L.T. 113.

(b) Amount.

[See also (2) (a), infra.]

(542)

Minimum of £150—Workman less than three years in employment.

Held that the minimum sum of £150 fixed by sec. (1) (a) (i.) of the first schedule to the Workmen's Compensation Act, 1897, as the compensation for a deceased workman's dependants applied although the deceased workman had been less than three years in the employment.

Forrester & Co. v McCallum, 1901, 3 F. 650; 38 S.L.R. 448; 8 S.L.T. 486.

(543)

No wages earned.

A miner was killed after he had descended to work in the pit in which he was employed, but before he had actually commenced to work, and before he had earned anything. **Held** that his widow was entitled to compensation under the Workmen's Compensation Act, 1897, and, the average weekly earnings of the deceased being nil, that she was entitled to the alternative sum of £150 under the first schedule of the Act.

Leonard v Baird & Co., 1901, 3 F. 890; 38 S.L.R. 649; 9 S.L.T. 83.

(544)

Partial dependence—Funeral expenses—First schedule (1).

Held that an arbitrator in fixing compensation under the Workmen's Compensation Act, 1897, for the death of a workman in a claim by partial dependants may competently take into account the outlays which the claimants have incurred in medical and funeral expenses.

Hughes v Summerlee and Mossend Iron and Steel Co., 1903, 5 F. 784; 40 S.L.R. 602; 11 S.L.T. 61.

(2) COMPENSATION FOR INJURY.**(a) Amount.****(i.) Average Weekly Earnings.**

[See also Cases under Act 1906, I. 19

(2) (a) (i.), supra.]

(545)

Broken weeks—Workman working one day in one week and four days in another.

A miner entered the service of a coal company on Friday, 23rd March; he did not work on Saturday, the 24th; he worked on Monday, the 26th, and on every day thereafter until Thursday, the 29th, when he received injuries, on account of which he claimed compensation under the Workmen's Compensation Act, 1897, from his employers. **Held** that these facts afforded a sufficient basis for calculating the claimant's "average weekly earnings" in terms of the first schedule (1) (b) of the Act.

Cadzow Coal Co. v Gaffney, 1900, 3 F. 72; 38 S.L.R. 40; 8 S.L.T. 224.

(546)

Workman not working full week but only one or more days in week.

In fixing the amount of compensation payable to a workman under the Workmen's Compensation Act, 1897, **held** (1) that where a workman before his disablement has worked not a full week, but only one or more days in the week, his actual earnings are to be taken as his weekly earnings; (2) that in ascertaining the average of his weekly earnings a fraction of a week counts as a whole week.

McCue v Barclay, Curle & Co., 1902, 4 F. 909; 39 S.L.R. 690; 10 S.L.T. 116.

(547)

Workman working three days in one week, and over four days in another week.

A workman, employed by the day, worked for three days in one week, and for four days and part of a fifth in the following week, in the service of the same employer. He died of injuries sustained on the day last mentioned. **Held** that these facts afforded a sufficient basis for calculating his "average weekly earnings," and that consequently it was not a valid answer to the claim that the amount of compensation to be awarded could not be ascertained in terms of sec. (1) (a) (i.) of the first schedule to the Act.

Observed that, in calculating the average weekly earnings, the actual earnings for each week should be taken irrespective of the number of working days in that week.

Opinion that the maximum of £300 mentioned in the same section of the schedules as the limit of the compensation applied to cases where the deceased workman had been in the employment for less than three years.

Russell v McCluskey, 1900, 2 F. 1312; 37 S.L.R. 931; 8 S.L.T. 172.

(548)

Workman working and earning wages in week following injury.

A workman, at the end of his first week in an employment, received injuries, arising out of and in the course of the employment, from which he ultimately died, but he continued to work and to earn wages in the employment for the week immediately succeeding that in which he had received the injuries. The employers maintained that no compensation was due, on the ground that it was impossible to ascertain the "average" weekly earnings of the deceased as required by sec. (1) (a) (i.) of the first schedule of the Act, as he had been in the employment for one week only at the date of the injuries. **Held** that the earnings of the week succeeding that in which the injuries were sustained fell to be taken into computation, and that the widow was entitled to compensation.

Doyle v Beattie & Sons, 1900, 2 F. 1166; 37 S.L.R. 915; 8 S.L.T. 131.

(549)

Week in which workman worked but earned nothing.

Where a workman in the course of his employment had earned 16s. 2d. in the first week, and in the second week had worked for two hours but earned nothing, and was then injured, **held** that 16s. 2d. represented his average weekly earnings in the sense of sched. I. of the Workmen's Compensation Act, 1897.

Nelson v Kerr & Mitchell, 1901, 3 F. 893; 38 S.L.R. 645; 9 S.L.T. 83.

(550)

Calendar week or trade week.

Held that in calculating a workman's "average weekly earnings" in the sense of the Workmen's Compensation Act, 1897, first schedule, sec. (1), where the employ-

ment is by trade weeks, the total earnings of the workman are to be divided by the number of trade weeks in which he has been employed, and not by the number of calendar weeks.

Campbell v Fife Coal Co., 1902, 5 F. 170; 40 S.L.R. 143; 10 S.L.T. 410.

(551)

Held (1) that "average weekly earnings" mean the total amount actually earned by the workman during his employment divided by the number of weeks during which or part of which he was employed, and (2) that the week to be taken as the unit of division was not the calendar week, but the trade or pay week of the particular employment.

Fleming v Lochgelly Iron and Coal Co., 1902, 4 F. 890; 39 S.L.R. 684; 10 S.L.T. 114.

(552)

—No trade week.

In fixing the amount of compensation payable to a workman, **held** that where there is no trade week the calendar week from Sunday to Saturday is to be taken as the week.

M'Cue v Barclay, Curle & Co., 1902, 4 F. 909; 39 S.L.R. 690; 10 S.L.T. 116.

(553)

Calendar week or week of seven days.

In a question as to the amount of compensation due for the death of a workman, who had been employed by the same employer for three days in one week and during the whole of the next two weeks, and on the Sunday of the fourth week, **held** that in computing the average weekly earnings of the deceased the total amount of his earnings must be divided by the number of calendar weeks, i.e., four, over which his employment extended.

Peacock v Niddrie and Benhar Coal Co., 1902, 4 F. 443; 39 S.L.R. 317; 9 S.L.T. 379.

(554)

Casual labour.

In a question as to the amount of compensation due for the death of a dock labourer, who had been employed by the same employer for a varying number of hours on seventy-seven given days, at irregular intervals, during a period of 105 weeks, his employment being by the hour, **held** that in computing the "average weekly earnings" of the deceased, the total amount of his earnings must be divided by the number of weeks, i.e., 105, over which his employment extended, without discarding weeks in which there had been no employment.

Small v M'Cormick & Ewing, 1899, 1 F. 883; 36 S.L.R. 700; 7 S.L.T. 35.

(555)

Continuous employment.

In estimating average weekly earnings for the purpose of assessing compensation under the Workmen's Compensation Act, 1897, only the period of continuous employment prior to the accident in the service of the same

employer is to be taken into account, and where that period is only part of a day the actual sum earned is to be taken as the average weekly earnings.

Grewar v Caledonian Railway Co., 1902, 4 F. 895; 39 S.L.R. 687; 10 S.L.T. 111.

(556)

—Interval of two months owing to accident.

A workman was employed by a firm of coalowners for over twelve months prior to 16th August, 1901, the engagement being terminable at the will of either party. On that date he was accidentally injured in the course of his employment; and thereafter, from 31st August, 1901, until his recovery on 15th October, 1901, he was unable to work, and was paid compensation by his employers under the Workmen's Compensation Act, 1897. On 15th October, 1901, having resumed his former employment, he worked for two hours, when he was again accidentally injured. **Held** that the Act contemplated a substantially continuous employment; that the period during which the workman was unable to work constituted a break in his employment; and that the workman was entitled to compensation under the Act in respect of the second injury, on the footing that he had been in the employment only from the date of his resuming work on 15th October, 1901.

Gibb v Dunlop & Co., 1902, 4 F. 971; 39 S.L.R. 750; 10 S.L.T. 184.

(557)

—Miner employed by contractors passing into employment of mine owners.

A miner employed by a contractor in a coal mine was dismissed from his employment on 7th October. On Friday, 9th October, he got employment from the coal master in the same mine. On Monday, 12th October, he was injured in the course of his employment. In a claim for compensation under the Workmen's Compensation Act, against his employer, **held** that in estimating his average weekly earnings, his earnings under the contractor could not be taken into account.

Hunter v William Baird & Co., 1904, 7 F. 304; 42 S.L.R. 245; 12 S.L.T. 567.

(558)

Deductions from wages — Payment for gratuitous assistance.

A miner who was paid according to his output employed his son as an assistant in his work, but paid him nothing for his services. The usual wage for such assistance was 2s. 9d. per day. The miner having been injured in the course of his employment, and having claimed compensation under the Workmen's Compensation Act, 1897, **held** that in estimating his average weekly earnings nothing fell to be deducted in respect of the gratuitous assistance given by the son.

Nelson v Kerr & Mitchell, 1901, 3 F. 893; 38 S.L.R. 645; 9 S.L.T. 83.

(559)

Weekly wages fixed by contract.

A workman was engaged for a fixed weekly wage. He entered upon his work on a Saturday, and worked for the whole of the following calendar week, at the end of which his employment was terminated by his employers in consequence of an injury resulting in total incapacity, and entitling him to compensation under the Workmen's Compensation Act, 1897. **Held** that the fixed weekly wage was the basis for determining the amount of the weekly payment due to the workman as compensation under the Act.

Brown v J. & J. Cunningham, 1904, 6 F. 997; 41 S.L.R. 835; 12 S.L.T. 231.

(ii.) Compensation in respect of Partial Incapacity—First Schedule (1) (b) and (2).

[See also Cases under Act 1906, I. 19 (2) (a) (iii.), supra.]

(a) Powers of Arbitrator.

(560)

Held that in fixing the amount of compensation in cases of partial incapacity the arbitrator may, if on the evidence he sees fit, give as compensation the whole amount of the difference between the average earnings of the workman before the injury and the average amount of the earnings after the injury, provided that it does not exceed fifty per cent. of the average earnings before the injury and does not exceed £1 a week.

Geary v William Dixon, Limited, 1899, 4 F. 1143; 36 S.L.R. 640; 7 S.L.T. 12.

Parker v William Dixon, Limited, 1902, 4 F. 1147; 39 S.L.R. 663; 10 S.L.T. 153.

(561)

Observations (per Lord President Dunedin) on the duties and powers of an arbitrator in fixing the amount of the weekly payments under the Workmen's Compensation Act, 1897.

Bryson v Dunn & Stephen, 1905, 8 F. 226; 43 S.L.R. 236; 13 S.L.T. 697.

(562)

Opinion (per Lord M'Laren) that under the Workmen's Compensation Act, 1897, an arbitrator may not award such a sum as would, when added to the wages being earned, give the workman a larger weekly income than he was earning before the accident.

Bryson v Dunn & Stephen, 1905, 8 F. 226; 43 S.L.R. 236; 13 S.L.T. 697.

(563)

Discretion of arbitrator.

A workman who had been totally incapacitated by an accident, and whose average weekly earnings were 36s. 8d., was awarded a weekly payment of 18s. 4d., being 50 per cent. of his previous wages. His incapacity having partially ceased, he was taken back into his employer's service at a wage of 17s. per week, and his employers,

in view of that change of circumstances, applied to the arbitrator to review the weekly payment of 18s. 4d. The arbitrator, in these circumstances, declined to diminish the existing payment. The Court dismissed an appeal on the ground that the arbitrator's award was not disconform to the statute.

Bryson v Dunn & Stephen, 1905, 8 F. 226; 43 S.L.R. 236; 13 S.L.T. 697.

(564)

Award fixed on erroneous construction of the Act.

In a claim by a workman who was partially incapacitated the sheriff found that the workman was entitled to 11s. 8d. per week, "being 50 per cent. of the difference between what he earned before the accident and what he was earning" after the accident. The Court, holding that while the award was within the competency of the arbitrator, it was plain that in making it he had proceeded on an unsound construction of the statute, pronounced an interlocutor finding that in fixing the amount of compensation in cases of partial incapacity the arbitrator may, if on the evidence he sees fit, give as compensation the whole amount of the difference between his average earnings before the injury and the average amount of his earnings after the injury, provided that it does not exceed 50 per cent. of the average earnings before the injury, and does not exceed £1 per week; and remitted to the sheriff-substitute to proceed in terms of the finding.

Corbet v Glasgow Iron and Steel Co., 1903, 5 F. 782; 40 S.L.R. 601; 11 S.L.T. 60.

(b) Wage-earning Capacity.

(565)

Held that the test of a workman's right to compensation was the diminution of his earning capacity in the future by reason of the injury received, and that the mere fact that at the date of his claim he earned the same wages after as he did before the accident did not necessarily exclude the claim under the Act.

Held further, that if a workman has not when he makes his claim suffered any loss, the proper course is not to dismiss his claim, but for the arbitrator to make a declaration of the liability of the employer, leaving the amount and the duration of the compensation to be fixed upon an application under the first schedule (12) to vary the award should the workman at any future time be unable, by reason of the accident, to earn the same wages.

Freeland v Macfarlane, Lang & Co., 1900, 2 F. 832; 37 S.L.R. 599; 7 S.L.T. 456.

(566)

Opinion, that while the Workmen's Compensation Act, 1897, first schedule, sec. (2), requires an arbitrator in fixing the amount of a weekly payment to have regard to the amount of the average weekly earnings of

the workman before the accident, and to the average amount he is earning after the accident, the latter is not conclusive as to the workman's wage-earning capacity.

Clelland v Singer Manufacturing Co., 1905, 7 F. 975; 42 S.L.R. 757; 13 S.L.T. 319.

(567)

Age—Decrease of wages in trade.

The employers of a miner who had been totally incapacitated for work by an injury in their service voluntarily paid him compensation for nearly two years, at a weekly rate fixed on the footing that he was entitled to half his average weekly earnings before the accident. The employers having refused to continue these payments at the same rate, the workman presented an application to have the weekly payments fixed by arbitration. The sheriff, in view of the facts (1) that the applicant had reached an age (sixty-four) when full wages as a miner could not be earned, and (2) that there had been a general fall in the rate of miners' wages subsequent to the accident, awarded a sum less than half the applicant's wages before the accident. **Held** that it was incompetent for the arbitrator to take these considerations into account in fixing compensation.

Jamieson v Fife Coal Co., 1903, 5 F. 958; 40 S.L.R. 704; 11 S.L.T. 201.

(568)

General fall in wages.

A workman, who had lost a hand by an accident, received compensation under the Workmen's Compensation Act, 1897, from his employers, until he was again taken into their employment at a wage of 18s. 6d. a week, the wage he had received before the accident. Subsequently, owing to a general fall in wages and not to any supervening incapacity upon the part of the workman, his wages were reduced to 16s. 7d. **Held** that he was not entitled to compensation in respect of the diminution in his earnings.

Black v Merry & Cuninghame, 1909 S.C. 1150; 46 S.L.R. 812; 1909, 2 S.L.T. 16.

(b) Review of Weekly Payments—First Schedule (12).

(i.) Competency.

[See also Cases under Act 1906, I. 19 (2) (b) (i.), supra.]

(569)

Change of circumstances—Inability to find employment.

In an application to the sheriff by a workman under article (12) of the first schedule of the Workmen's Compensation Act, 1897, to review and increase a weekly payment, payable to him, as partially incapacitated, under an agreement with his employers, the workman averred that he was entitled in law to be held as totally incapacitated, in respect that his employers were unable to give him

suitable light work, and that he was unable to obtain light employment elsewhere. **Held** that the application fell to be dismissed in respect that no relevant grounds for reviewing the weekly payments were set forth.

Boag v Lochwood Collieries, 1910 S.C. 51; 47 S.L.R. 47; 1909, 2 S.L.T. 373.

(570)

Payments made under unrecorded verbal agreement.

Opinions (per Lord Adam and Lord M'Laren), that weekly payments made voluntarily may be reviewed in an application for review under par. (12) of the first schedule to the Act.

Jamieson v Fife Coal Co., 1903, 5 F. 958; 40 S.L.R. 704; 11 S.L.T. 201.

(ii.) Date from which Weekly Payments may be Reviewed.

[See also Cases under Act 1906, I. 19 (2) (b) (ii.), supra.]

(571)

Held that when an application under sched. I. (12) of the Workmen's Compensation Act, 1897, to review a weekly payment under the Act is brought before an arbitrator, he is bound to treat the agreement for, or award of, the weekly payment, as enforceable up to the date of his decision in the application, and can end, diminish, or increase the payment, as from that date only.

Steel v Oakbank Oil Co., 1902, 5 F. 244; 40 S.L.R. 205; 10 S.L.T. 505.

Pumpherson Oil Co. v Cavaney, 1903, 5 F. 963; 40 S.L.R. 724; 11 S.L.T. 171.

Baird & Co. v Stevenson, 1907 S.C. 1259; 44 S.L.R. 864; 15 S.L.T. 291.

(572)

Ending of compensation—Power of arbitrator to order compensation to end at a future date.

In an application to have compensation, payable to an injured workman, ended or diminished, the arbitrator made a remit to a medical referee, who, on 26th February, 1906, reported that the workman's wage-earning capacity would be fully restored by 31st March. The arbitrator on 27th February ordered compensation to be continued till 31st March, 1906, and to end at that date. **Held** that the arbitrator had no power to make such an order, in respect that his duty in assessing compensation was to have regard to the workman's present state, and that he was not entitled to pronounce an order the validity of which would depend on the workman's condition at a future date.

Allan v Thomas Spewart & Co., 1906, 8 F. 811; 43 S.L.R. 599; 14 S.L.T. 84.

(573)

Unrecorded agreement.

Question, whether an unrecorded agreement to pay compensation under the Work-

men's Compensation Act, 1897, remains in force until formally terminated or modified in terms of the Act **Opinion** (per Lord Low) that it does not.

Colville & Sons v Tigue, 1905, 8 F. 179; 43 S.L.R. 129; 13 S.L.T. 571.

(574)

——— **Unrecorded agreement to pay compensation during incapacity—Stoppage of payments by employer on the ground that incapacity had ceased.**

In August, 1903, a firm of employers agreed to pay compensation to A, a workman, at the rate of 12s. 5d. a week "during the period of his incapacity." The agreement was not recorded under the Act. The employers stopped the payments on 14th December, 1903, alleging that A's incapacity had ceased. In arbitration proceedings at the instance of A the sheriff found that A's incapacity had ceased by 14th December, 1903, but ordained the employers to make payment to A, at the rate of 12s. 5d. a week, as from 14th December, 1903, to 12th July, 1905—the date of the award. **Held** that the sheriff, as arbitrator, had wrongly awarded compensation as from 14th December, 1903, to the date of his award, in respect that (1) if A's application for compensation was made in respect of the agreement the sheriff, as arbitrator, had no power to enforce the agreement by decerning for arrears of compensation due under it; and (2) if the application was for the purpose of settling compensation by arbitration, A was not entitled to the compensation awarded, the sheriff having found in fact that A's incapacity had ceased by 14th December, 1903.

Colville & Sons v Tigue, 1905, 8 F. 179; 43 S.L.R. 129; 13 S.L.T. 571.

(iii.) Method of Obtaining Review.

[See 20, *infra*.]

(iv.) Recovery of Injured Workman.

[See also Cases under Act 1906, I. 19 (2) (iv.), *supra*.]

(575)

Payments ended by arbitrator on ground of recovery—Supervening incapacity—New application for compensation—Competency.

The compensation payable under a recorded agreement to a workman by his employers, in respect of injuries received in an accident, was "ended" by an arbitrator on an application for review brought under sec. (12) of the first schedule of the Workmen's Compensation Act, 1897, on the ground that the workman had recovered. Subsequently the workman instituted arbitration proceedings under sec. 1 (3) of the Act, for an award of compensation, averring that incapacity had again supervened. **Held** that the new application was incompetent, and that the workman could not again obtain compensa-

tion in respect of the accident, the payments having been ended by the arbitrator.

Cadenhead v Ailsa Shipbuilding Co., 1910 S.C. 1129; 47 S.L.R. 784; 1910, 2 S.L.T. 65.

(576)

Refusal to allow proof—Remit to medical practitioner appointed by Secretary of State—Second schedule (13).

In an application by an employer for review of a weekly payment made under agreement, in respect that the workman had recovered, and had been certified as recovered by a medical practitioner selected by the employer, the workman moved for a proof, but the sheriff-substitute refused this motion, and remitted to a medical practitioner appointed by the Secretary of State, and thereafter, on a consideration of his report, ended the weekly payment. **Held** that the sheriff-substitute was not entitled to refuse the allowance of proof asked, and case remitted to him to allow a proof, and to proceed.

Johnstone v Cochran & Co., 1904, 6 F. 854; 41 S.L.R. 644; 12 S.L.T. 175.

(577)

Personal bar—Offer by employer to continue wages previously earned.

Fraser v Great North of Scotland Railway Co., 1901, 3 F. 908; 38 S.L.R. 653; 9 S.L.T. 96, No 637, *infra*.

(c) Suspensory Orders.

[See also Cases under Act 1906, I. 19 (2) (c), *supra*.]

(578)

Competency—Earning capacity diminished—Earning same wages as before accident.

Held that if a workman's earning capacity has been diminished as the result of injuries by accident, but he has not, when he makes his claim, suffered any loss, the proper course is not to dismiss his claim, but for the arbiter to make a declaration of the liability of the employer, leaving the amount and the duration of the compensation to be fixed upon an application under the first schedule (12) to vary the award should the workman at any future time be unable, by reason of the accident, to earn the same wages.

Freeland v Macfarlane, Lang & Co., 1900, 2 F. 832; 37 S.L.R. 599; 7 S.L.T. 456.

(579)

——— **Nominal award.**

In an application by an employer for review of an order for weekly payments to an injured workman, it appeared from a report by the medical practitioner, appointed by the Secretary of State, that the power of vision of the workman's right eye was permanently reduced by one-half, that the left eye was sound, and that in the opinion of the reporter, the workman "will never be able for any work for which unimpaired vision is essential, but he is quite able to undertake his ordinary work as a labourer."

The Court remitted to the arbitrator to make a nominal award of one penny per week until further orders.

Ferrier v Gourlay Brothers, 1902, 4 F. 711; 39 S.L.R. 453; 9 S.L.T. 517.

(580)

A lad of seventeen, who had been temporarily incapacitated by the loss of the third finger of his left hand in consequence of an injury sustained in his employers' factory, for a number of weeks received from his employers 8s. a week, being the full sum which he would have earned had he been working. The employers then offered to receive him back, and as he did not return, ceased the payments. He then took work from a new employer, and thereafter claimed compensation under the Workmen's Compensation Act, 1897, against his former employers, in respect of the loss of his finger, and instituted arbitration proceedings, in which he admitted that he was then able to do all his old work. **Held** that the claimant was not entitled to such a declaration of the liability of his former employers as would preserve his rights in the event of supervening incapacity.

Husband v Campbell, 1903, 5 F. 1146; 40 S.L.R. 822; 11 S.L.T. 243.

(581)

In an application by an employer to have a weekly payment to an injured workman reviewed and ended, **held** that it is incompetent for the arbitrator under the Workmen's Compensation Act, 1897, if either party objects, to postpone the determination of the question of compensation by making an interim nominal award of one penny per week.

Clelland v Singer Manufacturing Co., 1905, 7 F. 975; 42 S.L.R. 757; 13 S.L.T. 319.

(582)

In an application by an employer for review of a weekly payment of 18s. to a workman who had been ruptured by an accident, the arbitrator, with consent of parties, remitted to a medical referee, who reported that, while the workman was not incapacitated and was able for his ordinary work, yet the ruptures probably would, in the future, prove detrimental to him. No further evidence was led, and the arbitrator reduced the compensation to 9s. per week. In an appeal by stated case, **held** (1) that there was no evidence of incapacity for work before the arbitrator to justify his award of compensation; (2) that it was incompetent to give a nominal award for the purpose of keeping open the claim for compensation; and (3) that the compensation should be ended.

Rosie v Mackay, 1910 S.C. 714; 47 S.L.R. 654; 1910, 1 S.L.T. 395.

(d) Miscellaneous Cases.

(583)

Arrears—Award of lump sum—Competency.

In an arbitration under the Workmen's

Compensation Act, 1897, a workman claimed compensation in respect of his partial incapacity during the preceding seven years. **Opinion** that it was incompetent for the arbitrator to award compensation in the shape of a lump sum. **Opinion** reserved as to the proper method of ascertaining the amount of compensation, assuming the workman had a good claim.

Dempster v Baird & Co., 1909 S.C. 127; 46 S.L.R. 119; 16 S.L.T. 470.

(584)

Pupils and minors—Appointment of trustees—First schedule (4) and (6).

In a claim under the Workmen's Compensation Act, 1897, at the instance of a pupil, the Court appointed trustees for the pupil, and authorised them to receive and hold for her the compensation to which she was found entitled.

Cooper v Fife Coal Co., 1907 S.C. 564; 44 S.L.R. 402; 14 S.L.T. 796.

(585)

Setting off expenses against weekly payment—First schedule (14).

Held that an employer, who had been found liable in a weekly payment under the Workmen's Compensation Act, 1897, to a workman, could not set off against that payment a sum awarded to him as expenses against the workman in an application for the diminution of the weekly payment.

Rosewell Gas Coal Co. v M'Vicar, 1904, 7 F. 290; 42 S.L.R. 233; 12 S.L.T. 529.

15. MEDICAL EXAMINATION OF WORKMAN DURING PAYMENTS—First Schedule (11).

[See also Cases under Act 1906, I. 20 (2), supra.]

(586)

Certificate of medical practitioner appointed by Secretary of State.

Held that where a certificate bore that a workman in receipt of weekly payments under the Act had recovered from the injuries in respect of which the payments were made, and that, although the workman was suffering from partial disability for work, such disability was not connected with the injuries, but was "the result of deficient natural vigour of constitution, together with advancing years," it was conclusive against any further claim by the workman for compensation under the Act.

M'Avan v Boase Spinning Co., 1901, 3 F. 1048; 38 S.L.R. 772; 9 S.L.T. 152.

(587)

Review of weekly payments.

Prior to an application by employers to have a weekly payment to a workman who had been totally incapacitated diminished, the workman was examined by one of the medical men appointed by the Secretary of State. The medical certificate bore that the workman's right eye was healthy, and the

vision good, but that the left eye was seriously defective. "His disability is, however, at present great enough to unfit him for his usual occupation of a mason's labourer, though I am of opinion he is quite fit for any work where he would not have to exercise for the safety of life or limb that nice discrimination as to distances for which the sight of two eyes is necessary." Neither party moved for proof.

Held (1) that the certificate of the medical practitioner under sec. (11) was conclusive evidence of the workman's condition; and (2) that as the certificate bore that the workman was unfit for his usual occupation, although fit for work of a particular character, and as his employers did not state or offer to prove that he could get such employment, the sheriff was entitled without further evidence to hold that there was no sufficient ground for reducing the weekly payment.

Bryce & Co. v Connor, 1904, 7 F. 193; 42 S.L.R. 154; 12 S.L.T. 539.

(588)

Failure to submit to examination—Suspension of compensation.

A workman who had been receiving compensation under an unrecorded agreement submitted himself, at his employers' request, for examination by a medical man provided by his employers, in terms of sec. (11) of the first schedule. The medical man reported that the workman had so recovered as to be able to do his former work. The workman was dissatisfied with this report, but did not apply to be examined by one of the medical practitioners appointed under the Act. **Held** that so long as the workman did not submit himself for examination by one of the medical practitioners appointed under the Act, his right to compensation was suspended, and proceedings by way of arbitration were excluded.

Davidson v Summerlee and Mossend Iron and Steel Co., 1903, 5 F. 991; 40 S.L.R. 764; 11 S.L.T. 269.

(589)

A workman, in receipt of a weekly payment under an agreement recorded in terms of the Workmen's Compensation Act, 1897, was examined and certified to be fit for work by a medical practitioner provided by the employers. The workman was dissatisfied with this certificate, but did not submit himself to examination by one of the medical practitioners appointed for the purposes of the Act, owing, as he alleged, to inability to pay the fee. In an application by the employers to review the weekly payment, the employers opposed an allowance of proof on the ground that the right of the workman to the weekly payments had been suspended at the date on which he had been certified to be fit for work. The workman produced a certificate by a medical practitioner certifying that he was unfit for his usual work. The arbitrator diminished the weekly payment. **Held** that the work-

man having submitted to an examination by a medical practitioner provided by his employers, his failure to submit to examination by one of the medical practitioners appointed under the Act did not infer a suspension of his right to compensation, and did not disentitle him to a proof.

Niddrie and Benhar Coal Co. v M'Kay, 1903, 5 F. 1121; 40 S.L.R. 798; 11 S.L.T. 275.

(590)

The employers of a workman, who had sustained injuries, orally agreed to pay him a weekly sum under the Workmen's Compensation Act, 1897. On the requisition of the employers, the workman submitted himself to examination by a medical man provided by them. A certificate having been granted by that medical practitioner, the workman was dissatisfied therewith, but did not submit himself for examination to one of the medical practitioners appointed under the Act. **Held** that the workman's right to compensation was not suspended in respect of his failure to submit himself to one of the medical practitioners appointed under the Act.

Strannigan v Baird & Co., 1904, 6 F. 784; 41 S.L.R. 609; 12 S.L.T. 152.

(591)

Workman going to Australia.

An injured workman, in receipt of weekly payments under the Workmen's Compensation Act, 1897, went to Australia without intimating to his employers that he was going or leaving his address. In an application by the employers for review of the weekly payments, the Court suspended in hoc statu the workman's right to the weekly payments on the ground that he was obstructing medical examination in the sense of sec. (11) of the first schedule of the Act.

Finnie & Son v Duncan, 1904, 7 F. 254; 42 S.L.R. 192; 12 S.L.T. 557.

(592)

Refusal to submit to examination—Workman in Ireland—Medical practitioner provided by employers in Scotland—Travelling expenses.

A workman who was receiving weekly payments as compensation fixed by agreement under the Workmen's Compensation Act, 1897, and who had twice submitted himself for examination by a medical practitioner provided by the employers, and been certified not to have recovered, immediately after the second examination went to Ireland to reside with his father. About two months thereafter he was again required to submit himself at Glasgow for examination by the employers' medical man. He offered to submit himself to a medical man near the place where he was residing in Ireland, but he refused to come to Glasgow for examination unless his expenses were paid. **Held** that the workman had not refused to submit himself to medical examination or obstructed the same in the sense of the Workmen's Compensation Act, 1897, sched. I., sec. (11), and

that the employers were not entitled to suspend payment of his compensation.

William Baird & Co. v Kane, 1905, 7 F. 461; 42 S.L.R. 347; 12 S.L.T. 697.

(593)

Revival of right to compensation.

A workman in receipt of compensation under an unrecorded agreement was examined by the medical adviser of his employers and certified able to resume his former occupation, but declined to submit himself to the medical referee appointed under the Act. The Court having held that he was debarred from arbitration on his claim, and that his compensation fell to be suspended so long as he refused to submit himself to a medical referee, the workman, some months afterwards, submitted himself to a medical referee, who found that he was unfit for his ordinary work, and would not be able to resume it. Thereupon the workman recorded the agreement, and charged his employers for the arrears of compensation, and the employers brought a note of suspension of the charge. The note was refused, on the ground that the workman's delay in submitting himself to the medical referee merely suspended payment of the compensation, and did not entail its forfeiture.

Summerlee and Mossend Iron and Steel Co. v Davidson, (O.H.) 1903, 11 S.L.T. 519.

SECOND SCHEDULE.

16. RECORDING MEMORANDUM OF AGREEMENT—Second Schedule (8) and (14) (b).

(1) COMPETENCY.

[See also Cases under Act 1906, I. 23 (1), supra.]

(594)

Verbal agreement—Proof.

Held that a sheriff may entertain a petition under sched. II., sec. (8) of the Workmen's Compensation Act, 1897, and relative Act of Sederunt, 3rd June, 1898, sec. 7 (a), for a special warrant to register a memorandum of an oral agreement, and where necessary may allow a proof.

Traill & Sons v Cochrane, 1901, 3 F. 1091; 33 S.L.R. 848; 9 S.L.T. 183.

(595)

Time for recording memorandum.

Opinion (per Lord Justice-Clerk Macdonald and Lord Low, Ordinary) that an agreement to pay compensation under the Workmen's Compensation Act, 1897, though not in writing, might be enforced under the Act by lodging a memorandum of agreement and getting the authority of the sheriff to register it in terms of the Act; and that this might be done although six months had elapsed from the date of the accident.

Cochrane v Traill & Sons, 1900, 2 F. 794; 37 S.L.R. 662; 7 S.L.T. 459.

(2) GENUINENESS.

[See also Cases under Act 1906, I. 23 (3), supra.]

(596)

Agreement alleged to have been made under essential error—Act of Sederunt, 3rd June, 1898, sec. 7 (a).

In answer to a petition by a workman for a special warrant to register a memorandum of a verbal agreement to pay compensation at the rate of 16s. a week under the Workmen's Compensation Act, 1897, the employers, while not denying the agreement, objected that it had been made under essential error as to the rights of parties under the Act, and that the sum agreed to be paid was more than half the workman's average weekly earnings. Held that the employers' objections were irrelevant as answers to a petition for warrant to register an agreement which was not denied.

Macdonald v Fairfield Shipbuilding and Engineering Co., 1905, 8 F. 8; 43 S.L.R. 1; 13 S.L.T. 428.

(3) AGREEMENT NO LONGER SUBSISTING.

[See also Cases under Act 1906, I. 23 (4), supra.]

(597)

Workman recovered and earning full wages—Second schedule, sec. (8)—Act of Sederunt, 3rd June, 1898, sec. 7.

In an application to a sheriff for special warrant to register a memorandum of agreement, the applicant admitted that he had resumed work and was earning higher wages than before the accident, and that nothing was due to him in name of compensation at the date of the application; but he averred that in consequence of his injuries he was liable to be incapacitated from work from time to time. The employers admitted that they and the applicant had come to an agreement as to compensation under the Act, but pleaded that the memorandum ought not to be recorded, in respect that the agreement was at an end owing to the applicant's recovery. Held that the terms of the agreement being admitted, the memorandum fell to be recorded.

Cammick v Glasgow Iron and Steel Co., 1901, 4 F. 198; 39 S.L.R. 138; 9 S.L.T. 255.

(4) APPEAL FROM ORDER GRANTING OR REFUSING WARRANT TO REGISTER.

[See also Cases under Act 1906, I. 23 (6), supra.]

(598)

Finality of sheriff—Act of Sederunt, 3rd June, 1898, sec. 7 (a).

Where a sheriff is applied to under sched. II., sec. (8), of the Workmen's Compensation Act, 1897, and relative Act of Sederunt, 3rd June, 1898, sec. 7 (a), for a special warrant to register a memorandum

of agreement, the genuineness of which is disputed, he is not acting as arbitrator under the Act, and an appeal by stated case from any order pronounced by him in such an application is incompetent.

Cochrane v Traill & Sons, 1900, 3 F. 27; 38 S.L.R. 18; 8 S.L.T. 228.

(599)

Opinions that an application to a sheriff under the Workmen's Compensation Act, 1897, second schedule, sec. (8), and the Act of Sederunt, 3rd June, 1898, sec. 7, is not an application to the sheriff in the exercise of his ordinary common law jurisdiction, and that an appeal in common form from the determination of the sheriff in such an application is incompetent.

Cammick v Glasgow Iron and Steel Co., 1901, 4 F. 198; 39 S.L.R. 138; 9 S.L.T. 255.

(600)

Ministerial or judicial.

In an appeal against the decision of a sheriff refusing to grant a warrant for the registration of a memorandum of an agreement under the Workmen's Compensation Act, 1897, **held**, by a majority of seven judges, that neither the statute nor the Act of Sederunt of 3rd June, 1898, authorised the intervention of the sheriff as a judge, and that his granting or refusing to grant a warrant was ministerial, and could not be appealed against.

Binning v Easton & Sons, 1906, 8 F. 407; 43 S.L.R. 312; 13 S.L.T. 783.

Lochelly Iron and Coal Co. v Sinclair, 1907 S.C. 3; 44 S.L.R. 2; 14 S.L.T. 341.

(601)

Observed that in a petition for warrant to register a memorandum of agreement under the Workmen's Compensation Act, 1897, once the alleged agreement is proved to have been in fact concluded, the functions of the sheriff-substitute are the same as those of the sheriff-clerk when the genuineness of the memorandum is not disputed.

Macdonald v Fairfield Shipbuilding and Engineering Co., 1905, 8 F. 8; 43 S.L.R. 1; 13 S.L.T. 428.

(5) SUSPENSION OF CHARGE ON RECORDED AGREEMENT.

[See 20, *infra*.]

(6) MISCELLANEOUS CASES.

(602)

Action of damages for breach of recorded agreement—Competency.

A memorandum of agreement, recorded under par. (8) of the second schedule of the Workmen's Compensation Act, 1897, bore to be "in the matter of an agreement under the Workmen's Compensation Act, 1897," between L and B & Co., and set forth that the parties were agreed that the maximum compensation to which L was entitled was 17s. 6d.; and that B & Co.

"agree in lieu of such compensation to give" B "regular employment as a foreman," and "to pay him the fixed weekly wage of 23s. . . . and also to pay him on the date hereof the sum of £90 sterling, and these in full of all his claims for compensation under the said Act." B & Co. paid £90 to L, and they also employed him on the agreed-on terms for about three years. They then dismissed him. L brought a common law action of damages for breach of contract against B & Co. **Held** that the action was incompetent in respect that the agreement being indivisible and being recorded, only the remedies provided by the Workmen's Compensation Act were available to L.

Lawrie v Brown & Co., 1908 S.C. 705; 45 S.L.R. 477; 15 S.L.T. 981.

(603)

Rectification of register—Recovery of workman before agreement recorded.

Held that the power conferred on the sheriff to "rectify" the special register appointed to be kept by the sheriff-clerk in terms of par. (8) of the second schedule to the Workmen's Compensation Act, 1897, did not empower the sheriff to expunge a memorandum of agreement between an employer and a workman on the ground that at the date when the memorandum was recorded the workman had completely recovered, and was earning on an average as much wages as he did before the accident.

Baird & Co. v Stevenson, 1907 S.C. 1259; 44 S.L.R. 864; 15 S.L.T. 291.

(604)

Reduction of discharge—Granting of discharge induced by misrepresentation.

A workman who had been injured and was in receipt of compensation under a registered agreement received a call from an officer of the insurance company which was paying the compensation. The officer desired to obtain a final discharge, and in the course of conversation with the workman, who was still very weak, referred to the recent report of their medical man as suggesting that the workman would be well again in some months. He did not read the report or give it to the workman to read. The report stated that the probable duration of disability would be some months, but that progress had been so slow that no prediction could be made. The workman granted a discharge, but did not thereafter recover. In an action of reduction of the discharge on the ground of misrepresentation and essential error, **held** that the discharge must be reduced.

Crossan v Caledon Shipbuilding and Engineering Co. (H.L.) 1906, 43 S.L.R. 852; 14 S.L.T. 33.

(605)

Reduction of recorded memorandum—Declarator that no agreement as to compensation had been concluded.

In a petition in the sheriff court at the

instance of the employer of an injured workman for an order on the sheriff-clerk to record the memorandum of an alleged agreement for compensation under the Workmen's Compensation Act, 1897, the workman lodged defences in which he disputed the genuineness of the memorandum. The sheriff, after proof, ordered the memorandum to be recorded. The workman brought an action in the Court of Session concluding for declarator that no agreement as to compensation had been concluded, and for reduction of the recorded memorandum of agreement. **Held** (1) that the action for declarator that there was no binding agreement and for reduction of the entry in the register was competent; (2) that although the order of the sheriff for the registration of the memorandum of agreement involved an opinion that the agreement had been proved, the order itself was purely an administrative act, and would not support the plea of *res judicata*.

Hughes v Thistle Chemical Co., 1907 S.C. 607; 44 S.L.R. 476; 14 S.L.T. 916.

(606)

Charge on memorandum.

A memorandum of agreement under the Workmen's Compensation Act, 1897, was recorded in the special register kept for the purpose under the Act by the sheriff-clerk, and also for preservation and execution in the sheriff court books. **Held** that a charge was competent on an *inducias* of six days.

Gavin Paul & Sons v Dickson, (O.H.) 1903, 11 S.L.T. 228.

17. REMIT TO MEDICAL REFEREE— Second Schedule (13).

[See also Cases under Act 1906, I. 24, *supra*.]

(607)

Competency.

A workman in receipt of weekly payments under the Workmen's Compensation Act, 1897, was examined on 7th November, 1902, and certified to be fit for work by a medical practitioner provided by the employers. The workman was dissatisfied with this certificate, but did not submit himself to examination by one of the medical practitioners appointed for the purposes of the Act. In an application by the employers for review of the weekly payments the employers opposed an allowance of proof on the ground that the right of the workman to the weekly payments had been suspended at the date on which he had been certified to be fit for work. The workman produced a certificate by a medical practitioner that he was unfit for his usual work. The arbitrator remitted to the statutory medical referee to report, and on his report that the workman was fit for light work, diminished the weekly payments. **Held** that the remit was competent.

Niddrie and Benhar Coal Co. v M'Kay, 1903, 5 F. 1121; 40 S.L.R. 798; 11 S.L.T. 275.

(608)

Application by employers for review of weekly payments—Motion by workman for proof refused.

Johnstone v Cochran & Co., 1904, 6 F. 854; 41 S.L.R. 644; 12 S.L.T. 175, No. 576, *supra*.

(609)

Finality of referee's report—Second schedule (13)—Statutory Rules and Orders, 1898, No. 407, rule 2.

Opinion that the report by a medical referee on a remit under rule 2 of the Statutory Rules and Orders, 1898, No. 407, is not to be taken by the arbitrator as final and conclusive, but falls to be considered by him along with the other evidence before him.

Dowds v Bennie & Son, 1902, 5 F. 268; 40 S.L.R. 239; 10 S.L.T. 439.

(610)

In an application by an employer for review of an order for weekly payments to an injured workman, the arbitrator remitted to the medical practitioner appointed by the Secretary of State to report as to the workman's condition. The report bore that the power of vision of the right eye was permanently reduced by one-half, that the left eye was quite sound, and that in the opinion of the reporter "he will never be able for any work for which unimpaired vision is essential, but he is quite able to undertake his ordinary work as a labourer." The arbitrator, without further proof, reduced the compensation to 5s. per week. **Held** that the report was conclusive evidence that the incapacity of the workman arising from his injuries had ceased to the effect of disentitling him to a continuance of the compensation at the present rate, and case remitted to the arbitrator to reduce the compensation to 1d. per week until further orders.

Ferrier v Gourlay Brothers, 1902, 4 F. 711; 39 S.L.R. 453; 9 S.L.T. 517.

18. PROCEDURE IN ARBITRATIONS— Second Schedule (14).

[See also Cases under Act 1906, I. 25, *supra*.]

(611)

Dismissal of claim on relevancy—*Sheriff Courts (Scotland) Act*, 1876, sec. 52.

A sheriff, acting as arbitrator under the Workmen's Compensation Act, may competently dismiss a claim as irrelevant without hearing proof.

Coyne v Glasgow Steam Coasters Co., 1907 S.C. 112; 44 S.L.R. 118; 14 S.L.T. 482.

(612)

Preliminary pleas—Duty of arbitrator to dispose of whole case at once.

Opinion *per curiam* that even if the sheriff's judgment on preliminary pleas is adverse to the claimant, he should, to avoid

multiplying appeals, exhaust the arbitration by pronouncing findings in fact and in law on the merits, and by assessing the compensation due to the claimant on the assumption that he is entitled to compensation.

Rankine v Alloa Coal Co., 1903, 5 F. 1164; 40 S.L.R. 828; 11 S.L.T. 233.

(613)

Decree by default—Second schedule (14) (c) — Sheriff Courts (Scotland) Act, 1876, secs. 20 and 52.

In a suspension held that it was incompetent for a sheriff acting as arbitrator under the Workmen's Compensation Act, 1897, to pronounce a decree by default for the amount of compensation claimed, and decree suspended.

United Collieries v Gavin, 1899, 2 F. 60; 37 S.L.R. 47; 7 S.L.T. 197.

19. APPEALS—Second Schedule (14) (c).

(1) COMPETENCY.

[See also Cases under Act 1906, I. 26 (1), *supra*.]

(614)

Question of law or question of fact—Accident arising out of and in the course of the employment.

In an arbitration before a sheriff under the Workmen's Compensation Act, 1897, the sheriff held that an accident to the workman was caused by his adopting a dangerous mode of doing a piece of work while a safe course was open to him, and that this was not an accident "arising out of and in the course of the employment" in the sense of the Act. In a case stated for appeal the question was put whether the sheriff "ought upon the facts stated to have found that the injury was caused by an accident arising out of and in the course of the employment" in the sense of sec. 1, sub-sec. (1), of the Act. Held that the appeal was competent, as the case showed that the decision of the sheriff involved the determination of a question of law in the construction of the Act.

Durham v Brown Brothers & Co., 1898, 1 F. 279; 36 S.L.R. 190; 6 S.L.T. 239.

(615)

Whether death resulted from accident.

A miner was on 4th May injured by the fall of a stone on his foot from the roof of the pit in which he was working, and he died on 29th June following. The sheriff-substitute refused compensation, on the ground that it had not been proved that his death resulted from or was accelerated by the injury. A case for appeal set forth that the workman, who was seventy-nine years of age, was off work for some time in consequence of the injury, but had returned to work before his death, and that the

proximate cause of his death was apoplexy. The question of law was—"Whether in the circumstances stated the death of the deceased resulted from or was accelerated by an accident within the meaning of the Workmen's Compensation Act, 1897?" The Court dismissed the appeal, holding that the question was a question of fact and not a question of law.

Warnock v Glasgow Iron and Steel Co., 1904, 6 F. 474; 41 S.L.R. 359; 11 S.L.T. 697.

(616)

Non-compliance with regulations for obtaining stated case—Act of Sederunt, 3rd June, 1898.

On the last day allowed for taking an appeal against an award by a sheriff under the Workmen's Compensation Act, 1897, the claimant's Edinburgh agent telegraphed to the local agent to apply for a case for appeal. The local agent being out of town, his clerk obtained the services of another agent, who went to the sheriff court office and wrote on the interlocutor sheet "The pursuer appeals against the foregoing judgment, and requests a case to be stated." He did not set forth any question of law, and he did not deposit £1, as required by the Act of Sederunt, 3rd June, 1898, sec. 9 (a). He was informed by the clerk in attendance at the sheriff court office that a deposit was not necessary. The sheriff stated a case. At the hearing on the appeal the deposit of £1 had not been made. The Court, on the objection of the respondents, dismissed the appeal in respect of the appellant's failure to comply with the regulations enacted by sec. 9 (a) of the Act of Sederunt, 3rd June, 1898.

Murphy v Blair & White, 1905, 7 F. 863; 42 S.L.R. 655; 13 S.L.T. 196.

(2) FORM OF STATED CASE.

[See also Cases under Act 1906, I. 26 (2), *supra*.]

(617)

Arbitrator's note.

A case stated by a sheriff under the Workmen's Compensation Act, 1897, should not have any note by the sheriff appended thereto.

Rae v Fraser, 1899, 1 F. 1017; 36 S.L.R. 782; 7 S.L.T. 73.

Cf. Act of Sederunt, 6th July, 1915, sec. (1) (C.A.S., L. xiii. 17 (d)).

(3) REFUSAL OF ARBITRATOR TO STATE A CASE.

[See also Cases under Act 1906, I. 26 (3), *supra*.]

(618)

Frivolous application—Act of Sederunt, 3rd June, 1898, sec. 9 (c).

In an arbitration under the Workmen's Compensation Act, 1897, the arbitrator re-

fused to state a case for appeal, on the ground that the application for a case was, in his opinion, frivolous, in respect that the questions of law proposed were definitely settled by a judgment of one Division of the Court. The appellant having presented a note, the Court remitted to the arbitrator to state a case.

Pumpherson Oil Co. v Cavaney, 1903, 5 F. 663; 40 S.L.R. 466; 10 S.L.T. 748.

(619)

Question of fact or law—Out of and in the course of the employment.

Circumstances in which held, in an arbitration under the Workmen's Compensation Act, 1897, that the question whether the accident had arisen "out of and in the course" of the workman's employment was a question of fact and not of law, and that the arbitrator was justified in refusing to state it as a question of law for the Court of Appeal.

Observed (by Lord Kinnear) that such refusal is justified whenever the arbitrator in determining the question has himself dealt with it as a question of fact.

Henderson v Corporation of Glasgow, 1900, 2 F. 1127; 37 S.L.R. 857; 8 S.L.T. 118.

(620)

Serious and wilful misconduct.

Glasgow & South-Western Railway Co. v Laidlaw, 1900, 2 F. 708; 37 S.L.R. 503; 7 S.L.T. 420, No. 406, supra.

(621)

Question not submitted to arbitrator.

In an arbitration under the Workmen's Compensation Act the sheriff found in fact that the employers were the contractors for the painting work on a building over 30 feet in height in course of construction, and that the workman had been injured while engaged in this painting work, and awarded compensation. The employers applied to the sheriff to state a case on the question "Whether the work on which the deceased had been engaged at the time of the accident was construction of the building in question in terms of sec. 7 (1) of the Workmen's Compensation Act, 1897?" The sheriff refused to state a case, on the ground that the proposed question was solely a question of fact. The employers then applied to the Court to direct the sheriff to state a case on the question—"Whether the applicants were 'undertakers' in the sense of sec. 7 (1) of the Act?" The Court refused to direct the sheriff as craved, on the ground that the question proposed had not been submitted to the sheriff for decision, and that he had not been asked to state a case upon it; but directed him to state a case on the question formerly submitted to him, in respect that question was, or might involve, a question of law.

Hobbs & Samuel v Bradley, 1900, 2 F. 744; 37 S.L.R. 532; 7 S.L.T. 433.

(622)

Whether employers prejudiced by want of notice—Whether want of notice occasioned by mistake or other reasonable cause.

In an arbitration under the Workmen's Compensation Act, 1897, the sheriff, after a proof, found in fact that the claimant was injured on 25th October, 1901, that he did not give notice of the accident until 24th March, 1902, and that thereby the respondents had been prejudiced in their defence. The sheriff thereupon dismissed the application, and refused to state a case on appeal on certain questions of law submitted by the claimant on the ground that they were not raised by the facts found to be proved. The Court, on a note by the claimant, remitted to the sheriff to state a case setting forth the facts bearing (1) on the question of prejudice to the employer; and (2) on the question whether or not the delay in giving notice was occasioned by mistake or other reasonable cause, along with his judgment on these facts on both points.

Rankine v Alloa Coal Co., 1903, 5 F. 1164; 40 S.L.R. 828; 11 S.L.T. 283.

(623)

Question as to competency of application—Whether a question had arisen between the parties.

At the first calling of a petition for arbitration, by a workman, the employers, while admitting liability to pay compensation at the rate claimed, pleaded that the petition was incompetent, in respect that (1) when it was presented no question had arisen between the parties within the meaning of sec. 1 (3) of the Act, and (2) reasonable opportunity had not been given to them to admit liability. The sheriff awarded compensation, and refused to state a case. Circumstances in which the Court remitted to the sheriff to state a case on the questions (1) whether under sec. 1 (3) of the Act a question had arisen as to the liability to pay compensation or as to the amount or duration thereof so as to give the sheriff jurisdiction to entertain the petition, and (2) whether the petition was competent in the circumstances.

Caledon Shipbuilding and Engineering Co. v Kennedy, 1906, 8 F. 597; 43 S.L.R. 430; 13 S.L.T. 901.

(4) REMIT TO ARBITRATOR.

[See also Cases under Act 1906, I. 26 (4), supra.]

(624)

Competency—Remit for question of law not raised before arbitrator.

Held that the Court had no power to send back for amendment a case stated on a specific question, in order to enable the appellant to raise a question which had not been raised before the arbitrator or decided by him.

Rae v Fraser, 1899, 1 F. 1017; 36 S.L.R. 782; 7 S.L.T. 73.

(625)

Remit for additional finding in fact.

Where a case for appeal bore to have been stated "as adjusted by the parties," and put one specific question of law, the Court refused to make a remit to have a finding upon a question of fact not stated in the case.

McDonald v Hobbs & Samuel, 1899, 2 F. 3; 37 S.L.R. 4; 7 S.L.T. 157.

(5) TRANSMISSION OF PROCESS FROM SHERIFF COURT.

[See also Cases under Act 1906, I. 26 (5), *supra*.]

(626)

In a stated case under the Workmen's Compensation Act, 1897, one of the parties moved for an order on the sheriff-clerk to transmit the process, on the ground that there was a note appended by the sheriff-substitute to his interlocutor which it was advisable that the Court should have before them when the stated case came up for decision. The Court refused the motion.

Singer Manufacturing Co. v Clelland, 1905, 7 F. 654; 42 S.L.R. 536; 13 S.L.T. 48.

(6) APPEAL TO HOUSE OF LORDS.

[See also Cases under Act 1906, I. 26 (6), *supra*.]

(627)

Held that, in an arbitration under the Workmen's Compensation Act, 1897, the judgment of a Division of the Court of Session upon a case stated by the sheriff cannot be appealed to the House of Lords.

McKinnon v Barclay, Curle & Co., 1901, 3 F. (H.L.) 1; [1901] A.C. 269; 38 S.L.R. 611; 9 S.L.T. 84.

20. SUSPENSION OF CHARGE TO PAY COMPENSATION.

[See also Cases under Act 1906, I. 27, *supra*.]

(628)

Charge for compensation for period when earning wages—First schedule (12), second schedule (8).

In July, 1906, the employers of an injured workman agreed to pay him 14s. 5d. per week, being half his former wage, as compensation under the Workmen's Compensation Act, 1897, and the workman received payment of that sum from July to September, 1906. A memorandum of the agreement was recorded. The agreement did not refer to the workman's total incapacity, but he admitted that he received the weekly payment in respect of total incapacity. In September, 1906, he returned to work with the same employers, and continued in their employment till May, 1907, earning wages which averaged 23s. 2d. per week. In May, 1907, he charged the employers on the recorded memorandum to pay him compensation at the full rate of 14s. 5d. per week for the

period from September, 1906, to May, 1907. The sum charged for, with the addition of the wages earned by him during that period, gave an average sum per week considerably in excess of his average weekly earnings before the accident. The employers brought a suspension, and tendered payment of the full difference between his earnings from September, 1906, to May, 1907, and his earnings for a like period before the accident. The Court, in respect of the workman's refusal to accept the sum tendered, suspended the charge.

William Baird & Co. v McWhinnie, 1908 S.C. 440; 45 S.L.R. 338; 15 S.L.T. 745.

(629)

On 19th September the employers of a miner agreed to pay him compensation at the rate of 13s. 3d. per week, being one-half of 26s. 6d.—his average wage before the accident. The agreement was recorded. On 12th January, 1906, the miner returned to work with his former employers, and received 20s. per week of wages. On the employers proposing to reduce the compensation payable, the miner, on 26th April, presented a petition to the sheriff to review the weekly payment. On 3rd May the miner's wages were raised to 27s. 6d. per week. On 18th October the sheriff pronounced an interlocutor in the petition reducing the compensation from that date to 1s. per week. On 10th November the miner charged his employers upon the registered memorandum of agreement for payment of compensation at the rate of 13s. 3d. per week from 17th January to 18th October. In a suspension brought by the employers they tendered payment at the rate of 6s. 6d. per week for the period from 12th January, when the miner returned to work at a wage of £1 per week, to 3rd May, when he received the full wage of 27s. 6d. per week. The Court suspended the charge, holding that the compensation agreed upon was only payable during the workman's incapacity, and that, having regard to the sum offered by the employers and the wages earned by the workman, nothing further was due to him for the period in question.

James Nimmo & Co. v Fisher, 1907 S.C. 890; 44 S.L.R. 641; 15 S.L.T. 14.

(630)

A workman obtained a decree under the Workmen's Compensation Act, 1897, awarding him 17s. per week of compensation against his employers "until further orders of Court." He thereafter accepted employment with the same employers, and was paid 34s. per week, being the same wages as before the accident, and continued to be so employed and paid for a considerable period, during which no payments under the decree were made, and no steps under the Act were taken by the employers to have the decree for weekly payments reviewed or terminated. Having left their employment, the workman charged the employers to pay him the weekly payments decerned for from the date of the decree. In a suspension brought by the em-

ployers, in which they offered payment of 17s. per week during the time the workman was off work, the Court suspended the charge, **holding** that the workman was not entitled to payment under the decree for the time he was earning full wages.

Beath & Keay v Ness, 1903, 6 F. 168; 41 S.L.R. 113; 11 S.L.T. 455.

(631)

Charge for period before and for period after registration of agreement—Acquiescence in discontinuance of compensation—First schedule (12), second schedule (8).

Where under an agreement a workman has received weekly payments of compensation, which have been varied or discontinued by his employers, and he afterwards records a memorandum of that agreement and charges for payment, the Court (1) with regard to payments due for the period subsequent to recording, will not suspend the charge, the employers' remedy lying in an application for review; (2) with regard to payments for the period prior to recording, will allow a proof when the complainant avers that the respondent has acquiesced in either the variation or discontinuance of compensation, and, if that averment is proved, will suspend.

Lochgelly Iron and Coal Co. v Sinclair, 1909 S.C. 922; 46 S.L.R. 665; 1909, 1 S.L.T. 367.

(632)

The employers of an injured workman entered into a verbal agreement to pay him compensation weekly, and paid such compensation till 28th June, 1907, when they ceased doing so, alleging that his incapacity had ceased. On 26th July, 1907, the workman intimated to them that he proposed to record a memorandum of the agreement. A memorandum was recorded on 20th August, 1907, and on 27th November, 1907, the employers were charged to make payment of compensation from 28th June, 1907, the date at which the previous payments had ceased. The employers brought a note of suspension of that charge on the ground that the workman's incapacity had ceased by 28th June, and that accordingly the agreement to pay him compensation had also terminated then. The Court found the charge orderly proceeded, **holding** that there were no such averments of delay on the part of the workman in recording the agreement, or of other actings on his part, as to entitle the complainers to a proof that the workman had acquiesced in the discontinuance of the compensation.

Archibald Finnie & Son v Fulton, 1909 S.C. 938; 46 S.L.R. 665; 1909, 1 S.L.T. 375.

(633)

Recorded agreement superseded by subsequent unrecorded agreement—Averment that workman's incapacity had ceased.

The employers of an injured workman agreed to pay him 15s. 11d. per week, the statutory maximum, as compensation under the Workmen's Compensation Act, 1897, and the workman received payment of that

sum from February, 1904, to September, 1905. A memorandum of the agreement was recorded under the Act. The workman having partially recovered returned to work, earned wages, and accepted payments first of 7s. 9d. and later of 5s. per week between October and December, 1905. On 10th January, 1906, he left the service of the employers, and thereafter intimated that he was totally incapacitated. The employers having refused to pay more than 5s. per week of compensation, the workman in March, 1906, charged them under the recorded agreement for payment of 15s. 11d. per week from 10th January, 1906. In a suspension the employers averred (1) that the agreement founded on had been superseded by subsequent agreements to accept first 7s. 9d. and then 5s. per week, and (2) that the workman was not incapacitated for work; and asked for a proof of these averments. The Court refused the suspension, upon the ground that it was contrary to the intention of the Act that such questions should be determined by proof in a suspension; and that the employers' remedy was to take proceedings under the Act either to have the payments under the original agreement reviewed, or to have the alleged subsequent agreement recorded.

Fife Coal Co. v Lindsay, 1908 S.C. 431; 45 S.L.R. 317; 15 S.L.T. 742.

(634)

Recorded agreement modified by subsequent unrecorded agreement—Restriction of charge.

An injured workman entered into a verbal agreement with his employers, whereby they agreed to pay him 16s. 6d. per week of compensation, and a memorandum of this agreement was recorded in the special register provided for by the Workmen's Compensation Act, and also in the sheriff court books. Having partially recovered, the workman afterwards entered into another verbal agreement, which was not recorded, whereby it was agreed that the compensation should be reduced to 11s. 6d. per week. On his employers subsequently refusing to continue the compensation he charged them for payment. The charge bore to proceed on the recorded agreement, but it also narrated the unrecorded agreement, and the sum charged for was the sum as modified by the unrecorded agreement, viz., 11s. 6d. per week. The Court refused a suspension of the charge at the instance of the employers, the Court **holding** (1) that the recorded agreement was not displaced as a ground of charge by the subsequent unrecorded agreement, and (2) that it was competent to restrict the amount charged for to a sum less than that in the agreement founded on.

Fife Coal Co. v Davidson, 1907 S.C. 90; 44 S.L.R. 108; 14 S.L.T. 462.

(635)

Alleged tender of compensation.

In a suspension of a charge for payment of compensation, **held** that an alleged tender

of payment by the employers, which consisted in an intimation to the workman that the money would be paid if called for at their office, was not a good ground of suspension.

Haughhead Coal Co. v Gallocher, (O.H.) 1903, 11 S.L.T. 156.

(636)

Charge given on only six days' induciæ.

A charge was given by a workman on a registered memorandum of agreement on induciæ of six days. The memorandum had been registered in the sheriff court books for preservation and execution. A note of suspension was presented on the ground that seven days' induciæ were necessary. Note refused.

Gavin Paul & Sons v Dickson, (O.H.) 1903, 11 S.L.T. 228.

21. EXPENSES.

[See EXPENSES I. 10 (2).]

22. PERSONAL BAR.

[See also Cases under Act 1906, I. 29, supra.]

(637)

Offer by employer to continue wages previously earned—First schedule (2).

Employers in whose service a workman, earning wages at the rate of 16s. a week, had sustained injuries resulting in the loss of an arm, offered to retain him in the same employment at the same wages. This offer was declined by the workman. The arbitrator in an application to fix compensation found that the loss of his arm diminished the applicant's capacity to earn wages in the employment in question and awarded compensation at the rate of 6s. a week. **Held** that the refusal of the workman to accept the offer of employment did not exclude his right to compensation, if otherwise well founded, and award sustained.

Fraser v Great North of Scotland Railway Co., 1901, 3 F. 908; 38 S.L.R. 653; 9 S.L.T. 96.

III. WORKMEN'S COMPENSATION ACT, 1900.

(63 & 64 Vict. c. 22.)

(638)

Agriculture—Workman mainly employed in agricultural, but occasionally in other work—Employment on traction engine and threshing-mill—Sec. 1, sub-sec. (3).

A workman in the employment of the owner of a portable threshing-mill, driven by a traction-engine, in the capacities of assistant thresher and traction-engine driver, was injured while the threshing-mill was being drawn by the traction-engine from a farm on which threshing had been finished to another farm where his employer had

contracted to thresh on the following day. **Held** that the workman was entitled to compensation from his employer, in respect that he was a person employed mainly in agricultural work, i.e., threshing, and partly or occasionally in other work, within the meaning of sub-sec. (3) of sec. 1 of the Workmen's Compensation Act, 1900. **Opinion** (per Lord Trayner) that, apart from sub-sec. (3) the workman was entitled to compensation in respect that he was injured in the course of his employment as a thresher, the transit between one farm and another not forming any break in the course of that employment.

Proctor v Cumisky, 1904, 6 F. 832; 41 S.L.R. 636; 12 S.L.T. 172.

(639)

Forestry—Sec. 1 (3).

Sec. 1 of the Workmen's Compensation Act, 1900, makes the Workmen's Compensation Act, 1897, apply to employment of workmen in "agriculture," which, by sub-sec. (3) includes "forestry." A workman in the employment of a sawmiller was employed to cut down growing trees, which had been purchased by his employer, and cart them to the sawmill, and, while so employed, was killed by being crushed between a standing tree and the trunk of a tree which he was removing on a cart. The cutting down and removing of the trees was an ordinary part of the employer's business. **Held** that the employment in which the deceased was killed was not "forestry" in the sense of the Act of 1900, and consequently that his representatives were not entitled to compensation under the Acts.

Meally v McGowan, 1902, 4 F. 883; 39 S.L.R. 662; 10 S.L.T. 145.

IV. WORKMEN'S COMPENSATION (WAR ADDITION) ACTS, 1917 and 1919.

(7 & 8 Geo. V. c. 42 and 9 & 10 Geo. V. c. 83.)

(640)

Recorded memorandum not bearing that incapacity total—Charge thereon to pay war additions—Suspension of charge.

A workman was receiving compensation in accordance with a memorandum recorded under the Act of 1897. That memorandum did not disclose ex facie that the workman's incapacity was total. The workman charged his employers on the memorandum requiring them to pay the additional compensation due under the Workmen's Compensation (War Addition) Acts, 1917 and 1919. Charge suspended on the ground that the memorandum did not disclose that the workman had an indisputable right to the additional payments.

William Baird & Co. v Diamond, (O.H.) 1921, 2 S.L.T. 77.

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I. WHAT IS WRIT.

(3)

—Loan—Proof.

The authenticity of pencil entries in a ledger as proof by writ recognised.

Hope v Derwent Rolling Mills Co., 1905,
7 F. 837; 42 S.L.R. 794; 13 S.L.T. 364.

(4)

Typewriting — Title to heritage — Type-written instrument forming part of title—
Sale — Sale of heritage — Objections to title—Act 1593, c. 179—Act 1681, c. 5—
Titles to Land Consolidation (Scotland) Act, 1868, sec. 149—Conveyancing (Scotland)

Pencil—Testament—Codicil.

Held that a codicil written in pencil is effectual, if it be clear that it is a testamentary writing, and not merely a jotting.
Muir's Trustees, 1869, 8 M. 53; 42 J. 25;
7 S.L.R. 24.

(2)

A testamentary deed is not invalid because it is written in pencil.
Simson v Simson, 1883, 10 R. 1247; 20 S.L.R. 831.

Act, 1874, sec. 38—Interpretation Act, 1889, sec. 20.

A trustee left a trust disposition and settlement duly subscribed by him and by the instrumentary witnesses, but wholly typewritten, and two codicils relative thereto, the earlier in date being typewritten and the later in date being written by hand, both referring in gremio to the settlement. The trustees acting thereunder having sold certain property, which formed part of the trust estate, the purchaser refused to accept the title to the property tendered by the trustees, on the ground that the trust disposition and settlement forming part of the title was typewritten.

In an action by the trustees for implement of the sale, **held** that the title tendered was valid.

Simpson's Trustees v Macharg & Son, (O.H.) 1902, 39 S.L.R. 562; 9 S.L.T. 398.

(5)
Execution—Power of appointment by writing to be executed with certain formalities—Failure to observe formalities.

When a contract or will confers a power to appoint to certain funds by a writing to be executed in a manner prescribed, the power cannot be exercised by a writing not so executed.

Question (per Lord M'Laren), whether—except in the case of a will—it is competent for a person to say that he will be bound by any future deed, although neither holograph nor tested.

Campbell's Trustees v Campbell, 1903, 5 F. 366; 40 S.L.R. 335; 10 S.L.T. 589.

II. AUTHENTICATION.

1. SUBSCRIPTION BEFORE WITNESSES.

(1) SIGNATURE.

(6) **Signature by stamp.**

Held that a codicil signed by means of a stamp was invalid.

Stirling Stuart v Stirling Crawford's Trustees, 1885, 12 R. 610; 22 S.L.R. 391.

(7) **Signature impressed by "cyclostyle"—Probative deed—Election law.**

A voter, objecting to a certain person's name being retained on the register of voters, instead of signing the notice of objection in the ordinary way, stencilled his name upon it through a perforated signature he had made on a waxed skin. **Held** that the notice was "signed by the person objecting" in the sense of sec. 4 of the *Burgh Voters Act, 1856*.

Observed that the signature would not satisfy the conditions of the statutes regulating the subscription and attestation of probative deeds.

Whyte v Watt, 1893, 21 R. 165; 31 S.L.R. 127; 1 S.L.T. 342.

(8)

Granter's hand supported.

Held that it did not invalidate the subscription of the maker of a deed that he was assisted by having his hand held about the wrist, the hand not having been led in the formation of the letters.

Noble v Noble, 1875, 3 R. 74; 13 S.L.R. 58.

(9)

Deed written bookwise—Signed on last page—Initialed on others—Act 1696, c. 15.

A deed dated prior to 1874, consisting of seven pages, written bookwise on two sheets of paper, was signed by the granters on the seventh page only, the other pages being initialed by them. **Held** that the deed was not probative under the Act 1696, in respect that each page was not signed by the granters.

Observed that the provisions of the Act 1696, c. 15, with regard to the executions of deeds written bookwise were the conditions on which alone validity was conferred upon such deeds.

Gardner v Lucas, 1878, 5 R. (H.L.) 105; 3 App.Cas. 582; 15 S.L.R. 740.

(10)

Deed consisting of more than one sheet subscribed on last page only—Whether deed instrument or writing subscribed by the granter or maker within the meaning of the 39th section of the Conveyancing (Scotland) Act, 1874.

M'Laren v Menzies, 1876, 3 R. 1151; 13 S.L.R. 703.

Inglis' Trustees v Inglis, 1901, 4 F. 365; 39 S.L.R. 253, Nos. 66 and 67, infra.

(11)

Codicil written partly on probative will and partly on separate paper and subscribed on latter only—Conveyancing (Scotland) Act, 1874, sec. 39.

Brown, 1883, 11 R. 400; 21 S.L.R. 267, No. 68, infra.

(12)

Unsigned Scots settlement admitted to probate in England and acted on for fifty years—Effect in Scotland—English case for opinion of Court.

A case settled by the High Court of Justice in England for the opinion of the Court of Session related to a trust disposition and settlement in Scots form, prepared by a writer to the signet, but undated and unsigned. The Court **held** that as the words of residuary bequest occurred in an unsigned writing, they were by the law of Scotland worthless to affect the succession or estate of a domiciled Scotsman, and that, although the unsigned writing had been admitted to probate in England, and was a good testamentary disposition according to English law, no Court administering the law of Scotland, or acting according to that law, as governing the case before it, could give any effect to such a writing.

Bradford v Young, &c., 1884, 11 R. 1135; 21 S.L.R. 772.

(13)

Illegibility—Retouching—Added initials.

In an action of reduction of a codicil, it was maintained that the codicil was invalid in respect that the signature was no more than a mark, and that it showed signs of having been retouched, and that certain initials had been added after the rest of the signature was written and witnessed, and outwith the presence of the witnesses. **Held**, after a proof, that the codicil bore the signature of the testator, and that it was immaterial whether it was legible or not, and that the original signature and the retouching had taken place at the same time, or, at all events, that the original untouched signature was sufficient.

Stirling Stuart v Stirling Crawford's Trustees, 1885, 12 R. 610; 22 S.L.R. 391.

(14)

Allegation that deed not signed by granter—Proof—Onus—Conveyancing (Scotland) Act, 1874, secs. 38 and 39.

Where a person alleged that a deed without a testing clause bearing to be signed by him and by attesting witnesses had not been signed by him, and it was proved that the witnesses had signed, but had not seen the alleged granter sign, or heard him acknowledge the subscription, and where the person founding on the deed did not prove that the granter had signed it, **held** that the deed could not receive effect.

Geddes v Reid, 1891, 18 R. 1186; 28 S.L.R. 879.

(15)

Ex facie mutual deed, but really conveyance signed by first party only—Formal completion after her death—Competency.

Objection that a deed, in form a mutual deed, though really a conveyance of heritage to trustees for a congregational chapel, having been given out as complete so far as the real granter was concerned, could not be completed after her death by the signatures of the other parties to it, the trustees, repelled.

Tener's Trustees v Tener's Trustees, 1879, 6 R. 1111; 16 S.L.R. 672.

See also *Walker v Whitwell*, 1916 S.C. (H.L.) 75; 53 S.L.R. 129; 1916, 1 S.L.T. 2, No. 37, *infra*.

(16)

Signature on erasure—Proof—Onus.

Brown v Duncan, 1888, 15 R. 511; 25 S.L.R. 369, No. 177, *infra*.

(17)

Signature on blank sheet—Will subsequently dictated by testator and written over signature.

A testator signed his name on a blank sheet of paper, and thereafter dictated the will, which overlapped the signature, but not the names and designations of the witnesses. Before they subscribed he acknowledged the authenticity of the will. **Held** that the will was valid.

Carsewell's Trustees v Carsewell, (O.H.) 1895, 3 S.L.T. 218.

(18)

Signature by mark—"Writing under his hand"—Friendly Societies Act, 1896, sec. 56 (1).

Held that a nomination authenticated by the mark of a member of a friendly society (she being unable to write) and by the signatures of two instrumental witnesses, was not a writing under her hand within the meaning of the above enactment, and that being of a testamentary character and unsigned it was of no force or effect in law.

Morton v French, 1908 S.C. 171; 45 S.L.R. 126; 15 S.L.T. 517.

(2) WRITER'S DESIGNATION.

(19)

Acts 1593, c. 179, and 1681, c. 5.

In an offer to sell heritable subjects, which was not holograph, the writer was mentioned in the body of the writing as "Mr. John Smith, who will prepare the disposition," and was only designed in the testing clause as "the said John Smith." **Held** that the writer of the offer was not duly designed, and that the offer was therefore improbativ, although in the acceptance, which was written on the same paper as the offer, allusion was made to "the said John Smith as agent for both parties."

Mitchell v Scott's Trustees, 1874, 2 R. 162; 12 S.L.R. 108. But see the Conveyancing Act, 1874, sec. 38.

(3) WITNESSES.

[See also (4), *infra*.]

(a) Capacity.

(20)

Women.

Sec. 139 of the Titles to Land Act, 1868, authorising women to act as instrumental witnesses, is not limited to deeds regarding heritage.

Hannay, 1873, 1 R. 246; 11 S.L.R. 106.

(21)

Witness interested in deed.

The attestation of a testamentary deed is not invalidated by the fact that an attesting witness takes benefit under it.

Simson v Simson, 1883, 10 R. 1247; 20 S.L.R. 831.

(22)

Knowledge of granter—Act 1681, c. 5.

Held that a codicil was validly executed where one of the witnesses had not previously known the granter, but was introduced to him at the time of the execution by the other witness, who was an acquaintance, and whom he knew to be a law agent.

Brock v Brock, 1908 S.C. 964; 45 S.L.R. 888; 16 S.L.T. 124.

(b) Execution.

(i) Essential to See Signature or Hear Acknowledgment.

(23)

"Informality of execution"—Conveyancing (Scotland) Act, 1874, sec. 39.

Where a person alleged that a deed without a testing clause, bearing to be signed by him and by attesting witnesses, had not been signed by him, and it was proved that the witnesses had signed, but had not seen, the alleged grantor sign or heard him acknowledge the subscription, and where the person founding on the deed did not prove that the grantor had signed it, **held** that the deed could not receive effect.

Opinion (per Lord Young) that when a deed is irregularly executed by reason of the persons signing as witnesses not having seen the grantor subscribe or heard him acknowledge his subscription, the deed will be effectual if it is proved that the grantor signed it.

Geddes v Reid, 1891, 18 R. 1186; 28 S.L.R. 879.

(24)

Opinion that the fact that the signature to a deed was neither adhibited nor acknowledged in the presence of one of the attesting witnesses is a fatal defect, and not a mere "informality of execution" in the sense of sec. 39 of the Conveyancing (Scotland) Act, 1874.

Forrests v Low's Trustees, 1907 S.C. 1240; 44 S.L.R. 925; 15 S.L.T. 330.

(25)

The Conveyancing (Scotland) Act, 1874, sec. 39, does not apply to a case where the signatures of witnesses bearing to attest the subscription of the grantor of a deed were adhibited before the subscription of the grantor, and where the witnesses neither saw the grantor sign nor heard him acknowledge his subscription.

Smyth v Smyth, 1876, 3 R. 573; 13 S.L.R. 356.

(26)

Mutual settlement—One party's signature not witnessed.

A deed bearing to be a mutual settlement by a husband and wife contained a conveyance by the husband of his whole estate in favour of his wife in life and his children in fee, and a corresponding conveyance by the wife of her estate in favour of her husband and children. The deed was signed by the husband before witnesses, and by the wife, but not before witnesses. **Held** that it was effectual as a testamentary settlement of the husband's estate.

Millar v Birrell, 1876, 4 R. 87; 14 S.L.R. 58.

(27)

Reduction of invalid deed—Form of issue.

Form of issue adjusted in a reduction of a deed, on the ground that the grantor had neither signed the deed in the presence of

the persons whose names appeared as witnesses nor acknowledged his subscription to them.

Cumming v Skeoch's Trustees, 1879, 6 R. 540; 16 S.L.R. 268.

(28)

Denial by attesting witness that signature adhibited or acknowledged in her presence.

Circumstances where the Court refused to set aside a will on the unsupported evidence of one of the attesting witnesses that the testator's signature had not been adhibited or acknowledged in her presence.

Observed, "When a deed is ex facie perfectly regular and duly tested, it cannot be set aside on the sole and unsupported statement of one of the witnesses that she did not really attest what her signature bears that she did attest. It can only be set aside on the clearest possible evidence."

Forrests v Low's Trustees, 1907 S.C. 1240; 44 S.L.R. 925; 15 S.L.T. 330.

(29)

Witnesses neither seeing signature adhibited nor hearing acknowledgment—Proof—Act 1681, c. 5.

A bond and disposition in security bore to be subscribed by a husband and wife at Glasgow on 4th June, 1907, before two witnesses, clerks to the law agent who prepared it. In an action for reduction of the deed at the wife's instance, the witnesses, while not professing to recollect witnessing the deed, deposed that their signatures were genuine, and that they never had signed as witnesses without either seeing the parties subscribe or hearing them acknowledge their subscriptions. It was proved that on 4th June the husband and wife were not in Glasgow, that on that day the law agent brought the deed from Glasgow to Thorntonhall (half an hour's journey by rail), and there obtained the signatures of both spouses, and that neither of the witnesses was at Thorntonhall upon that day. The Court, while not doubting the honesty of the instrumentary witnesses, **held** that the other evidence was sufficient to prove that the deed was not duly and validly executed.

Young v Paton, 1910 S.C. 63; 47 S.L.R. 78; 1909, 2 S.L.T. 340.

(30)

Objection by granters that witnesses not present—Onerous deed—Objection latent and technical—Personal bar.

The granters of an onerous deed ex facie probative, and delivered to the grantee, challenged it on the ground that one of the instrumentary witnesses had neither seen them sign nor heard them acknowledge their signatures. **Held** (1) on the evidence that this allegation had not been proved; and (2) that, even if it had, the granters of the deed were barred from bringing a challenge of it on such a latent and technical ground.

Baird's Trustee v Murray, 1883, 11 R. 153; 21 S.L.R. 109.

(31)

Rei interventus—Cautioner.

A bank agreed to make advances to A on his obtaining B's guarantee. A formal letter of guarantee, ending with the words "in witness whereof," was then prepared by the bank and handed to A for execution by B. A obtained B's signature, and afterwards got two persons to sign as witnesses who had not seen B subscribe nor heard him acknowledge his subscription. A returned the document to the bank with the names and designations of the witnesses, the testing clause was filled up by the bank, and the bank made an advance to A on the faith of the guarantee. In an action by the bank on the letter of guarantee against B, the defender pleaded that he was not bound, as the deed was not tested. These facts were admitted on proof. **Held** that the defender having signed the deed and delivered it to A, who was in hac re the bank's agent, he had delivered it to the bank as a guarantee for advances to A, and that the bank having made advances on the faith of it, the defender's imperfect obligation had been validated by rei interventus.

National Bank of Scotland v Campbell, 1892, 19 R. 885; 29 S.L.R. 757.

(32)

A lady granted a bond in favour of a bank. The bond was ex facie well executed, and the bank, in perfect good faith, gave onerous consideration in return for it. The deed was not in fact duly attested, the lady not having subscribed in presence of the attesting witnesses or acknowledged her signature to them. In an action by the lady against the bank for reduction of the deed, **held** that the pursuer could not plead against the defenders the informality of execution of the deed.

MacLeish v British Linen Bank, (O.H.) 1911, 2 S.L.T. 168.

(ii) Subscription ex Intervallo.

(33)

After granter's death.

In a reduction of a testament, ex facie probative, on the ground that it had been signed by the witnesses ex intervallo and after the testator's death, **held**, after a proof, that the deed was not intended by the granter to be completed, and had not been completed. **Question**, whether a deed can be subscribed by the instrumentary witnesses after the death of the granter.

Arnott v Burt, 1872, 11 M. 62; 45 J. 46; 10 S.L.R. 51.

(34)

A deed was subscribed by the granter in presence of two persons, one of whom only at the time adhibited his signature as an instrumentary witness, the parties being under the impression that this was enough. Some time after the death of the granter the other added his signature as an attesting

witness to the granter's signature. **Held** that the deed must receive effect.

Tener's Trustees v Tener's Trustees, 1879, 6 R. 1111; 16 S.L.R. 672.

(35)

One of the two witnesses to the signature of the granter of a document signed it as a witness after the death of the granter. It was proved to the satisfaction of the Court that the signature of the witness was her own signature, that the document was the one signed by the granter, and that the witness saw him sign it. **Held** that the document was probative.

Beattie v Bain's Trustees, (O.H.) 1899, 6 S.L.T. 277.

(36)

J R died, leaving a will which was subscribed by himself and by one witness. After his death his widow, who was a beneficiary under the will, and who had been present when it was subscribed, added her subscription as a witness. **Held** (by Lord Johnston, Ordinary) and **opinion** (per Lord M'Laren), that the will had not been validly executed.

Brownlee v Robb, 1907 S.C. 1302; 44 S.L.R. 876; 15 S.L.T. 261.

(37)

In a petition under sec. 39 of the Conveyancing (Scotland) Act, 1874, to have it declared that a testamentary writing, to which the signature of one of the two attesting witnesses had been adhibited after the death of the testator, was duly subscribed, **held** that an attesting witness cannot adhibit his signature after the death of the granter of the deed, and, accordingly, that the testamentary writing was invalid. Rules and principles regulating the attestation of deeds discussed and explained.

Walker v Whitwell, 1916 S.C. (H.L.) 75; 53 S.L.R. 129; 1916, 1 S.L.T. 2.

(38)

Duplicate missives of sale of heritage were written out by a third party and subscribed by the seller and purchaser in presence of other persons not specially called as witnesses. The purchaser, four months afterwards, repudiated the bargain, and the seller then caused the persons who had been present to subscribe the missive in her possession as instrumentary witnesses, and had a testing clause added. **Held** that the subscription of the witnesses and the testing clause had been competently added, and that the missive was a probative writ.

Stewart v Burnas, 1877, 4 R. 427; 14 S.L.R. 292.

(39)

After acknowledgment—Act 1681, c. 5.

Held that it was not a good objection under the Act 1681, c. 5, to the validity of a deed, that the attesting witnesses had not subscribed in the presence of the granter after hearing her acknowledge her signa-

ture, but had taken the deed away and appended their signatures in another house within three quarters of an hour thereafter.

Thomson v Clarkson's Trustees, 1892, 20 R. 59; 30 S.L.R. 93.

(40)

After lodging for recording.

Circumstances in which the Court authorised a testamentary deed (not bearing the signatures of the instrumentary witnesses) which had been lodged with the Keeper of the Register of Deeds, &c., for the purpose of being recorded for preservation in the Books of Council and Session, but which had not yet been recorded, to be signed by the instrumentary witnesses in presence of the Keeper of the Register, on condition that an extract which had been issued before recording be returned to the keeper, and that a copy of the deliverance should be added to future extracts, and authenticated by the Keeper as part of the extract and decree.

Murray, 1904, 6 F. 840; 41 S.L.R. 640; 12 S.L.T. 156.

(iii) Acknowledgment.

(41)

Form of acknowledgment—Authority to attest acknowledgment of signature—Act 1681, c. 5.

Where a person, who was not present at the time when the granter of a deed signed it, afterwards subscribes as a witness to the signature, it is sufficient compliance with the statute 1681, c. 5, if he receive from the granter a sufficient acknowledgment of his signature, in whatever form that acknowledgment may be made.

Cumming v Skeoch's Trustees, 1879, 6 R. 963; 16 S.L.R. 574.

(42)

—Res gestæ.

In an action of reduction of a will an issue was sent to trial, "Whether the alleged witnesses did not see A B subscribe the same, and did not hear him acknowledge his subscription?" The presiding judge directed the jury that "If there be, at the time of the witnesses subscribing, any sufficient acknowledgment by the party of his signature, in whatever form that acknowledgment may have been made, that is all which is required," and refused to give the direction demanded by the pursuers' counsel "that the witnesses must have heard the party acknowledge by his own spoken words the subscription." Bill of exceptions, on the grounds (1) that the ruling was bad in law; and (2) that even if it was good law in the abstract it was inappropriate to the issue and misleading; disallowed.

Res gestæ which held to amount to a virtual acknowledgment by the testator of his signature to one of the witnesses who did not see him sign, and to justify the verdict.

Cumming v Skeoch's Trustees, 1879, 6 R. 963; 16 S.L.R. 574.

(43)

Circumstances tantamount to acknowledgment in which the execution of a deed was held good when it was alleged that an instrumentary witness had neither seen the deed signed nor heard the granters acknowledge their signature.

Sutherland v W. M. Low & Co., (O.H.) 1901, 8 S.L.T. 395; affirmed on another ground, 1901, 3 F. 972; 38 S.L.R. 720; 9 S.L.T. 91. *FRAUD*, No. 43.

(iv) Absence of Witness's Signature.

(44)

One of the instrumentary witnesses never signed the minute of enactment in favour of the purchaser at a sale of heritage by auction. Held (by Lord Kyllachy, Ordinary) that a valid contract of sale had not been completed.

Moncrieff v Lawrie, 1896, 23 R. 577; 33 S.L.R. 452; 3 S.L.T. 298.

(4) TESTING CLAUSE.

(a) Added *ex Intervallo*.

(45)

Supplemented after granter's death.

In a case in which a testator, who died in March, 1874, had left a codicil with a defective testing clause, which had been supplemented after his death, held that the deed was probative.

Question how far the provisions of secs. 38 and 39 of the Conveyancing Act, 1874, as to authentication of deeds, have a retrospective effect.

Veasey v Malcolm's Trustees, 1875, 2 R. 748; 12 S.L.R. 479.

(46)

Mutual deed—Added after repudiation by one of the parties.

Duplicate missives of sale were signed but not tested. Four months afterwards the purchaser repudiated. The seller then caused parties present at the signing, though not called as instrumentary witnesses, to sign as such the missive in her possession, and added a testing clause.

Held that the missive was probative.

Stewart v Burns, 1877, 4 R. 427; 14 S.L.R. 292.

(47)

Deed produced in judgment.

Some years after a person's death an action was raised against his executor-dative for payment of an alleged legacy. The will founded on, when produced in process, was held by the sheriff-substitute not to be regularly tested, as the testing clause did not mention the name of the writer of the deed; but before answer he allowed an addition to be made to the testing clause. Held that the deed was null under the Act 1681, c. 5, and that the testing clause could not be completed after the will had been produced in judgment.

Hill v Arthur, 1870, 9 M. 223; 43 J. 171; 8 S.L.R. 176.

(48)

Deed produced in process but not founded on.

Where a deed with an incomplete testing clause was produced in process by one of the parties, who did not found on it, **held** that the opposite party was entitled to have the testing clause completed and effect given to the deed in the process.

Millar v Birrell, 1876, 4 R. 87; 14 S.L.R. 58.

(b) Designation of Witness.

(49)

Discrepancy between signature of witness and name in testing clause—Conveyancing (Scotland) Act, 1874, sec. 39.

The testing clause of a recorded disposition of heritage bore, *inter alia*, that the disposition had been subscribed by Hugh James Rollo (one of the granters) "before these witnesses, William Robertson, apprentice, and John Alexander James, clerk, both to me, the said Hugh James Rollo." The subscription of one of the witnesses to what bore to be Rollo's subscription was "William Robertson, witness." A proof, allowed in a petition under the 39th section of the Conveyancing (Scotland) Act, 1874, established that William Robertson, apprentice to Rollo, had attested Rollo's subscription by subscribing the words "William Robertson, witness," appearing on the disposition in question. **Held** that the discrepancy between "Robertson" and "Roberton" was an informality of execution within the meaning of the 39th section of the Act, that that section therefore applied, and, looking to the proof, that the petition fell to be granted.

Richardson's Trustees, 1891, 18 R. 1131; 28 S.L.R. 889.

(50)

How to be designed.

Held that the Act 1681, c. 5, did not require the insertion in the testing clause of probative deeds of the names of the subscribing witnesses, but only of such a designation as along with their subscriptions was sufficient for identification.

M'Dougall v M'Dougall, 1875, 2 R. 814; 12 S.L.R. 502.

(51)

Subscribing witness not designed—Conveyancing (Scotland) Act, 1874, secs. 38 and 39.

Thomson's Trustees v Easson, 1878, 6 R. 141; 16 S.L.R. 67, No. 60, *infra*.

(52)

Erroneous designation.

In the testing clause of a deed of entail granted by two sisters, their servant, who signed as witness to their signatures, was designed as "their" servant instead of "our" servant. **Held** that as the meaning was plain from the context the mistake did not invalidate the deed.

Speirs v Speirs' Trustees, 1878, 5 R. 923; 15 S.L.R. 649.

(c) Provisions in Testing Clause.

(53)

Held that words inserted in the testing clause of a deed can have no effect in altering or adding to its provisions.

Blair v Assets Co., 1896, 23 R. (H.L.) 36; [1896] A.C. 409; 33 S.L.R. 539; 4 S.L.T. 13.

(54)

The testing clause of a trust settlement bore that the deed was subscribed "under the express provision and declaration, viz., that the whole of the legacies, &c., shall be strictly alimentary, and shall not be arrestable or attachable for the debts" of the beneficiaries. **Question**, whether a judgment of the First Division (1877, 5 R. 97), holding that the restriction was ineffectual, because it occurred only in the testing clause, was sound. **Opinion** (per Lord Gordon) that the decision was not consistent with the principle laid down by the House in Dunlop v Greenlees, 1865, 3 M. (H.L.) 46.

Chambers' Trustees v Smith, 1878, 5 R. (H.L.) 151; 3 App.Cas. 795; 15 S.L.R. 541.

(5) PROOF OF IMPROBATIVE WRITS UNDER CONVEYANCING (SCOTLAND) ACT, 1874, SEC. 39.

(55)

Whether retrospective.

Question, how far the provisions of sec. 39 of the Conveyancing (Scotland) Act, 1874, have a retrospective effect.

Veasey v Malcolm's Trustees, 1875, 2 R. 748; 12 S.L.R. 479.

(56)

Held that this enactment did not apply to deeds executed prior to 1st October, 1874, the date when the Act came into operation.

Gardner v Lucas, 1878, 5 R. (H.L.) 105; 3 App.Cas. 582; 15 S.L.R. 740.

(57)

Informality of execution—Witnesses.

Opinion that the fact that the signature to a deed was neither adhibited nor acknowledged in the presence of one of the attesting witnesses is a fatal defect, and not a mere informality of execution in the sense of sec. 39 of the Conveyancing (Scotland) Act, 1874.

Forrests v Low's Trustees, 1907 S.C. 1240; 44 S.L.R. 925; 15 S.L.T. 330.

(58)

Witnesses—Necessity for attestation.

Held that the Conveyancing (Scotland) Act, 1874, sec. 39, did not apply to a case where the signatures of witnesses bearing to attest the subscription of the granter of a deed were adhibited before the subscription of the granter, and where the witnesses neither

saw the granter sign nor heard him acknowledge his subscription.

Smyth v Smyth, 1876, 3 R. 573; 13 S.L.R. 356.

[*Cf. Stewart v Burns*, 1877, 4 R. 427; 14 S.L.R. 292, No. 38, *supra*.]

(59)

Witnesses—Proof.

A person died leaving a trust disposition bearing to be subscribed by himself and attested by two witnesses, but without a testing clause. His representatives presented a petition under sec. 39 of the Conveyancing (Scotland) Act, 1874, craving a proof, and thereafter to have it declared that the deed was subscribed by the granter and witnesses. The Court allowed a proof by commission, and thereafter found and declared as craved.

Addison, 1875, 2 R. 457; 12 S.L.R. 334.

(60)

Witnesses — Designation — Competence.

In a petition under the 39th section of the Conveyancing (Scotland) Act, 1874, to have it declared that a testamentary writing was subscribed by the granter and witnesses by whom it bore to be subscribed, held that it was no objection to the competency of the petition that the particular informality sought to be cured was the want of the designations of the subscribing witnesses, which, by the 38th section of the statute, might have been appended before the writing was founded on in any Court, but which remedy was no longer applicable.

Thomson's Trustees v Easson, 1878, 6 R. 141; 16 S.L.R. 67.

(61)

Witnesses' designations.

The executors-nominate under a last will and testament recorded in the books of a sheriff court, presented a petition under sec. 39 of the Conveyancing (Scotland) Act, 1874, to set up the deed. The informality of execution was that the designation of the attesting witnesses was wanting. The petitioners moved the Court to grant warrant for the delivery of the deed to them for the purpose of exhibition to one of the witnesses resident in India. The Court granted the motion on the petitioners finding caution for the return of the deed *quam primum*, an extract duly authenticated being previously lodged in its stead.

Garrett, 1883, 20 S.L.R. 756.

(62)

Witnesses—Designation—Proof.

A person died leaving a will and codicil partly written and partly printed, bearing to be subscribed by herself and attested by two witnesses, but the witnesses' designations were neither contained in the deeds nor appended to their signatures. Her executor presented a petition under sec. 39 of the Conveyancing (Scotland) Act, 1874, stating that the will and codicil were subscribed and

witnessed by the persons whom he mentioned in the petition, and craving a proof, and thereafter to have it declared that the deeds were subscribed by the granter and by the persons by whom the deeds bore to be attested. The Court allowed a proof by commission, and thereafter found and declared as craved.

Nisbet, 1897, 24 R. 411; 34 S.L.R. 301; 4 S.L.T. 279.

(63)

Discrepancy between signature of witness and name in testing clause.

Richardson's Trustees, 1891, 18 R. 1131; 28 S.L.R. 889, No. 49, *supra*.

(64)

Discrepancy between signature of granter and name of granter in body of deed and testing clause—Conveyancing (Scotland) Act, 1874, sec. 39.

A disposition of heritable subjects was subscribed "Isabella C. Moncur," whereas the body of the deed bore that it was granted by, and the testing clause that it was subscribed by, "Mrs. Isabella Williamson or Moncur." Another disposition of heritage was subscribed "Joan Colville Brown," whereas the body of the deed bore that the granter was Mrs. Joan Colville or Brown, and the testing clause made no reference to the discrepancy. In a petition under the Conveyancing (Scotland) Act, 1874, sec. 39, for declarator that the deeds were duly subscribed by the granters thereof, held that the petition was unnecessary and must be dismissed.

Grieve's Trustees v Japp's Trustees, 1916, 54 S.L.R. 176; 1917, 1 S.L.T. 70.

(65)

Where one of the witnesses is subscribing *ex intervallo*, and after granter's death.

A will was subscribed by the granter in presence of two persons, one of whom only at the time adhibited his signature as an instrumentary witness, the parties being under the impression that this was enough. Some time after the death of the granter, the other added his signature as an attesting witness to the granter's signature. Held that subscription by a witness after the granter's death was a fatal defect, and not a mere informality of execution in the sense of the 39th section of the Conveyancing (Scotland) Act, 1874, and that the will was accordingly invalid.

Walker v Whitwell, 1916 S.C. (H.L.) 75; 53 S.L.R. 129; 1916, 1 S.L.T. 2.

(66)

Subscription of granter—Deed consisting of more than one sheet subscribed on last page only.

Held that a writing in the form of a deed consisting of more than one sheet, and bearing the name of the alleged granter by way of subscription on the last page only, along

with the names, also by way of subscription, of two attesting witnesses, may be proved by evidence prout de jure to be a "deed, instrument, or writing subscribed by the grantor or maker" within the meaning of the 39th section of the Conveyancing Act, 1874.

M'Laren v Menzies, 1876, 3 R. 1151; 13 S.L.R. 703.

(67)

—Proof of signature.

A draft trust disposition and settlement, prepared by a law agent on the instructions of a client, was written on eight pages of two sheets of paper folded bookwise, and sent to the client, who, after the lapse of five years, took it to his bank, where he signed it on the last page only before two of the bank clerks, who subscribed as witnesses. There was no testing clause. The deed was found in the client's repositories at his death. In a petition to the Court under sec. 39 of the Conveyancing Act, 1874, for declarator that the deed was subscribed by the client as the maker thereof, and by the witnesses, the above facts were proved. Held that the deed had been signed by the client as the maker thereof, and by the witnesses, and that it was a valid testamentary writing.

Inglis' Trustees v Inglis, 1901, 4 F. 365; 39 S.L.R. 253.

(68)

—Codicil written partly on probative will, partly on separate paper, and subscribed on latter only.

A codicil relative to a properly signed and attested will was written partly on a blank space at the end of the last sheet of the will, and partly on a separate sheet. The latter part of the codicil was duly signed and tested, but the former part was unsubscribed. Held that the codicil was a "deed, instrument, or writing" which might be proved by evidence prout de jure to have been "subscribed by the grantor or maker," within the meaning of the 39th section of the Conveyancing (Scotland) Act, 1874.

Brown, 1883, 11 R. 400; 21 S.L.R. 267.

(69)

Foreign—Will made according to law of New Zealand—Titles to Land Consolidation (Scotland) Act, 1868, sec. 20.

A person died domiciled in New Zealand possessed of heritable estate situated in Scotland, and leaving a trust disposition and settlement, good according to the law of New Zealand, but not probative according to Scots law. The trustees, in order to entitle them to make up a title to the heritable estate in Scotland, presented a petition under sec. 39 of the Conveyancing (Scotland) Act, 1874, for declarator that the settlement was duly subscribed. The Court granted the petition, but held that the deed was already valid under sec. 20 of the Titles to Land Consolidation (Scotland) Act, 1868.

Browne, 1882, 20 S.L.R. 76.

2. SUBSCRIPTION BY NOTARIES.

(70)

Personal objection—Mutual deed—Same notary for different parties.

Held that it was not a nullity under the statute that the same two notaries had subscribed for each of the two parties to a mutual settlement, revocable by either.

Grame v Grame's Trustees, 1868, 7 M. 14; 41 J. 15; 6 S.L.R. 7.

(71)

—Marriage contract—Notary signing for wife—Husband's law agent.

A widow brought an action of reduction of her antenuptial marriage contract against her husband's trustees on the ground that the notary public who executed the deed on her behalf, she being unable to write, was at the time acting as her husband's law agent in the matter. Question, whether the execution was invalid.

Lang v Lang's Trustees, 1889, 16 R. 590; 26 S.L.R. 466.

(72)

—Notary sole executor and intromitter.

A person who is nominated sole executor and intromitter under a settlement cannot competently act as notary in the execution of that settlement.

Chisholm v Macrae, (O.H.) 1903, 41 S.L.R. 300; 11 S.L.T. 416.

(73)

—Notary appointed trust agent.

A will was held to be invalid on the ground that the notary signing it was appointed law agent on the trust estate.

Newstead v Dansken, (O.H.) 1918, 1 S.L.T. 136.

(74)

Necessary formalities—Application of Conveyancing (Scotland) Act, 1874, sec. 39.

In an action of reduction of an alleged will purporting to be notarially executed, the pursuer averred that the notary (1) neither wrote his docquet (2) nor adhibited his signature in presence of the granter. The Lord Ordinary allowed issues, holding that the statutory requirements were that the notary must read the deed over; that he must subscribe it in presence of the granter and by his authority and also in the presence of the witnesses; that the witnesses must see or hear the authority given; and that there must be a docquet in a certain form, which must be adhibited in presence of the granter as well as of the witnesses. If the witnesses signed outwith the presence of the granter, this also would be a grave irregularity. Sec. 39 of the Conveyancing (Scotland) Act, 1874, did not apply to notarial execution.

Kissack v Webster's Trustees, (O.H.) 1894, 2 S.L.T. 172.

(75)

—Signature and docquet—Conveyancing (Scotland) Act, 1874, sec. 41.

A deed written upon one page had ap-

pendent to it on the same page a docquet by a notary public, stating, *inter alia*, that, by the authority of the granter, he subscribed these presents for him. The docquet was signed by the notary and witnesses, but the notary did not add a separate signature to the deed. **Held** that the execution was valid.

Mathieson v Hawthorns & Co., 1899, 1 F. 468; 36 S.L.R. 356; 6 S.L.T. 311.

(76)

—Whether deed “read over” to granter—Conveyancing (Scotland) Act, 1874, sec. 41.

A docquet appended to a deed, which had been executed notarially under the 41st section of the Conveyancing (Scotland) Act, 1874, bore that the deed had “been previously gone over and explained” to the granter, but not that it had been “read over” to him. In a reduction of the deed, the pursuers averred that the deed had not been read over to the granter. The defenders averred that it had been twice read over to him before subscription, the first time verbatim, and the second time, if not verbatim, at all events substantially, no material word being omitted. The Court allowed parties a proof of their averments before answer.

Watson v Beveridge, 1883, 11 R. 40; 21 S.L.R. 31.

(77)

Requisites of docquet—Holograph.

Held that a testament signed for a blind man by one notary and two witnesses was invalid, in respect that the notary’s docquet was not holograph. **Observed** that the legal equivalent for the signature of a person who cannot write is not merely the notary’s signature, but also the docquet attesting the facts of the inability of the granter of the deed to write, and of his having conferred authority on the notary to subscribe for him.

Henry v Reid, 1871, 9 M. 503; 43 J. 237; 8 S.L.R. 356.

(78)

Held (1) that a testament bearing to be signed for the granter by a justice of the peace was invalid, in respect that the docquet signed by the latter was not holograph; and (2) that the defect could not be remedied after the testator’s death.

Campbell v Purdie, 1895, 22 R. 443; 32 S.L.R. 316; 2 S.L.T. 547.

(79)

—Conveyancing (Scotland) Act, 1874, sec. 41.

Held that the necessity for a notarial docquet being holograph was not removed by the provisions of the 41st section of the Conveyancing (Scotland) Act, 1874, and that a deed bearing to be signed for the granter by a justice of the peace was invalid in respect that the docquet signed by the latter was not holograph.

Irvine v M’Hardy, 1892, 19 R. 458; 29 S.L.R. 361.

v 51

(80)

—Form—Conveyancing (Scotland) Act, 1874, sec. 41.

Held that the 41st section of the Conveyancing (Scotland) Act, 1874, does not prescribe the use of the form in sched. (I.), but merely suggests it as a good form, and that therefore a notarial docquet which was otherwise sufficient was not rendered invalid by its disconformity to the schedule.

Atchison’s Trustees v Atchison, 1876, 3 R. 388.

3. HOLOGRAPH.

(1) WHAT IS HOLOGRAPH.

(81)

Document partly holograph.

A document partly holograph, partly not, but signed by granter, **held** sufficient proof of loan.

Christie’s Trustees v Muirhead, 1870, 8 M. 461; 42 J. 215; 7 S.L.R. 273.

(82)

—Will—Lithograph.

Opinion (by Lord Gifford, Ordinary) that a will of which the formal clauses were lithographed, but the names of the testator and trustees and the effective words disposing of the estate were in the handwriting of the testator, was holograph of the testator.

A’s Executors v B, (O.H.) 1874, 11 S.L.R. 259.

(83)

—Will—Print.

A B, a domiciled Scotsman, resident in Shanghai, filled up, dated, and signed a printed form of a will drawn in English style, but left the annexed attestation schedule blank, there being no subscribing witnesses. The form contained blanks (1) for the name of the testator; (2) for the names of the legatees; and (3) for the name of an executor. In the first A B inserted his own name and designation, in the second the names of his two brothers, and the words “equally and jointly, if one deceased to the survivor only,” and in the third the name of a friend. The words of bequest and the description of the subjects were in print. The whole document, with the manuscript insertions, read as a bequest by A B of his whole heritable and moveable property to his two brothers. The execution of the will was defective according to the law of England, the *lex loci actus*, but it was founded on as a valid will by the law of Scotland. **Held** that the document could not receive effect as a holograph will.

Macdonald v Cuthbertson, 1890, 18 R. 101; 28 S.L.R. 92.

(84)

—Will—Partly written by law agent.

A lady filled up a sketch of provisions of a will which had been prepared by her

law agent and signed it. **Held** that it was a valid will.

Murdoch's Judicial Factor v Thomson, (O.H.) 1896, 4 S.L.T. 155.

(85)

Terms of a signed but unattested testamentary writing, partly holograph and partly printed, which were **held** to constitute a valid will, in respect that the holograph portions expressed the testamentary intentions of the writer.

Carmichael's Executors v Carmichael, 1909 S.C. 1387; 46 S.L.R. 807; 1909, 2 S.L.T. 4.

(86)

"Before these witnesses."

A testator wrote the words "before these witnesses" above his signature to a holograph will. **Held** that by these words he had not prescribed attestation before witnesses as a necessary solemnity to his signature.

Gunnell's Trustees v Jones, (O.H.) 1915, 1 S.L.T. 166.

(87)

Unauthenticated marginal addition.

Brown v Maxwell's Executors, 1884, 11 R. 821; 21 S.L.R. 549, No. 170, *infra*.

(88)

Unauthenticated pencil indorsation on outside of holograph testament.

Petticrew's Trustees v Pettigrew, &c., 1884, 12 R. 249; 22 S.L.R. 171, No. 171, *infra*.

(89)

Pencil alterations on holograph will written in ink.

Currie's Trustees v Currie, 1904, 7 F. 364; 42 S.L.R. 297; 12 S.L.T. 613, No. 172, *infra*.

(90)

Holograph of a firm.

Held that a letter written and signed by one of the partners of a company in the firm name was holograph of the firm.

Nisbet v Neil's Trustee, 1869, 7 M. 1097; 41 J. 637; 6 S.L.R. 691.

(91)

An offer for the purchase of heritage belonging to a charitable corporation was made in the handwriting of one member of a firm, and signed with the company signature by another, but the acceptance was in the handwriting of a clerk, and though signed by the acceptor was not tested. **Held** that the offer was holograph of the firm, but the acceptance improbative, and that therefore there was no contract of sale.

McLaren v Law, (O.H.) 1871, 44 J. 17.

(92)

Authentication by signature—Granter unable to read—Document acknowledging indebtedness—Document neither holograph nor tested—Evidence to prove document grantor's writ—Proof.

In support of a claim due as wages by the father, a daughter, after her father's death,

produced a document acknowledging his indebtedness to the extent claimed. This document was signed by the father, but was neither holograph nor tested, and except the signature was written by the daughter. The father could not read writing. **Held** that the daughter must prove that the document produced had been read over and explained to her father, and that he understood what he was signing, and evidence upon which **held** that she had failed to do so.

Macnaughton v Finlayson's Trustees, 1902, 40 S.L.R. 645; 10 S.L.T. 322.

(93)

Telegram.

The manager of a bank sent to a builder an improbative letter offering to sell a distillery which belonged to the bank. The builder sent a written acceptance of the offer to the bank manager. The bank manager then sent a telegram to the builder, which, the builder alleged, recognised or homologated the offer to sell the distillery contained in the improbative letter. **Question** (per Lord Kincairney, Ordinary), whether a telegram could be holograph of the sender of it.

Mowat v Caledonian Banking Co., (O.H.) 1895, 3 S.L.T. 108. Judgment affirmed, 1895, 23 R. 270; 33 S.L.R. 203; 3 S.L.T. 186.

(94)

Pencil entries in defender's ledger—Loan—Proof—Writ sufficient to prove loan.

Hope v Derwent Rolling Mills Co., 1905, 7 F. 837; 42 S.L.R. 794; 13 S.L.T. 364. *Loan*, No. 31.

(2) GRANTER'S SIGNATURE.

(95)

Unauthenticated holograph writing accompanied by letter subscribed with Christian name only.

A lady, two years before her death, delivered to her nephew a sealed-up packet, bearing on the outside her signature and the nephew's name. Attached to the packet by a string was an envelope addressed to the nephew as from her, these names also being in her writing. When delivering the packet she stated that it contained her will, and was not to be opened till her death. When the packet was opened after her death it was found to contain a holograph writing commencing with the words—"I, A B, do hereby make my last will and testament," but the writing itself was not subscribed. In a holograph letter which was in the envelope attached to the packet she referred to having made her will; and gave directions as to her burial. This letter was only signed with her Christian name. **Held** that in the circumstances of the case the presumption that an unsigned holograph will was incomplete had been displaced, and that the writing was a valid testament.

Russell's Trustees v Henderson, 1883, 11 R. 283; 21 S.L.R. 204.

(96)

Unauthenticated holograph writing accompanied by writing subscribed by initials.

After the death of H S there was found in a locked desk, of which she kept the key, two holograph writings, one on a sheet of paper, and the other on a smaller piece of paper, the sheet being within an envelope, and the smaller paper partly pushed into the same envelope. The sheet was dated, and commenced as follows:—"Wishing to make some little changes in my settlements, I, Helen Speirs," &c. It was not subscribed. The smaller paper began with "Also," and was initialed "H S." It was admitted that H S was in the habit of subscribing letters and documents with initials only, and that she had frequently referred to her will in conversation, and specially mentioned certain bequests which appeared in the holograph writings. **Held** that the two writings formed a probative and valid last will and testament.

Speirs v Home Speirs, 1879, 6 R. 1359; 16 S.L.R. 784.

(97)

Unauthenticated holograph writing subscribed "your loving mother"—Clause validating informal writings.

A testatrix by her settlement directed her trustees to "give effect to any wishes which I may hereafter express in writing, however informal." She subsequently executed an unsigned holograph writing in favour of certain of her children which she subscribed "Your loving mother." The writing was found in her repositories after her death enclosed in a sealed envelope on which she had indorsed the words "Not to be opened until." **Held** that the document was a valid testamentary writing.

Pentland v Pentland's Trustees, (O.H.) 1908, 46 S.L.R. 291; 16 S.L.T. 480.

(98)

Superscription—Name in gremio.

A writing, in the form of an unsigned will, holograph of a person deceased, was found in his repositories. The writing commenced thus—"I, Alexander Skinner." It then proceeded to dispose of the whole property of the deceased, and it ended thus—"And this written at Newton of Abbots-hall, by my own hand, this 17th day of July, 1882." **Held** that, as the document was not subscribed, it could not receive effect as a valid testamentary writing.

Skinner v Forbes, 1883, 11 R. 88; 21 S.L.R. 81.

(99)

Held that an unsigned holograph document commencing, I, A B, and purporting to be the writer's will, was not a valid settlement, though it was backed with "Disposition and settlement by A B, 1908."

Shiell v Shiell, (O.H.) 1913, 1 S.L.T. 62.

(100)

Held that an unsubscribed holograph document in these terms—"Mr. Lewis Shedden I leave this to my sister Janet Shedden," written on the back of a bank

deposit receipt, belonging to Lewis Shedden, could not receive effect as a testamentary writing, and that it was incompetent to prove by parole evidence that it was the intention of the writer that it should receive effect after his death.

Goldie v Shedden, 1885, 13 R. 138; 23 S.L.R. 87.

(101)

A document was found in the repositories of the deceased Miss Jessie Taylor enclosed in an unsealed envelope on which was written "My will." The document, which was holograph of the deceased, was written on one side of a sheet of paper and contained a list of bequests which disposed of the whole of her estate. It was headed, "Sunnybank Alford My last Will Jessie Taylor," but was not signed by her at the end. **Held** that, in the absence of subscription, the document could not receive effect as a valid testamentary writing.

Taylor's Executrices v Thom, 1914 S.C. 79; 51 S.L.R. 55; 1913, 2 S.L.T. 337.

(102)

Unsubscribed holograph document—Adoption—Writing on closed envelope containing document—Subscription or docquet.

In the repositories of the deceased Joseph Stenhouse was found a closed envelope, upon which he had written the words—"Will & testimony off Joseph Stenhouse for Mr. Sturrock, S S C, Dalkeith." The envelope contained a document, holograph of the deceased, but not subscribed, headed, "18 Westfield Park, Dalkeith. Will & testimony of Joseph Stenhouse. April, 1915," and purporting to dispose of his whole estate. **Held** that the writing on the envelope was a docquet or backing, and not a subscribed writ adopting as a will the document therein contained; and, accordingly, that the document, not being itself subscribed, was invalid as a testamentary writing.

Stenhouse v Stenhouse, 1922 S.C. 370; 59 S.L.R. 297; 1922 S.L.T. 259.

(103)

—Name in gremio—Delivery.

Held that an unsubscribed holograph offer regarding heritage, containing the writer's name as granter in gremio, delivered for the purpose of being acted on, was binding on the writer when accepted.

Weir v Robertson, 1872, 10 M. 438; 44 J. 238.

(104)

Unsubscribed holograph writing underneath subscribed holograph settlement.

A holograph writing, occurring below the subscription to a holograph trust settlement, and containing bequests of specific articles **held** to be effectual, as part of the trust settlement, although not itself subscribed.

Burnie's Trustees v Lawrie, 1894, 21 R. 1015; 31 S.L.R. 841; 2 S.L.T. 153.

(105)

Extrinsic evidence to set up will in absence of subscription.

An unsubscribed writing in the form of a

will, holograph of a person deceased, commenced thus—"I, Ethel F. Costello," these words being underlined, and proceeded thereunder, "I will all the money I have" in certain legacies. **Held** that as the document was not subscribed it could not receive effect as a valid testamentary writing, and that no evidence was admissible to set it up.

Foley v Costello, 1904, 6 F. 365; 41 S.L.R. 286; 11 S.L.T. 660.

(106)

Grantor's signature on covering envelope.

An unsigned testamentary writing was placed by A B, the writer of it, in an envelope bearing the inscription, "The will of A B." He closed the envelope and kept it in a locked box with valuable papers, which he instructed his sister to hand to his agent after his death. The inscription on the envelope and the enclosed writing were both holograph of the writer. On the death of the writer, **held** that the writing was the valid and effectual will of the deceased.

Murray v Kuffel, (O.H.) 1910, 2 S.L.T. 388.

(107)

A testator left an unsigned holograph will enclosed in an envelope. On the envelope was docqueted "my holograph will, &c." This docquet was signed. **Held** that the envelope was not part of the will and therefore the will was not a valid testament.

France's Judicial Factor v France's Trustees, (O.H.) 1916, 1 S.L.T. 126.

(108)

—Unsigned holograph testamentary writing in sealed packet bearing grantor's signature and name of nephew — Packet attached by string to envelope addressed to nephew and containing holograph testamentary writing superscribed only.

Russell's Trustees v Henderson, 1883, 11 R. 283; 21 S.L.R. 204, No. 95, supra.

(109)

Subscription on last page of several sheets —Holograph will—Confirmation.

Held (1) that in respect of the long-continued practice of the Commissary Court, when an untested writing bearing to be the holograph will of a person deceased is produced by the person therein named as executor to the commissary for confirmation, he should grant it de plano if there be no opposition; and (2) that the rule applies where the writing is in several separate sheets, and is signed only on the last page.

Cranston, 1890, 17 R. 410; 27 S.L.R. 305.

(3) ADOPTION AS HOLOGRAPH.

(110)

Grantor's understanding of words of adoption.

An offer to purchase heritable property written by the seller's law agent was signed by the offerer, and contained above the offerer's signature and in his handwriting the

words "adopted as holograph." The offer was accepted by the seller. Circumstances in which **held** that the missives were not binding on the offerer—an illiterate man who had not been advised by a separate agent—the Court not being satisfied on the evidence that he understood the effect of the words "adopted as holograph," or meant by adding them to his signature to make the document irrevocably binding on him.

Harvey v Smith, 1904, 6 F. 511; 41 S.L.R. 292; 11 S.L.T. 667.

(111)

Adoption below signature.

A missive offer to take a building feu was neither holograph nor tested, but below the offerer's signature were the words, in his handwriting, "adopted as holograph." **Held** that the missive was to be regarded as holograph.

Gavine's Trustee v Lee, 1883, 10 R. 448; 20 S.L.R. 303.

(112)

Documents of debt pinned together with holograph writing importing legatum liberationis.

In the repositories of a deceased four I O U's and a letter from the borrower, acknowledging the sum for which one of them had been granted, were found pinned together and folded so that the back of the letter was outermost; and on the back of the letter there was a holograph note signed by the truster, "I don't want this money paid up." **Held** that the writing constituted a valid bequest in cancellation of the debts contained in the I O U's.

Mitchell's Trustees v Pride, 1912 S.C. 600; 49 S.L.R. 452; 1912, 1 S.L.T. 302.

(113)

Holograph repetition of substance of non-holograph writing—Loan—Acknowledgment.

In an action for repetition of an alleged loan of £50, the pursuer founded on a document bearing the defender's signature in the following terms:—"I acknowledge having received the sum of £50 sterling from my sister, A M. Should it ever be in my power to repay her this sum, I will do so if required. *Received the sum of £50 stg.—James Muirhead.*" It was proved that the words in italics and the signature were holograph of the defender, and had been added by him to the other portion which was not holograph. **Held** that the loan had been proved.

Christie's Trustees v Muirhead, 1870, 8 M. 461; 42 J. 215; 7 S.L.R. 273.

(114)

Adoption of improbativ will by holograph codicil—Adoption of improbativ codicil by holograph postscript to letter.

A testator dictated his will to his wife, and signed the will. He then wrote and signed a holograph codicil, in which he conferred certain powers and immunities on his trustees. The testator's wife wrote out a second

codicil, which the testator signed. She also wrote a letter to the testator's law agent requesting him to put the will into legal shape. To this letter the testator added a holograph and signed postscript to the effect that all this had been done by his wife at his request. **Held** (1) that the first codicil was a sufficient adoption of the improbativ will, notwithstanding evidence to the effect that the testator knew that the will required to be witnessed; and (2) that the postscript was not a testamentary document, and did not validate the second codicil.

Cross's Trustees v Cross, (O.H.) 1921, 1 S.L.T. 244.

(115)

Unsubscribed holograph document—Adoption—Writing on closed envelope containing document—Subscribed writ or docquet.

Stenhouse v Stenhouse, 1922 S.C. 370; 59 S.L.R. 297; 1922 S.L.T. 259, No. 102, supra.

(116)

Writing partly holograph—Receipt—Partly holograph and signed.

In the repositories of Thomas Maitland, deceased, there was found a deposit receipt for £900 enclosed in an envelope, on the back of which were these words—"To my executors. —Miss Margaret Maitland.—This nine hundred pounds belongs to her,—five hundred to be sunk for her, and the remaining four to be given her. Thomas Maitland." Only the words, "To my executors" and the signature were in the handwriting of the deceased. **Held** that the words which were holograph were not sufficient to infer adoption of the part of the writing which was not holograph, and that the bequest, being neither tested nor holograph, was not effectual.

Maitland's Trustees v Maitland, 1871, 10 M. 79; 44 J. 48; 9 S.L.R. 51.

(117)

Unauthenticated holograph writing accompanied by writing subscribed by initials.

Speirs v Home Speirs, 1879, 6 R. 1359; 16 S.L.R. 784, No. 96, supra.

(118)

Unauthenticated holograph writing accompanied by letter subscribed with Christian name only.

Russell's Trustees v Henderson, 1883, 11 R. 283; 21 S.L.R. 204, No. 95, supra.

(119)

Unsigned testamentary writing in envelope bearing holograph inscription, "The will of" A B.

Murray v Kuffel, (O.H.) 1910, 2 S.L.T. 388, No. 106, supra.

(120)

Backing on unsubscribed will.

In an action to establish the validity of a holograph, but unsubscribed will, on a sheet of draft paper, which was folded and backed "Disposition and settlement by John Shiel, 1908," the words being in the handwriting

of the testator, **held** that the writing was not a valid will.

Shiell v Shiell, (O.H.) 1913, 1 S.L.T. 62.

(121)

Altered and mutilated will.

An altered and mutilated will was found in the repositories of a deceased person. Part of the testing clause was scored out, and the lower part of the page on which the latter part of the testing clause had probably been written, and which presumably contained the signatures of the testator and of the witnesses, was cut away altogether. Written in red ink on the margin and holograph of the writer were the words "codicil," and "this clause to read my mother, Mrs. A B," and again "the name," C D, "to be revoked in favour of my mother, Mrs. A B, who shall receive all the benefits of this my will—George Liddle (signature of writer)." **Held** that the document was a valid testamentary writing, the body of the writing being adopted as holograph by the writing on the margin.

Liddle v Liddle, (O.H.) 1898, 6 S.L.T. 218.

(122)

Any writing under my hand or signed by me.

A trustor in his trust deed directed his trustees to give effect to "any codicil or separate writing under my hand or signed by me from which my trustees may be satisfied as to my wishes and intentions, notwithstanding the same may be defective in the solemnities required by law." **Question**, whether a holograph writing, undated and unsigned, found in his repositories headed "Notes as to settlement and alterations," and stating that he had "now meantime cancelled" a bequest owing to losses on investments, was a valid testamentary writing.

Lamont v Magistrates of Glasgow, 1887, 14 R. 603; 24 S.L.R. 426.

(123)

Any writing under my hand clearly expressive of my wishes.

A testatrix by a formal trust disposition directed her trustees "to pay any legacies and to carry out any instructions I may give by any writing under my hand clearly expressive of my wishes, although the same may not be formal." An informal writing bearing a subsequent date, neither holograph nor tested, but admittedly bearing the signature of the testatrix, and containing certain bequests, was found in her repositories. **Held** that the informal writing was a testamentary writing of the nature contemplated by the trust disposition, and must receive effect.

Fraser v Forbes's Trustees, 1899, 1 F. 513; 36 S.L.R. 469; 6 S.L.T. 310.

(124)

Clause validating informal writings.

A testator by his settlement directed payment and fulfilment of all legacies and be-

quests left and bequeathed by, inter alia, "any writing under my hand (however informally executed or defective), showing my wishes and intentions." He left an unsigned and undated holograph memorandum apporportioning certain articles of furniture among certain persons. This memorandum he had handed to his law agents to be put up with his settlement. **Held** that the memorandum was not an operative testamentary writing. *Hamilton's Trustees v Hamilton*, 1901, 4 F. 266; 39 S.L.R. 159.

[See also *Morton v French*, 1908 S.C. 171; 45 S.L.R. 126; 15 S.L.T. 517, No. 153, *infra*.]

(125)

—A testator by his will directed his trustees to make payment of "such legacies as I shall bequeath to any person by any codicil hereto, or any memorandum clearly expressive of my will although not formally executed." **Held** that these words did not dispense with the necessity of signatures to the validity of any testamentary writing, and that, accordingly, an unsigned holograph codicil was invalid.

Parker v Matheson, (O.H.) 1876, 13 S.L.R. 405.

(4) WHETHER WRITING DELIBERATIVE OR FINAL.

[See also 5 (1), *infra*, and SUCCESSION V. 1 (6).]

(126)

Holograph memorandum.

In the repositories of a person deceased was found a pencil writing consisting of a list of names and figures, and having written at one side of it the words "Will of John Brennan." These figures and words were not in themselves intelligible without extrinsic evidence of their meaning. **Held**, after a proof, that while it is not necessary that a document relied on as a will take the form of a proposition or completed sentence, the document in question was, by its own appearance and also by the parole proof, shown to be only a memorandum and not to have been intended as a completed will.

Brennan's Executor v Turner, 1885, 22 S.L.R. 632.

(127)

Holograph signed document headed "draft of codicil."

After the death of a person whose settlement by two codicils thereto, had been prepared by law agents and formally executed, there was found in an open drawer, where no important papers were kept, a writing of later date, holograph of and signed by the deceased, headed "draft of codicil," containing a new disposition of his property in favour of his children, but with a blank in the ultimate destination of the estate failing children and their issue. He survived the date of this document for several months, and there was nothing to show that it had been signed subsequent to the date it bore.

Held that the writing was a mere draft, and inoperative as a testamentary writing.

Forsyth's Trustees v Forsyth, 1872, 10 M. 616; 44 J. 353; 9 S.L.R. 367.

(128)

Holograph writing headed "Notes of intended settlement."

In the repositories of a person who died leaving no other testamentary writing, the following holograph document was found bearing a date seven years before his death—"Bankhead, 19th June, 1873.—Notes of intended settlement by Walter Whyte of Bankhead. First, I liferent my wife, Mrs. Margaret Pollok or Whyte, in my whole estate both heritable and moveable, burdened with an annuity of £300 stg., three hundred pounds sterling, a year to," &c. After various bequests expressed in the same full and careful manner, the writer's signature was appended. In an action of declarator that the writing was testamentary (in which a proof was led without throwing any additional light on the question), **held** that the document was testamentary.

Hamilton v White, 1882, 9 R. (H.L.) 53; 7 App.Cas. 400; 19 S.L.R. 688.

(129)

"Sketch of provisions"—Words of gift.

A law agent sent to a lady client a paper entitled "Sketch of provisions of proposed will." The lady not merely filled in blanks in the "sketch," but wrote words, which were capable of being read by themselves without aid from the context, and which imported de presenti gifts of a testamentary character, and she dated and signed the document. **Held** that the document was a valid and effectual will.

Murdoch's Judicial Factor v Thomson, (O.H.) 1896, 4 S.L.T. 155.

(130)

Testamentary writing headed "Rough."

Circumstances in which **held** that a holograph testamentary writing headed "Rough" was not intended by the deceased to receive testamentary effect.

Sprot's Trustees v Sprot, 1909 S.C. 272; 46 S.L.R. 161; 16 S.L.T. 497.

(131)

Pencil codicil.

Held that a codicil written in pencil is effectual if it be clear that it is a testamentary writing and not merely a jotting.

Muir's Trustees, 1869, 8 M. 53; 42 J. 25; 7 S.L.R. 24.

(132)

Pencil alterations — Holograph unsigned document.

Lamont v Magistrates of Glasgow, 1887, 14 R. 603; 24 S.L.R. 426, No. 158, *infra*.

(133)

Holograph pencil memorandum containing list of legacies.

Circumstances where **held** that a holograph pencil memorandum headed "Legacies," and

containing a list of names with sums of money appended to each, which was found tied up with a testator's will, was a valid testamentary document.

Tait's Trustees v Chiene, 1911 S.C. 743; 48 S.L.R. 609; 1911, 1 S.L.T. 360.

(134)

Undated letter cancelling last will and confirming prior will.

Circumstances in which the last will of a testator was held cancelled and a prior will confirmed in accordance with an implied direction to that effect contained in an undated letter which was found along with the two wills in the repositories of the deceased, and which declared that the later will was to take effect only in a certain event which did not occur.

Blackwood v Beveridge, 1875, 12 S.L.R. 384.

(135)

Deletions and pencil alterations.

MacKinnon's Trustees v MacKinnon, (O.H.) 1896, 3 S.L.T. 284, No. 164, infra.

(136)

Settlement revoked under *conditio si testator sine liberis decesserit*—Whether pencil alterations on deed revived settlement.

A solicitor, on 5th February, 1884, made a holograph will in favour of his parents should they survive him, and failing them in favour of his nephew. A year afterwards he married, executing a marriage contract in which he settled part of his estate upon his wife and children. He died in 1889, leaving a widow and children. After his death the will was found in his repositories with some words deleted and altered in pencil in favour of his wife and daughter. The alterations were in his handwriting, but were neither initialed nor signed, and had no date attached to them. **Held** (1) that the will as it originally stood became inoperative by reason of the *conditio si testator sine liberis decesserit*; and (2) that the pencil alterations were to be regarded merely as converting the will into a draft for another will to be afterwards made.

Munro's Executors v Munro, 1890, 18 R. 122; 28 S.L.R. 104.

4. PRIVILEGED WRITS.

(1) IN RE MERCATORIA.

(137)

General rule.

Opinion (per Lord Neaves) that as a general rule no document of importance, except in re mercatoria, is binding unless probative.

M'Laren v Howie, 1869, 8 M. 106; 42 J. 52; 7 S.L.R. 56.

(138)

I O U.

Opinion (per Lord Deas) that an I O U should be holograph.

Bowe & Christie v Hutchison, 1868, 6 M. 642; 40 J. 326; 5 S.L.R. 380.

(139)

I O U—Loan.

An I O U signed by the debtor, though not holograph or tested, is competent evidence to prove loan.

Nicholson v Stuart's Executor, (O.H.) 1896, 3 S.L.T. 233.

(139a)

Opinion (per Lord Kyllachy) that an I O U should be holograph or tested.

Opinion contra (per Lord Young).

Paterson v Paterson, 1897, 25 R. 144; 35 S.L.R. 150; 5 S.L.T. 209.

(140)

Acknowledgment of sum due on account signed by debtor, but written by creditor's shopman and not tested.

G sued the executrix of his deceased brother J for £950, the amount of an account alleged to be due by J to him. The account was for shop furnishings, cash disbursements, and loans of cash above and below £100 Scots, and extended over twelve years. In support of his claim G produced a document written by one of G's shopmen, and signed by J, in which the amount of the account was admitted by J to be due by him. It appeared that this document had been signed by J with a view to enabling G to borrow money, but it had never been used for that purpose. **Held** that the document was not probative in law, nor such as to exclude inquiry into the accuracy of the account, or to obviate the necessity of regular vouchers for the cash advances charged.

M'Adie v M'Adie's Executrix, 1883, 10 R. 741; 20 S.L.R. 476.

(141)

Holograph acknowledgment of loan—Proof of date.

Held that a holograph writing acknowledging receipt of £500 in loan was not a writ in re mercatoria, and did not prove its date.

Purvis v Dowie, 1869, 7 M. 764; 41 J. 396; 6 S.L.R. 492.

(142)

Letter of obligation.

Per Lord Salvesen—"A letter by a bank with which a customer had deposited bonds, written at the request of that customer and addressed to a third party, to the effect that the bank held the bonds for account of the third party, is a writ in re mercatoria."

Stuart v Potter, Choate & Prentice, 1911, 48 S.L.R. 657; 1911, 1 S.L.T. 377.

(143)

Letter not holograph of even date with bill.

A letter not holograph granted of even date with a promissory note and explanatory of it held competent evidence of the facts stated in it. **Opinion** (per Lord Neaves) that it was entitled to the privileges of a writ in re mercatoria.

Thoms v Thoms, 1867, 6 M. 174; 40 J. 99; 5 S.L.R. 131.

(144)

Cautionary obligation.

Question, whether a letter of guarantee is a writing in re mercatoria.

National Bank of Scotland v Campbell, 1892, 19 R. 885; 29 S.L.R. 757.

(145)

—Necessity for probative writ—Mercantile Law Amendment Act, 1856, sec. 6.

Question, whether under the Mercantile Law Amendment Act, 1856, sec. 6, bonds of guarantee are valid if subscribed by the granter although without witnesses.

Snaddon v London, Edinburgh, and Glasgow Assurance Co., 1902, 5 F. 182; 40 S.L.R. 164; 10 S.L.T. 410.

(146)

—For executor—1681, c. 5.

An "act of caution," signed by the cautioner, but without the solemnities required by the Act 1681, c. 5, and engrossed in the books of the Commissary Court, held to bind the subscriber as cautioner for an executor.

Smith v Kerr and Smith, 1868, 7 M. 42; 41 J. 18.

(147)

Award in submission.

An informal and improbable award in a submission sustained where the submission itself was informal and in re mercatoria.

Dykes v Roy, 1869, 7 M. 357; 41 J. 208.

(148)

Account between landlord and tenant —
Holograph of landlord.

In an action by a landlord against his tenant, held that a document in the landlord's handwriting, bearing to be an account between him and his tenant, and having a docket subscribed by both parties, was entitled to the privilege of a writing in re mercatoria.

Fell v Ratray, 1869, 41 J. 236.

(149)

Contract of service.

Held that a contract of service for two years is not a writing in re mercatoria.

Stewart v M'Call, 1869, 7 M. 544; 41 J. 287; 6 S.L.R. 332.

(150)

Agreement to take over lease and shop fittings.

In an action of damages for breach of contract, the pursuer averred that he offered orally to purchase from the defender, at the price of £15, an engine and fittings in the premises occupied by the latter, and to take over the remaining one and a half years of his lease of the premises, which offer the defender accepted orally. The defender denied that there was any completed contract. The pursuer produced, inter alia, a writing in the defender's handwriting, signed by the pursuer—"I hereby agree to take

these premises . . . from this date, and to relieve" the defender "of rent from November 11, 1891, till the expiry of his lease, and to pay him for fittings, £15." The defender pleaded that there was no binding contract, in respect that the pursuer's letter was neither holograph nor tested, and had not been accepted in writing. Held that a valid contract had been instructed, in respect that the letter from the defender to the pursuer was, so far as respected the fittings, a writing in re mercatoria, and as regarded the premises was not a contract relating to heritage, but merely a bargain that the pursuer should relieve the defender of his liability for rent, and that the defender should aid in getting the landlord's consent to a transfer of the lease, and therefore that the defender was liable in damages.

Kinninmont v Paxton, 1892, 20 R. 128; 30 S.L.R. 178.

(151)

Ship—Bill of lading—Omission to fill in quantity of cargo before signature by master.

The master of a ship, before the cargo was all on board, signed a bill of lading, which was blank, as to the amount of goods shipped. After the loading was completed the shipper filled in the correct amount of cargo, and indorsed and delivered the bill of lading to a bank in security of an advance. The shipper having become bankrupt, in a question between his creditors held that the validity of the bill of lading as a negotiable instrument was not affected by its having been signed by the master blank as to the amount of cargo.

Cowdenbeath Coal Co. v Clydesdale Bank, 1895, 22 R. 682; 32 S.L.R. 549; 3 S.L.T. 41.

(152)

Authentication mark — Sale — Written warranty.

Question, as to how far and in what circumstances a written warranty, to which a seller who cannot write has adhibited his mark, is binding on him.

Rose v Johnston, 1878, 5 R. 600; 15 S.L.R. 325.

(153)

—“Writing under his hand” — Friendly Societies Act, 1896, sec. 56 (1).

The Friendly Societies Act, 1896, enacts, sec. 56—“(1) A member of a registered society . . . may, by writing under his hand . . . nominate a person to whom any sum of money payable by the society or branch on the death of that member, not exceeding £100, shall be paid at his decease.” Held that a nomination authenticated by the member's mark only (she being unable to write) and by the signatures of two instrumentary witnesses, was not a writing under her hand within the meaning of the above enactment, and that being of a testamentary character and unsigned it was of no force or effect in law.

Morton v French, 1908 S.C. 171; 45 S.L.R. 126; 15 S.L.T. 517.

(2) CROWN WRITS.

(154)

Observed that the statutes applicable to the testing of deeds were not applicable to Crown writs.

Catton v Mackenzie, 1874, 1 R. 488; 11 S.L.R. 278.

5. ALTERATIONS.

(1) DELETIONS AND MARGINAL OR OTHER ADDITIONS.

(a) Deletions.

(155)

General rules—Testamentary writing.

(Per Lord McLaren, Ordinary)—“(1) If a will or codicil is found with the signature cancelled, or lines drawn through the dispositive or other essential clause of the instrument, then on proof that the cancellation was done by the testator himself, or by his order, with the intention of revoking the will, the will is to be held as revoked; otherwise it is to be treated as a subsisting will. (2) If a will or codicil is found with one or more of the legacies or particular provisions scored out, that raises no case for inquiry as to the testator's intention to revoke the instrument in whole; a question is raised only as to his intention to revoke the particular provision, which will not be held to have been revoked unless upon evidence that the scoring was done by the testator himself or by his direction with the intention of revoking the clause, and the authentication of the deletion by the testator's initials is sufficient evidence of such intention.”

Pattison's Trustees v University of Edinburgh, 1888, 16 R. 73.

Contract.

(156)

In the construction of a contract embodied in a formal deed the Court is not entitled to look at words in the deed which have been deleted before signature, but which happen to remain legible.

Inglis v Buttery & Co., 1878, 5 R. (H.L.) 87; 3 App.Cas. 552; 15 S.L.R. 462.

(157)

Superimposition of one document on another.

A document cannot be legally deleted by merely pasting another on the top of it.

Dunsire v Bell, 1909 S.C. (J.) 5; 5 Adam, 625; 46 S.L.R. 236; 16 S.L.T. 631.

(158)

Authenticity of deletions — Testament — Holograph unsigned document—Pencil markings.

Unsigned pencil alterations made by a testator on his testament written in ink will be presumed to be deliberative merely, but if there is evidence, parole or otherwise, to show that he intended them to be final they

will receive effect. A truster in his trust deed directed his trustees to give effect to “any codicil or separate writing under my hand or signed by me from which my trustees may be satisfied as to my wishes and intentions, notwithstanding the same may be defective in the solemnities required by law.” By holograph codicil written in ink and signed he bequeathed £10,000 to the magistrates of Glasgow, with directions how it was to be applied in charity. In his repositories these documents were found along with two other holograph pencil documents, which were both undated and unsigned. In one of these, headed “Notes as to settlement and alterations,” he stated that he had “now meantime cancelled” his bequest to the magistrates of Glasgow, “owing to losses on investments.” The other was a list of charities to which he had left bequests, but that to the magistrates was not mentioned. Through the bequest and instructions relative thereto in the holograph codicil were drawn perpendicular pencil lines, and along its margin was drawn in ink a bracket. It was admitted that a few months before his death the testator had called upon his law agents and informed them that, having lost £30,000, he had resolved to make some alterations on his settlement and codicil, and that he got possession of the documents, which were at that time free from deletions and interlineations. **Held** that it had been proved that the bequest had been effectually cancelled by the truster.

Lamont v Magistrates of Glasgow, 1887, 14 R. 603; 24 S.L.R. 426.

(159)

Holograph testament.

A testatrix left certain holograph testamentary writings which were found in a locked desk in a chest of drawers in her house. The writings were contained in a closed envelope, which was addressed in the testatrix's handwriting to her brother, whom she appointed her executor. The writings contained a number of bequests, some of which had been scored through in ink. **Held** that the bequests deleted had been duly revoked, in respect that the inference to be drawn from the deletions themselves, and from the circumstances in which the writings were found, was that the deletions had been made by the testatrix herself with the intention of revoking the bequests.

Milne's Executor v Waugh, 1913 S.C. 203; 50 S.L.R. 102; 1912, 2 S.L.T. 379.

(160)

Holograph testament.

A blacksmith left a holograph will which was found after his death in a locked writing desk belonging to him. The will was enclosed in an unsealed envelope, on which was written his name and the word “Private.” The will contained a number of bequests, many of which had been scored through in ink. The deletions were not authenticated by the testator's initials or

otherwise. With one exception, all the beneficiaries whose names had been deleted had predeceased the testator. In a special case, in which it was not maintained that the will as a whole had been revoked, held that the bequests deleted had been duly revoked, in respect that the inference to be drawn from the circumstances was that the deletions had been made by the testator himself with the intention of revoking the bequests.

Allan's Executrix v Allan, 1920 S.C. 732; 57 S.L.R. 614; 1920, 2 S.L.T. 248.

(161)

Debt—Acknowledgment of debt in envelope—Directions that envelope to be burned unopened—Cancellation of directions.

Among the repositories of a deceased person were found in an envelope two documents, which were acknowledgments of debt by the testator's sons, the first being for a loan given to one son, the amount of which was to be deducted from that son's share of the deceased's estate, and the other for the sum due by each of two other sons for the price of their father's business, which they had taken over from the testator without any price paid. On the back of the envelope there were written directions in pencil that it should not be opened, but burned. Across this writing there were a number of pencil scorings, which the pursuers maintained showed that the writing had been cancelled and the directions to the trustees revoked. The envelope when found was open, though it bore signs of having previously been sealed. Some years later the testator made a new will, in which no reference was made to the sums contained in the documents which had been found, but owing to depreciation of shares held by the deceased the value of his estate had considerably diminished. Held that the testator had cancelled the directions to the trustees to burn the envelope and its contents, and that the sums fell to be debited against the son's shares.

Lennie v Lennie's Trustees, (O.H.) 1914, 1 S.L.T. 258.

(b) Deletions and Substituted Words.

(162)

General rule—Testamentary writing.

Per Lord McLaren, Ordinary—"When a will or codicil contains words scored out and others inserted in their place the cancellation is conditional on the substituted words taking effect, so that if the substituted words are rejected for want of authentication, the will is to be read as if there had been no deletion."

Pattison's Trustees v University of Edinburgh, 1888, 16 R. 73.

(163)

Deletion of bequests in settlement—Other provisions made for same persons in subsequent unsigned codicil.

A testator deleted from his settlement certain provisions which he had made in

favour of the family of one of his sons, but the deletions left the original wording still visible and legible. He afterwards prepared a codicil, in which he made certain other provisions for his sons, but this codicil was left unsigned by him at the time of his death. Held in an action of multiplicity brought to ascertain the rights of various parties interested in his succession (1) that the settlement contained a valid deed notwithstanding the clauses which had been deleted, as the deletions could only have the effect of a partial revocation; (2) that no effect could be given to the unsigned codicil; but (3) that as the deletion of part of the deed and the making of the codicil must be regarded as one continuous act for one object, and as the testator had failed to complete the act by making an effectual codicil, the settlement must receive effect in the same way as if no part had been deleted.

Parker v Matheson, (O.H.) 1876, 13 S.L.R. 405.

(164)

Deletions and pencil alterations.

A testator had in his possession a copy of his settlement, the principal being in the custody of his law agent. Upon his copy he made certain pencil alterations, some of them being dated and initialed, some of them dated but not initialed, and some neither dated nor initialed. Some words of the copy were deleted in pencil, the deletions not being in any way authenticated, and the jottings were curiously and elliptically expressed, and not worded so as to form proper grammatical additions to the will. Held that the jottings did not constitute additions to the will.

MacKinnon's Trustees v MacKinnon, (O.H.) 1896, 3 S.L.T. 284.

(165)

Altered and mutilated will.

An altered and mutilated will was found in the repositories of a deceased person. Part of the testing clause was scored out and the lower part of the page on which the latter part of the testing clause had probably been written and which presumably contained the signatures of the testator and of the witnesses was cut away altogether. Written in red ink on the margin, and holograph of the writer, were the words "codicil" and "this clause to read my mother, Mrs. 'A B,'" and again, "the name 'C D' to be revoked in favour of my mother, Mrs. A B, who shall receive all the benefits of this, my will.—George Liddle (signature of writer)." Held that the document was a valid testamentary writing, the body of the writing being adopted as holograph by the writing on the margin.

Liddle v Liddle, (O.H.) 1898, 6 S.L.T. 218.

(166)

Erasure, deletion, and substitution of other words.

Where in a regularly attested will the terms of certain bequests were altered by

erasure, deletion, and the substitution of other words, **held** that the bequests were ineffectual, because the circumstances of the case and the methods of deletion sufficiently proved the intention of the testator to revoke them.

Watson's Factor v Watson, (O.H.) 1899, 7 S.L.T. 238.

(167)

Substituted word.

The amount of a legacy in a will was changed by the alteration of the word "four" to "two," but no reference to the alteration was made in the testing clause. **Held** that the original word "four" must receive effect and the alteration be disregarded, because the will was a regularly tested deed and the presumption of law was that erasures in such a deed were made after execution.

Drummond v Peddie, (O.H.) 1893, 1 S.L.T. 189.

(c) Marginal Additions, Interlineations, and Other Alterations in Writing.

(168)

General rule—Testamentary writing.

(Per Lord M'Laren, Ordinary)—"Marginal or interlineal additions, apparently in the testator's writing, will not be held part of the instrument unless authenticated by his signature or initials, for until such authentication he cannot be supposed to have finally resolved to make the addition."

Pattison's Trustees v University of Edinburgh, 1888, 16 R. 73.

(169)

Holograph signed marginal addition.

A father took the disposition to certain subjects purchased by him to himself and his wife in conjunct fee and liferent allenerly, and after their deaths to his daughters in liferent allenerly, and their children in fee, with a clause of reservation allowing him during his life to sell or dispose the subjects gratuitously. At his death the disposition was found in his repositories with a holograph signed marginal addition admitting children of deceased daughters to a share of the rents. **Held** that this was an effectual alteration on the destination.

Caledonian Banking Co. v Fraser, 1874, 11 S.L.R. 345.

(170)

Unauthenticated marginal addition.

Opinion (per Lord Young and Lord Craighill) that an unauthenticated holograph marginal addition cannot competently be admitted to qualify the terms of a holograph document.

Brown v Maxwell's Executors, 1884, 11 R. 821; 21 S.L.R. 549.

(171)

Unauthenticated pencil indorsation on holograph testament.

On the outside of a trust disposition and settlement which was found in the repositories of the truster after her decease,

were the following holograph words written in pencil: "Residue of estate to be given to Jane Fraser, draper, and her sister, Helen Fraser, or survivor, Christain Porter or Rodger deleted, deleted also the names of Isabela Petticrew and Bessie Thom, daughters, Alex. Thom, Edinr." The writing was not signed. **Held** that these words did not form part of the testamentary writings of the deceased.

Petticrew's Trustees v Pettigrew, 1884, 12 R. 249; 22 S.L.R. 171.

(172)

Pencil alterations on holograph will.

Held that unauthenticated holograph pencil alterations on a holograph will which was written in ink had no effect.

Currie's Trustees v Currie, 1904, 7 F. 364; 42 S.L.R. 297; 12 S.L.T. 613.

(173)

Holograph addition.

A man executed a will, written for him by another person, by subscribing it before two instrumentary witnesses. Some time afterwards the testator inserted in a space which had been left between the end of the will and his subscription and those of the witnesses a holograph addition which began "Codicil," and made provision for the disposal of an annuity which had lapsed through the death of the annuitant since the execution of the will. **Held** that the holograph addition was a valid part of the testamentary writings of the deceased.

Gray's Trustees v Dow, 1900, 3 F. 79; 38 S.L.R. 56.

(174)

Interlineation—Entail.

Held that the interpolation of the word "not" in a deed of entail between the words "shall" and "be lawful" in the clause prohibiting an alteration of the order of succession, which was not noticed in the testing clause, invalidated the entail.

Munro v Butler Johnstone, 1868, 7 M. 250; 41 J. 153; 6 S.L.R. 208.

(175)

Sequestration—Affidavit of claim—Interlineation not authenticated.

In a petition for sequestration the affidavit of claim stated "compeared James Drew," &c. Between the words "compeared" and "James" were interlined the words "Verney Drew, a partner in the firm of" and the interlineation was not initialed. There was no partner called James Drew. **Held** that the affidavit, without the interlined words, was clearly bad, an unauthenticated interlineation being presumed to be *ex post facto*, and petition dismissed.

Drew v Richard, (O.H.) 1904, 11 S.L.T. 646.

(2) ERASURES.

(176)

Whether erasure or not—Irritant clause of entail.

The irritant clause in a deed of entail bore

"If C P" (the institute), "or any of the said heirs of tailzie, shall contravene," &c. The validity of the entail was challenged, on the ground that the word "or," and the letters "an" in the word "any," were written on an erasure. The fact of erasure having been disputed, a proof was led, in which the evidence of experts was conflicting. The Lord Ordinary (Barcaple), being of opinion that the balance of evidence turned in favour of there being an erasure, held the erasure proved, and declared the entail invalid. The Inner House reversed the Lord Ordinary's judgment, on the ground that the fact of erasure had not been clearly established.

Hamilton v Lindsey-Bucknall, &c., 1869, 8 M. 323; 42 J. 152; 7 S.L.R. 205.

(177)

Signature on erasure—Onus.

Where in a testamentary deed the signature bearing to be that of the testator was written on an erasure, but was otherwise *ex facie* duly tested, and the deed was challenged as vitiated in *essentialibus*, held that the deed was *ex facie* probative, and that the onus was consequently on the party challenging it to prove either that the signature was not genuine, or, if genuine, that it had not been duly tested. The proof on these points having failed, deed sustained.

Brown v Duncan, 1888, 15 R. 511; 25 S.L.R. 369.

(178)

Erasure not in *essentialibus*.

A marriage contract bore that the spouses reserved power to sell "at any time during their joint lives." The letters "li" of the word "lives" were written on an erasure, which was not mentioned in the testing clause, and the Register of Sasines showed that the word had been "leaves" when the deed was recorded. Held that the clause of the deed was not vitiated by the alteration.

Wilson v Taylor & Son, 1869, 7 M. 773; 41 J. 400; 6 S.L.R. 502.

(179)

—Date of decree.

Objection to the validity of a decree of the Commissary Court, on the ground that its date was written on an erasure, repelled.

Dowie v Barclay, 1871, 9 M. 726; 43 J. 364; 8 S.L.R. 445.

(180)

—Erasures in Crown charter on precept in which institute of entail expedite infestment.

M executed an entail in the form of a procuratory of resignation for new infestment, to be granted to his eldest son H and the heirs whomsoever of his body, whom failing, &c. In the lifetime of the entailor the deed was recorded in the Register of Tailzies, and a crown charter of resignation was expedite. Upon the death of the entailor, H expedite infestment on the precept in the Crown charter. The deed of entail was itself unobjectionable, but the Crown charter contained various erasures, interpolations,

and superinductions, and, in particular, several lines of the destination following the name of the institute in the dispositive clause were written on an erasure, and in the prohibitory clause the word "directe" had in one instance been converted into "indirecte" by the interpolation of the letters "in." The Crown charter was written to the Seal in the usual style, without a testing clause. The words on erasure in the destination were authenticated according to the customary practice by the initials of the Director of Chancery. The interpolation in the prohibitory clause was not authenticated in any way. The signature, the Chancery copy of the signature, the signet precept, and the copy of the charter recorded in Chancery, as also the instrument of sasine expedite by H upon the Crown charter, were all perfect, the words in question being correctly and distinctly written, without any vitiation, as they finally appeared in the charter. Held that the vitiations in the Crown charter had not the effect of invalidating the entail, nor of freeing H as institute of tailzie from the fetters of the entail.

Catton v Mackenzie, 1874, 1 R. 488; 11 S.L.R. 278.

(181)

—Testing clause—Erased portion held pro non scripto.

A deed contained the following testing clause:—"In witness whereof . . . before these witnesses, John M'Corquodale, schoolmaster in the Island of Seil, and Alexr. Dow, Residenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane. (Signed) John M'Dougall. John M'Corquodale, witness; Alex. Dow, witness." The letters printed in italics were written on erased portions of the deed. Held, in an action raised before 1st October, 1874, the date when the Conveyancing Act, 1874, came into operation, that what was written on erasure must be regarded *pro non scripto*, but that the person whose Christian name was given as "Alex," and who was designed as "residentifier in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane," was shown without going beyond the deed to be the subscribing witness Alex. Dow, and therefore that the deed was duly tested.

M'Dougall v M'Dougall, 1875, 2 R. 814; 12 S.L.R. 502.

(182)

—Description by reference — False authentication in testing clause.

A bond and disposition in security, after sufficiently describing the subjects conveyed, further bore—"being the subjects and others particularly described in the disposition" granted by A B to the granter, "dated the twenty-seventh September, and recorded the twelfth day of November, 1880." The testing clause of the bond set forth that it had been signed on 5th October, 1880, and that the words "the twenty-seventh September," "twelfth," and "November," above quoted had been

written on an erasure before signing. **Held** that, as the statement in the testing clause regarding the words written on erasure was manifestly false, the words written on erasure must be held *pro non scriptis*, but that as the description of the subjects was otherwise sufficient, the deed was not vitiated in *essentialibus*, and was valid.

Cattanach's Trustee v Jamieson, 1884, 11 R. 972; 21 S.L.R. 661.

(183)

———**Date.**

The date of a document embodying a promise that the grantee should receive a sum of money out of the grantor's estate after his decease in return for valued services rendered was written upon an erasure which was unauthenticated. **Held** that this did not vitiate the deed, as the erasure was not in *essentialibus*.

Cairney v Macgregor's Trustees, (O.H.) 1916, 1 S.L.T. 357.

(184)

———**Date—Mandate.**

Held that mandates bearing to be for a meeting to be held on August 16th were valid, although the figure 6 was printed on an erasure from which the figure 5 had been removed.

Muir v Thompson, 1876, 3 R. (H.L.) 1; 13 S.L.R. 739.

(185)

Erasure, deletion, and substitution of other words—Will regularly attested—Intention to revoke.

Watson's Factor v Watson, (O.H.) 1899, 7 S.L.T. 288, No. 166, *supra*.

III. DELIVERY.

1. WHAT AMOUNTS TO DELIVERY.

(186)

Deeds inter virum et uxorem.

Observations (per Lord Deas) on the delivery necessary in the case of gratuitous *inter vivos* deeds granted by a wife in favour of her husband.

Kirkpatrick v Kirkpatrick's Trustees, 1873, 11 M. 551; 45 J. 353; 10 S.L.R. 363.

[Judgment reversed, 1874, 1 R. (H.L.) 37; L.R., 2 H.L. Sc. 397; 11 S.L.R. 717.]

(187)

———**Donation.**

Money was advanced by a husband and security taken in the name of himself and his wife "equally between them and to the survivor of them, and to the heirs, executors, &c., of the survivor." The security deed was kept by the husband in a drawer accessible both to him and his wife. After the husband's death, **held** that the deed was undelivered, and therefore testamentary merely.

Walker's Executor v Walker, 1878, 5 R. 965; 15 S.L.R. 636.

(188)

Trust—Policy of insurance in favour of wife and children.

Held that a policy of insurance taken by a husband in favour of trustees for behoof of his wife and the children of the marriage did not confer a vested right in the beneficiaries without delivery, actual or constructive, of the policy.

Circumstances which were **held** not to amount to delivery of a policy of insurance taken by a husband in favour of trustees for behoof of his wife and children.

Jarvie's Trustee v Jarvie's Trustees, 1887, 14 R. 411; sub nom. Scottish Provident Institution v Fleming, 24 S.L.R. 299.

(189)

Mutual deeds in duplicate.

The rule that a mutual deed requires no delivery applies to mutual deeds executed in duplicate.

Robertson's Trustees v Lindsay, 1873, 1 R. 323; 11 S.L.R. 113.

(190)

Mandate to deliver—Death of mandant.

One of a number of persons who were to grant a bond as co-obligants signed it, and returned it to the agent for himself and his co-obligants. Before all had signed it or any money had been advanced, and while the bond was yet in the hands of the agent, the person who had signed it died. **Held** that the implied mandate to deliver the deed after the other signatures had been obtained had fallen by the mandant's death, and the deed being in fact undelivered, his executors were not liable.

Life Association of Scotland v Douglas, 1886, 13 R. 910; 23 S.L.R. 632.

(191)

Mandate to burn will—Death of mandant.

A testator wrote a letter to her law agent stating that she had written a holograph will, and instructing him "to burn the preceding ones." She did not deliver the letter to her law agent. **Held** that the letter did not revoke the prior wills.

France's Judicial Factor v France's Trustees, (O.H.) 1916, 1 S.L.T. 126.

(192)

Sale of heritage—Posting of conveyance.

In a petitory action in the Court of Session against a domiciled American, whom the pursuers averred to be the proprietor of heritage in Scotland, the defender pleaded no jurisdiction, averring that although he had been at one time the proprietor of such heritage he had sold it before the raising of the action. It appeared that in October, 1889, the defender became proprietor of certain heritable subjects in Scotland; that by improbativ missives, dated November and December, 1890, he sold these subjects; that on 9th January, 1891, he executed and on 12th January despatched by post from America a conveyance of the subjects in favour of the purchaser; and that this conveyance did not reach the purchaser till

after the service of the summons, which took place on 21st January. **Held** that as the transference of the subjects had not been completed until after the service of the summons the plea of no jurisdiction fell to be repelled.

Dowie & Co. v Tennant, 1891, 18 R. 986; 28 S.L.R. 758.

2. EQUIVALENT OF DELIVERY— REGISTRATION, &c.

(193)

Constructive delivery.

Terms of a disposition which were held to constitute a father trustee for his children, though it remained with him undelivered till his death.

Gilpin v Martin, 1869, 7 M. 807; 41 J. 430; 6 S.L.R. 518.

(194)

Registration—Inter vivos trust deed ex facie irrevocable—Stamped, registered, and extract delivered.

Held that an ex facie absolute and irrevocable trust-conveyance of heritage inter vivos, properly stamped as such, and of which an extract, after registration in the Books of Council and Session, had been transmitted by the grantor to a trustee, with writs and securities affecting the property, was a delivered and irrevocable deed, although the grantor afterwards executed a revocation thereof expressly declaring that it had not been intended to be irrevocable, and had been registered for preservation merely.

Tennent v Tennent's Trustees, 1869, 7 M. 936; 41 J. 530; 6 S.L.R. 629.

(195)

Recording in Register of Sasines.

A lent money belonging to himself upon a bond and disposition in security taking the bond in favour of himself as trustee for his daughter nominatim and recorded the bond in the Register of Sasines for behoof of himself as trustee for his daughter. The bond bore that the money had been lent by A from funds held by him in trust for his daughter. A retained the bond in his own custody till his death and his daughter did not know of its existence until after his death. **Held** that the recording of the bond in the Register of Sasines did not operate delivery of the bond to the daughter so as to create an effectual trust in her favour.

Cameron's Trustees v Cameron, 1907 S.C. 407; 44 S.L.R. 354; 14 S.L.T. 719.

(196)

Gratuitous deed.

The grantor of a gratuitous deed wrote to the law agent who had prepared it, requesting him "by way of delivering" the deed to the grantee, to register it in the Books of Council and Session. **Held** that the registration of the deed was equivalent to delivery.

Obers v Paton's Trustees, 1897, 24 R. 719; 34 S.L.R. 538; 4 S.L.T. 350.

(197)

Entry in valuation roll.

Circumstances in which **held** (1) that an assignation of a long lease by an insolvent to his son, who was a boy at school, had not been delivered, and (2) that an assignation in favour of his daughters, which was published by entering them as proprietors of the house in the valuation roll, had been delivered.

Hodge v Morrison, 1883, 21 S.L.R. 40.

3. EFFECT OF DELIVERY OF IMPROBATIVE WRITING.

(198)

Offer as to heritage.

A holograph offer regarding heritage unsubscribed, but bearing the grantor's name in gremio, having been delivered for the purpose of being acted on, **held** binding on the grantor.

Weir v Robertson, 1872, 10 M. 438; 44 J. 238.

(199)

Deed granted for onerous causes—Personal bar—Reduction.

A bond and disposition in security bore to be subscribed before two witnesses. In an action for reduction of the deed on the ground that the witnesses had neither seen the parties subscribe nor heard them acknowledge their subscriptions, the Court **held** that the evidence was sufficient to prove that the deed was not duly and validly executed; but that, as there was an averment that the bond had been delivered for onerous causes, it did not necessarily follow that the bond fell to be reduced, and cause remitted to the Lord Ordinary for further procedure.

Young v Paton, 1910 S.C. 63; 47 S.L.R. 78; 1909, 2 S.L.T. 340.

(200)

Informal letter of guarantee — Rei interventus.

A bank agreed to make advances to A on his obtaining B's guarantee. A formal letter of guarantee, ending with the words "In witness whereof," was then prepared by the bank and handed to A for execution by B. A obtained B's signature and afterwards got two persons to sign as witnesses who had not seen B subscribe nor heard him acknowledge his subscription. A returned the document to the bank with the names and designations of the witnesses, the testing clause was filled up by the bank, and the bank made an advance to A upon the faith of the guarantee. In an action by the bank upon the letter of guarantee against B the defender pleaded that he was not bound, as the deed was not tested. The above facts were admitted or proved. **Held** that the defender having signed the deed and delivered it to A, who was in hac re the bank's agent, he had delivered it to the bank as a guarantee for advances to be made to A, and that the bank having made advances upon the faith of it, the defender's imper-

fect obligation had been validated by rei interventus.

National Bank of Scotland v Campbell, 1892, 19 R. 885; 29 S.L.R. 757.

IV. CONSTRUCTION.

[See also CONTRACT II. 7 (2).]

(201)

Punctuation.

The punctuation of a deed may be looked at for the purpose of aiding its construction. *Turnbull's Trustees v Lord Advocate*, 1918 S.C. (H.L.) 88; [1918] A.C. 337; 55 S.L.R. 208; 1918, 1 S.L.T. 112.

(202)

Grammatical error—Correction of error by Court.

In construing a deed the Court corrected a grammatical error which, if allowed to stand, would have had the effect of nullifying the obvious intention of the granters.

Glen's Trustees v Lancashire and Yorkshire Accident Insurance Co., 1906, 8 F. 915; 43 S.L.R. 684; 14 S.L.T. 168.

(203)

Clerical error.

Clerical error in testing clause of deed given in for registration in the Books of Council and Session allowed to be corrected, the Court pronouncing no judgment as to the effect of the proposed amendment.

Caldwell, 1871, 10 M. 99; 44 J. 70; 9 S.L.R. 89.

(204)

Erroneous designation of witness — "Their" servant instead of "our" servant — Deed of entail granted by two sisters.

Speirs v Speirs' Trustees, 1878, 5 R. 923; 15 S.L.R. 649, No. 52, *supra*.

(205)

Blank in description in feu charter.

Question as to the competency of filling in by inference from the context a blank in the description of the subjects disposed under a feu charter.

Magistrates of Musselburgh v Musselburgh Real Estate Co., 1904, 7 F. 308; 42 S.L.R. 247; 12 S.L.T. 636.

(206)

Onerous inter vivos trust deed — Contemporaneous correspondence.

Opinion that it was not competent for the purpose of construing an onerous inter vivos deed to look at contemporaneous correspondence passing between the parties concerned.

Davidson v Davidson, (O.H.) 1906, 14 S.L.T. 337.

(207)

Fortius contra proferentem—Marine insurance.

Observations on the maxim fortius contra proferentem in its application to the construction of policies of marine insurance.

Birrell v Dryer, 1884, 11 R. (H.L.) 41; 9 App.Cas. 345; 21 S.L.R. 590.

V. WRIT OF AGENT.

(208)

Agreement regarding heritage—Holograph of agent.

Acceptance holograph of authorised agent of the seller held to complete binding contract.

Whyte v Lee, 1879, 6 R. 699; 16 S.L.R. 376.

(209)

Written by factor to landlord's dictation, but unsigned by either factor or landlord.

Where a proposed additional agreement between a landlord and tenant was dictated by the landlord to his factor in the tenant's presence and handed to the tenant unsigned, and subsequently accepted by the tenant in writing, held that the writings did not constitute a completed contract, the first writing being neither holograph of the landlord nor the writ of his factor, and that the tenant was therefore entitled to rescind.

Sinclair v Caithness Flagstone Quarrying Co., 1881, 8 R. (H.L.) 78; 6 App.Cas. 340; 18 S.L.R. 466.

(210)

Loan—Agent and client.

Opinion (per Lord Justice-Clerk Moncreiff) that a loan may be proved by the writ of the authorised agent of the debtor.

Laidlaw v Shaw, 1886, 13 R. 724; 23 S.L.R. 593.

(211)

Partnership—Power of partner to borrow money—Writ signed by cashier.

A partner of a mercantile firm borrowed, as for his firm, a sum of £100 from his wife. She requested an acknowledgment from the firm, and, in compliance with that request, he handed her an acknowledgment which bore that the money had been received from her by the hands of her husband "on temporary loan." The acknowledgment was written by a clerk of the firm and was signed by their cashier pp. of the firm. It was proved that the cashier had so signed on the verbal instructions of the husband; that the money was paid to the cashier and put to the credit of the husband in the books of the firm. In an action by the wife against the firm for the repayment of the loan, held (1) that the husband, as partner of a mercantile firm, had power to borrow money and to bind the firm for the debt; (2) that the writ, having been signed by the cashier on the instruction of such a partner, was writ of the firm; and (3) that it might be used in modum probationis, although it was neither holograph nor tested; and that therefore the loan to the firm had been established.

Bryan v Butters Brothers & Co., 1892, 19 R. 490; 29 S.L.R. 415.

(212)

Accession to composition agreement.

Held that the accession by a creditor to a

composition agreement may be proved by the writ of his duly authorised agent.

Henry v Strachan & Spence, 1897, 24 R. 1045; 34 S.L.R. 790; 5 S.L.T. 94.

(213)

Amanuensis signing principal's name.

An offer holograph of the authorised amanuensis of the offerer, and subscribed by him, not with his own, but with the offerer's name, **held** not to make a binding contract.

Scottish Lands and Buildings Co. v Shaw, 1880, 7 R. 756; 17 S.L.R. 543.

(214)

Bank current account—Initialing of entries by bank agent.

Entries in a customer's bank pass-book of sums paid into the bank, duly initialed by a bank official, are prima facie evidence against the bank that the money has been paid in.

Couper's Trustees v National Bank of Scotland, 1889, 16 R. 412; 26 S.L.R. 320.

(215)

Payer signing for illiterate payee—Discharge—Claim under Workmen's Compensation Act, 1897.

Circumstances in which **held** that a discharge signed bona fide by the payer on

behalf of and in the presence of an illiterate payee was void.

Gilmour, Morton & Co. v Bolland, (O.H.) 1906, 14 S.L.T. 583.

(216)

Signature of claim for another by person having no mandate—Burgh Voters Act, 1856, sec. 36.

Held that a claim to be enrolled on the register of voters, which was signed on behalf of the claimant by a person who held no mandate, written or oral, from the claimant, was not valid.

Burns v Cassells, 1891, 19 R. 287; 29 S.L.R. 141.

(217)

Building society—"Signature" of members—The Building Societies Act, 1874, sec. 32, sub-sec. (2).

Held that the word "signatures" in sec. 32, sub-sec. (2), of the Building Societies Act, 1874, means signatures of the members themselves, and that signatures adhibited to an instrument of dissolution by the mandatories of members cannot be reckoned in calculating whether the instrument was signed by the requisite number of members.

Second Edinburgh and Leith Building Society v Aitken, 1892, 19 R. 603; 29 S.L.R. 456.

